

Part 8

Actions Affecting Preconstruction and Construction Liens

38-1a-801 Preconstruction and construction liens assignable -- Action by assignee to enforce lien.

- (1) A preconstruction lien or construction lien is assignable as any other chose in action.
- (2) An assignee of a preconstruction lien or construction lien may, in the assignee's own name, commence and prosecute an action on the lien as provided in Part 7, Enforcement of Preconstruction and Construction Liens.

Enacted by Chapter 278, 2012 General Session

38-1a-802 Waiver or limitation of a lien right -- Forms -- Scope.

- (1) As used in this section:
 - (a) "Check" means a payment instrument on a depository institution including:
 - (i) a check;
 - (ii) a draft;
 - (iii) an order; or
 - (iv) other instrument.
 - (b) "Depository institution" is as defined in Section 7-1-103.
 - (c) "Receives payment" means, in the case of a restrictive endorsement, a payee has endorsed a check and the check is presented to and paid by the depository institution on which it is drawn.
- (2) Notwithstanding Section 38-1a-105, a claimant's written consent that waives or limits the claimant's lien rights is enforceable only if the claimant:
 - (a)
 - (i) executes a waiver and release that is signed by the claimant or the claimant's authorized agent; or
 - (ii) for a restrictive endorsement on a check, includes a restrictive endorsement on a check that is:
 - (A) signed by the claimant or the claimant's authorized agent; and
 - (B) in substantially the same form set forth in Subsection (4)(d); and
 - (b) receives payment of the amount identified in the waiver and release or check that includes the restrictive endorsement:
 - (i) including payment by a joint payee check; and
 - (ii) for a progress payment, only to the extent of the payment.
- (3)
 - (a) Notwithstanding the language of a waiver and release described in Subsection (2), Subsection (3)(b) applies if:
 - (i) the payment given in exchange for any waiver and release of lien is made by check; and
 - (ii) the check fails to clear the depository institution on which it is drawn for any reason.
 - (b) If the conditions of Subsection (3)(a) are met:
 - (i) the waiver and release described in Subsection (3)(a) is void; and
 - (ii) the following will not be affected by the claimant's execution of the waiver and release:
 - (A) any lien;
 - (B) any lien right;
 - (C) any bond right;

(D) any contract right; or

(E) any other right to recover payment afforded to the claimant in law or equity.

(4)

(a) A waiver and release given by a claimant meets the requirements of this section if it is in substantially the form provided in this Subsection (4) for the circumstance provided in this Subsection (4).

(b) A waiver and release may be in substantially the following form if the claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress billing:

"UTAH CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name: _____

Property Location: _____

Undersigned's Customer: _____

Invoice/Payment Application Number: _____

Payment Amount: _____

Payment Period: _____

To the extent provided below, this document becomes effective to release and the undersigned is considered to waive any notice of lien or right under Utah Code Ann., Title 38, Chapter 1a, Preconstruction and Construction Liens, or any bond right under Utah Code Ann., Title 14, Contractors' Bonds, or Section 63G-6a-1103 related to payment rights the undersigned has on the above described Property once:

(1) the undersigned endorses a check in the above referenced Payment Amount payable to the undersigned; and

(2) the check is paid by the depository institution on which it is drawn.

This waiver and release applies to a progress payment for the work, materials, equipment, or a combination of work, materials, and equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount. This waiver and release does not apply to any retention withheld; any items, modifications, or changes pending approval; disputed items and claims; or items furnished or invoiced after the Payment Period.

The undersigned warrants that the undersigned either has already paid or will use the money the undersigned receives from this progress payment promptly to pay in full all the undersigned's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or combination of work, materials, and equipment that are the subject of this waiver and release.

Dated: _____

_____ (Company Name)

By: _____

Its: _____"

(c) A waiver and release may be in substantially the following form if the lien claimant is required to execute a waiver and release in exchange for or to induce the payment of a final billing:

"UTAH WAIVER AND RELEASE UPON FINAL PAYMENT

Property Name: _____

Property Location: _____

Undersigned's Customer: _____

Invoice/Payment Application Number: _____

Payment Amount: _____

To the extent provided below, this document becomes effective to release and the undersigned is considered to waive any notice of lien or right under Utah Code Ann., Title

38, Chapter 1a, Preconstruction and Construction Liens, or any bond right under Utah Code Ann., Title 14, Contractors' Bonds, or Section 63G-6a-1103 related to payment rights the undersigned has on the above described Property once:

(1) the undersigned endorses a check in the above referenced Payment Amount payable to the undersigned; and

(2) the check is paid by the depository institution on which it is drawn.

