

**AMEND MECHANICS LIEN LAW**

1999 GENERAL SESSION

STATE OF UTAH

**Sponsor: Scott N. Howell**

AN ACT RELATING TO THE RESIDENCE LIEN RESTRICTION AND LIEN RECOVERY FUND ACT; PROVIDING FOR THE ASSIGNMENT OF A CLAIMANT'S JUDGMENT TO THE FUND; CLARIFYING THE PROCEDURAL REQUIREMENTS IN CASES OF BANKRUPTCY; ADDING A SEVERABILITY CLAUSE; PROVIDING FOR THE PAYMENT OF INTEREST, COSTS, AND ATTORNEY'S FEES FROM THE FUND; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows:

**AMENDS:**

**38-11-102**, as last amended by Chapter 13, Laws of Utah 1998

**38-11-202**, as last amended by Chapter 10, Laws of Utah 1997

**38-11-203**, as last amended by Chapter 49, Laws of Utah 1998

**38-11-204**, as last amended by Chapter 49, Laws of Utah 1998

**38-11-205**, as last amended by Chapter 172, Laws of Utah 1995

**ENACTS:**

**38-11-109**, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **38-11-102** is amended to read:

**38-11-102. Definitions.**

(1) "Board" means the Residence Lien Recovery Fund Advisory Board established under Section 38-11-104.

(2) "Construction on an owner-occupied residence" means designing, engineering, constructing, altering, remodeling, improving, repairing, or maintaining a new or existing residence.

- (3) "Department" means the Department of Commerce.
- (4) "Director" means the director of the Division of Occupational and Professional Licensing.
- (5) "Division" means the Division of Occupational and Professional Licensing.
- (6) "Encumbered fund balance" means the aggregate amount of all outstanding claims against the fund. The remainder of monies in the fund are unencumbered funds.
- (7) "Executive director" means the executive director of the Department of Commerce.
- (8) "Fund" means the Residence Lien Recovery Fund established under Section 38-11-201.
- (9) "Laborer" means a person who provides services at the site of the construction on an owner-occupied residence as an employee of an original contractor or other qualified beneficiary performing qualified services on the residence.
- (10) "Licensee" means any holder of a license issued under Title 58, Chapters 3a, 22, 53, and 55.
- (11) "Nonpaying party" means the original contractor, subcontractor, or real estate developer who has failed to pay the qualified beneficiary making a claim against the fund.
- ~~[(11)]~~ (12) "Original contractor" means a person who contracts with the owner of real property or the owner's agent to provide services, labor, or material for the construction of an owner-occupied residence.
- ~~[(12)]~~ (13) "Owner" means a person who:
- (a) contracts with a person who is licensed as a contractor or is exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the construction on an owner-occupied residence upon real property owned by that person;
- (b) contracts with a real estate developer to buy a residence upon completion of the construction on the owner-occupied residence; or
- (c) buys a residence from a real estate developer after completion of the construction on the owner-occupied residence.
- ~~[(13)]~~ (14) "Owner-occupied residence" means a residence that is, or after completion of the construction on the residence will be, occupied by the owner or the owner's tenant or lessee as a primary or secondary residence within 180 days from the date of the completion of the construction on the residence.
- ~~[(14)]~~ (15) "Qualified beneficiary" means a person who:

- 59 (a) provides qualified services;
- 60 (b) pays all necessary fees or assessment required under this chapter; and
- 61 (c) registers with the division:
- 62 (i) as a licensed contractor under Subsection 38-11-301(1) or (2) if that person seeks
- 63 recovery from the fund as a licensed contractor; or
- 64 (ii) as a person providing qualified services other than as a licensed contractor under
- 65 Subsection 38-11-301(3) if the person seeks recovery from the fund in a capacity other than as a
- 66 licensed contractor.

67 ~~[(15)]~~ (16) "Qualified services" means the following performed in construction on an

68 owner-occupied residence:

- 69 (a) contractor services provided by a contractor licensed or exempt from licensure under
- 70 Title 58, Chapter 55, Utah Construction Trades Licensing Act;
- 71 (b) architectural services provided by an architect licensed under Title 58, Chapter 3a;
- 72 (c) engineering and land surveying services provided by a professional engineer or land
- 73 surveyor licensed or exempt from licensure under Title 58, Chapter 22;
- 74 (d) landscape architectural services by a landscape architect licensed or exempt from
- 75 licensure under Title 58, Chapter 53;
- 76 (e) design and specification services of mechanical or other systems;
- 77 (f) other services related to the design, drawing, surveying, specification, cost estimation,
- 78 or other like professional services;
- 79 (g) providing materials, supplies, components, or similar products;
- 80 (h) renting equipment or materials; and
- 81 (i) labor at the site of the construction on the owner-occupied residence.

82 ~~[(16)]~~ (17) "Real estate developer" means a person having an ownership interest in real

83 property who contracts for the construction of a residence that is offered for sale to the public.

84 ~~[(17)]~~ (18) "Residence" means an improvement to real property used or occupied, to be

85 used or occupied as, or in conjunction with, a primary or secondary detached single-family

86 ~~[residence]~~ dwelling or multifamily ~~[residence]~~ dwelling up to two units.