This waiver and release applies to the final payment for the work, materials, equipment, or combination of work, materials, and equipment furnished by the undersigned to the Property or to the Undersigned's Customer.

The undersigned warrants that the undersigned either has already paid or will use the money the undersigned receives from the final payment promptly to pay in full all the undersigned's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or combination of work, materials, and equipment that are the subject of this waiver and release.

Dated: _____

_____ (Company Name)

By: _____

Its: _____"

(d) A restrictive endorsement placed on a check to effectuate a waiver and release described in this Subsection (4) meets the requirements of this section if it is in substantially the following form:

"This check is a progress/ final payment for property described on this check sufficient for identification. Endorsement of this check is an acknowledgment by the endorser that the waiver and release to which the payment applies is effective to the extent provided in Utah Code Ann. Subsection 38-1a-802(4)(b) or (c) respectively."

(e)

(i) If using a restrictive endorsement under Subsection (4)(d), the person preparing the check shall indicate whether the check is for a progress payment or a final payment by circling the word "progress" if the check is for a progress payment, or the word "final" if the check is for a final payment.

(ii) If a restrictive endorsement does not indicate whether the check is for a progress payment or a final payment, it is considered to be for a progress payment.

(5)

(a) If the conditions of Subsection (5)(b) are met, this section does not affect the enforcement of:

- (i) an accord and satisfaction regarding a bona fide dispute; or
- (ii) an agreement made in settlement of an action pending in any court or arbitration.

(b) Pursuant to Subsection (5)(a), this section does not affect enforcement of an accord and satisfaction or settlement described in Subsection (5)(a) if the accord and satisfaction or settlement:

- (i) is in a writing signed by the claimant; and
- (ii) specifically references the lien rights waived or impaired.

Renumbered and Amended by Chapter 278, 2012 General Session
Amended by Chapter 347, 2012 General Session

38-1a-803 Cancellation of preconstruction or construction lien -- Penalty for failure to cancel timely.

- (1) After the full amount owing under a preconstruction or construction lien, including costs and cancellation fees, has been paid, a person interested in the property that is the subject of the lien may request the claimant to submit for recording with the office of each applicable county recorder a cancellation of the lien.
- (2) Within 10 days after receiving a request under Subsection (1), the claimant shall submit to the office of each applicable county recorder a cancellation of the preconstruction or construction lien, as applicable.
- (3) A claimant who fails to submit a cancellation within the time prescribed in Subsection (2) is liable to the person who requested the cancellation for \$100 for each day after the time prescribed in Subsection (2) that the cancellation is not submitted, or the person's actual damages, whichever is greater.

Enacted by Chapter 278, 2012 General Session

38-1a-804 Notice of release of lien and substitution of alternate security.

- (1) The owner of any interest in a project property that is subject to a recorded preconstruction or construction lien, or any original contractor or subcontractor affected by the lien, who disputes the correctness or validity of the lien may submit for recording a notice of release of lien and substitution of alternate security:
 - (a) that meets the requirements of Subsection (2);
 - (b) in the office of each applicable county recorder where the lien was recorded; and
 - (c) at any time before the date that is 90 days after the first summons is served in an action to foreclose the preconstruction or construction lien for which the notice under this section is submitted for recording.
- (2) A notice of release of lien and substitution of alternate security recorded under Subsection (1) shall:
 - (a) meet the requirements for the recording of documents in Title 57, Chapter 3, Recording of Documents;
 - (b) reference the preconstruction or construction lien sought to be released, including the applicable entry number, book number, and page number; and
 - (c) have as an attachment a surety bond or evidence of a cash deposit that:
 - (i)
 - (A) if a surety bond, is executed by a surety company that is treasury listed, A-rated by AM Best Company, and authorized to issue surety bonds in this state; or
 - (B) if evidence of a cash deposit, meets the requirements established by rule by the Department of Commerce in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;
 - (ii) is in an amount equal to:
 - (A) 150% of the amount claimed by the claimant under the preconstruction or construction lien or as determined under Subsection (7), if the lien claim is for \$25,000 or more;
 - (B) 175% of the amount claimed by the claimant under the preconstruction or construction lien or as determined under Subsection (7), if the lien claim is for at least \$15,000 but less than \$25,000; or
 - (C) 200% of the amount claimed by the claimant under the preconstruction or construction lien or as determined under Subsection (7), if the lien claim is for less than \$15,000;
 - (iii) is made payable to the claimant;
 - (iv) is conditioned for the payment of:

- (A) the judgment that would have been rendered, or has been rendered against the project property in the action to enforce the lien; and
 - (B) any costs and attorney fees awarded by the court; and
- (v) has as principal:
- (A) the owner of the interest in the project property; or
 - (B) the original contractor or subcontractor affected by the lien.
- (3)
- (a) Upon the recording of the notice of release of lien and substitution of alternate security under Subsection (1), the real property described in the notice shall be released from the preconstruction lien or construction lien to which the notice applies.
 - (b) A recorded notice of release of lien and substitution of alternate security is effective as to any amendment to the preconstruction or construction lien being released if the bond amount remains enough to satisfy the requirements of Subsection (2)(c)(ii).
- (4)
- (a) Upon the recording of a notice of release of lien and substitution of alternate security under Subsection (1), the person recording the notice shall serve a copy of the notice, together with any attachments, within 30 days upon the claimant.
 - (b) If a suit is pending to foreclose the preconstruction or construction lien at the time the notice is served upon the claimant under Subsection (4)(a), the claimant shall, within 90 days after the receipt of the notice, institute proceedings to add the alternate security as a party to the lien foreclosure suit.
- (5) The alternate security attached to a notice of release of lien shall be discharged and released upon:
- (a) the failure of the claimant to commence a suit against the alternate security within the same time as an action to enforce the lien under Section 38-1a-701;
 - (b) the failure of the lien claimant to institute proceedings to add the alternate security as a party to a lien foreclosure suit within the time required by Subsection (4)(b);
 - (c) the dismissal with prejudice of the lien foreclosure suit or suit against the alternate security as to the claimant; or
 - (d) the entry of judgment against the claimant in:
 - (i) a lien foreclosure suit; or
 - (ii) suit against the alternate security.
- (6) If a copy of the notice of release of lien and substitution of alternate security is not served upon the claimant as provided in Subsection (4)(a), the claimant has six months after the discovery of the notice to commence an action against the alternate security, except that no action may be commenced against the alternate security after two years from the date the notice was recorded.
- (7)
- (a) The owner of any interest in a project property that is subject to a recorded preconstruction or construction lien, or an original contractor or subcontractor affected by the lien, who disputes the amount claimed under a preconstruction or construction lien may petition the district court in the county in which the notice of lien is recorded for a summary determination of the correct amount owing under the lien for the sole purpose of providing alternate security.
 - (b) A petition under this Subsection (7) shall:
 - (i) state with specificity the factual and legal bases for disputing the amount claimed under the preconstruction or construction lien; and
 - (ii) be supported by a sworn affidavit and any other evidence supporting the petition.

- (c) A petitioner under Subsection (7)(a) shall, as provided in Utah Rules of Civil Procedure, Rule 4, serve on the claimant:
 - (i) a copy of the petition; and
 - (ii) a notice of hearing if a hearing is scheduled.
- (d) If a court finds a petition under Subsection (7)(a) insufficient, the court may dismiss the petition without a hearing.
- (e) If a court finds a petition under Subsection (7)(a) sufficient, the court shall schedule a hearing within 10 days to determine the correct amount claimed under the preconstruction or construction lien for the sole purpose of providing alternate security.
- (f) A claimant may:
 - (i) attend a hearing held under this Subsection (7); and
 - (ii) contest the petition.
- (g) A determination under this section is limited to a determination of the amount claimed under a preconstruction or construction lien for the sole purpose of providing alternate security and does not conclusively establish:
 - (i) the amount to which the claimant is entitled;
 - (ii) the validity of the claim; or
 - (iii) any person's right to any other legal remedy.
- (h) If a court, in a proceeding under this Subsection (7), determines that the amount claimed under a preconstruction or construction lien is excessive, the court shall set the amount for the sole purpose of providing alternate security.
- (i) In an order under Subsection (7)(h), the court shall include a legal description of the project property.
- (j) A petitioner under this Subsection (7) may record a certified copy of any order issued under this Subsection (7) in the county in which the lien is recorded.
- (k) A court may not award attorney fees for a proceeding under this Subsection (7), but shall consider those attorney fees in any award of attorney fees under any other provision of this chapter.

Renumbered and Amended by Chapter 278, 2012 General Session

38-1a-805 Failure to file notice -- Petition to nullify preconstruction or construction lien -- Expedited proceeding.

- (1) An owner of an interest in a project property that is subject to a recorded preconstruction lien or a recorded construction lien may petition the district court in the county in which the project property is located for summary relief to nullify the preconstruction lien or the construction lien if:
 - (a) the owner claims that the preconstruction lien or the construction lien is invalid because:
 - (i) the lien claimant did not timely file a notice of preconstruction service under Section 38-1a-401; or
 - (ii) the lien claimant did not timely file a preliminary notice under Section 38-1a-501;
 - (b) the owner sent the lien claimant a written request to withdraw in accordance with Subsection (2); and
 - (c) the lien claimant did not withdraw the preconstruction lien or the construction lien within 10 business days after the day on which the owner sent the written request to withdraw.
- (2) A written request to withdraw described in Subsection (1) shall:
 - (a) be delivered by certified mail to the lien claimant at the lien claimant's address provided in the recorded preconstruction lien or the recorded construction lien;

- (b) state the owner's name, address, and telephone number;
 - (c) contain:
 - (i)
 - (A) the name of the county in which the property that is subject to the preconstruction lien or the construction lien is located; and
 - (B) the tax parcel identification number of each parcel that is subject to the preconstruction lien or the construction lien; or
 - (ii) a legal description of the property that is subject to the preconstruction lien or the construction lien;
 - (d) state that the lien claimant has failed to timely file:
 - (i) a notice of preconstruction service under Section 38-1a-401; or
 - (ii) a preliminary notice under Section 38-1a-501;
 - (e) request that the lien claimant withdraw the lien claimant's preconstruction lien or construction lien within 10 business days after the day on which the written request to withdraw is sent; and
 - (f) state that if the lien claimant does not withdraw the preconstruction lien or the construction lien within 10 business days after the day on which the written request to withdraw is sent, the owner may petition a court to nullify the lien in an expedited proceeding under this section.
- (3) A petition under Subsection (1) shall:
- (a) state with specificity that:
 - (i) the lien claimant's preconstruction lien or the lien claimant's construction lien is invalid because the lien claimant did not file a notice of preconstruction service or a preliminary notice, as applicable;
 - (ii) the petitioner sent the lien claimant a written request to withdraw in accordance with Subsection (2); and
 - (iii) the lien claimant did not withdraw the preconstruction lien or the construction lien within 10 business days after the day on which the owner sent the written request to withdraw;
 - (b) be supported by a sworn affidavit of the petitioner; and
 - (c) be served on the lien claimant, in accordance with the Rules of Civil Procedure, within three business days after the day on which the petitioner files the petition in the district court.
- (4)
- (a) If the court finds that a petition does not meet the requirements described in Subsection (3), the court may dismiss the petition without a hearing.
 - (b) If the court finds that a petition meets the requirements described in Subsection (3), the court shall schedule an expedited hearing to determine whether the preconstruction lien or the construction lien is invalid because the lien claimant failed to file a notice of preconstruction service or a preliminary notice, as applicable.
- (5)
- (a) If the court grants a hearing, within three business days after the day on which the court schedules the hearing and at least seven business days before the day on which the hearing is scheduled, the petitioner shall serve on the lien claimant, in accordance with the Rules of Civil Procedure, a copy of the petition, notice of the hearing, and a copy of the court's order granting the expedited hearing.
 - (b) The lien claimant may attend the hearing and contest the petition.
- (6) An expedited proceeding under this section may only determine:
- (a) whether the lien claimant filed a notice of preconstruction service or a preliminary notice; and
 - (b) if the lien claimant failed to file a notice of preconstruction service or a preliminary notice, whether the lien claimant's preconstruction lien or construction lien is valid.

- (7)
 - (a) If, following a hearing, the court determines that the preconstruction lien or the construction lien is invalid, the court shall issue an order that:
 - (i) contains a legal description of the property;
 - (ii) declares the preconstruction lien or the construction lien void ab initio;
 - (iii) releases the property from the lien; and
 - (iv) awards costs and reasonable attorney fees to the petitioner.
 - (b) The petitioner may submit a copy of an order issued under Subsection (7)(a) to the county recorder for recording.
- (8)
 - (a) If, following a hearing, the court determines that the preconstruction lien or the construction lien is valid, the court shall:
 - (i) dismiss the petition; and
 - (ii) award costs and reasonable attorney fees to the lien claimant.
 - (b) The dismissal order shall contain a legal description of the property.
 - (c) The lien claimant may submit a copy of the dismissal order to the county recorder for recording.
- (9) If a petition under this section contains a claim for damages, the proceedings related to the claim for damages may not be expedited under this section.

Enacted by Chapter 303, 2015 General Session