87 ~~[(18)]~~ (19) "Subsequent owner" means a person who purchases a residence from an owner

88 within 180 days from the date of the completion of the construction on the residence.

89 Section 2. Section **38-11-109** is enacted to read:

**38-11-109. Severability clause.**

If any provision of this chapter is held invalid or unconstitutional by court of competent jurisdiction, the invalidity shall not affect the other provisions of this chapter which can be given effect without the invalid or unconstitutional provision.

Section 3. Section **38-11-202** is amended to read:

**38-11-202. Payments to the fund.**

The Residence Lien Recovery Fund shall be supported solely from:

(1) initial and special assessments collected by the division from licensed contractors registered as qualified beneficiaries in accordance with Subsections 38-11-301(1) and (2) and Section 38-11-206;

(2) initial and special assessments collected by the division from other qualified beneficiaries registering with the division in accordance with Subsection 38-11-301(3) and Section 38-11-206;

(3) fees determined by the division under Section 63-38-3.2 collected from laborers under Subsection 38-11-204~~(5)~~(7) when the laborers obtain a recovery from the fund;

(4) amounts collected by subrogation under Section 38-11-205 on behalf of the fund following a payment from the fund;

(5) application fees determined by the division under Section 63-38-3.2 collected from qualified beneficiaries or laborers under Subsection 38-11-204(1)(b) when qualified beneficiaries or laborers make a claim against the fund;

(6) registration fees determined by the division under Section 63-38-3.2 collected from other qualified beneficiaries registering with the department in accordance with Subsection 38-11-301(3)(a)(iii);

(7) reinstatement fees determined by the division under Section 63-38-3.2 collected from registrants in accordance with Subsection 38-11-302(5)(b);

(8) civil fines authorized under Subsection 38-11-205(2) collected by the attorney general for failure to reimburse the fund; and

(9) any interest earned by the fund.

Section 4. Section **38-11-203** is amended to read:

**38-11-203. Disbursements from the fund -- Limitations.**

(1) A payment of any claim upon the fund by a qualified beneficiary shall be made only

upon an order issued by the director finding that:

(a) the claimant was a qualified beneficiary during the construction on a residence;

(b) the claimant complied with the requirements of Section 38-11-204; and

(c) there is adequate money in the fund to pay the amount ordered.

(2) A payment of a claim upon the fund by a laborer shall be made only upon an order issued by the director finding that:

(a) the laborer complied with the requirements of Subsection 38-11-204~~(4)~~(6); and

(b) there is adequate money in the fund to pay the amount ordered.

(3) (a) An order under this section may be issued only after the division has complied with the procedures established by rule under Section 38-11-105.

~~[(b) If the claimant is a laborer or is precluded from obtaining a judgment because the person described in Subsection 38-11-204(3) (b) has filed bankruptcy, the director shall determine the amount to be paid from the fund.]~~

~~[(c) If the qualified beneficiary obtains a judgment, subject to the limitation of this section, the director shall order payment of the amount of the judgment.]~~

(b) The director shall order payment of the qualified services as established by evidence, or if the claimant has obtained a judgment, then in the amount awarded for qualified services in the judgment to the extent the qualified services are attributable to the owner-occupied residence at issue in the claim.

(c) The director shall order payment of interest on all \$ [claims] AMOUNTS CLAIMED FOR QUALIFIED SERVICES § at the rate of 12% \$ , ANNUAL PERCENTAGE RATE, § from the date payment was due to the date the claim is approved for payment except for delays attributable to the claimant.

(d) The director shall order payment of costs in the amount stated in the judgment. If the judgment does not state a sum certain for costs, or if no judgment has been obtained, the director shall order payment of reasonable costs as supported by evidence. The claim application fee as established by the division pursuant to Subsection 38-11-204(1)(b) is not a reimbursable cost.

(e) The director shall order payment of attorney's fees in the amount stated in a judgment.

(4) (a) Payments made from the fund may not exceed:

(i) \$75,000 per residence to all qualified beneficiaries and laborers who have claim against the fund for that residence; and

(ii) \$500,000 per qualified beneficiary or laborer for payments to the qualified beneficiary

over the qualified beneficiary's lifetime.

(b) If claims against the fund for a residence exceed \$75,000, the \$75,000 shall be awarded proportionately so that each qualified beneficiary and laborer awarded compensation from the fund for qualified services shall receive an identical percentage of the qualified beneficiary's or laborer's award.

(5) Subject to the limitations of Subsection (4), if on the day the order is issued there are inadequate funds to pay the entire claim and the director determines that the claimant has otherwise met the requirements of Subsection (1) or (2), the director shall order additional payments once the fund meets the balance limitations of Section 38-11-206.

Section 5. Section **38-11-204** is amended to read:

**38-11-204. Claims against the fund -- Requirement to make a claim -- Qualifications to receive compensation.**

(1) To claim recovery from the fund a person shall:

(a) meet the requirements of either Subsection (3) or ~~[(4)]~~ (6);

(b) pay an application fee determined by the division under Section 63-38-3.2; and

(c) file with the division a completed application on a form provided by the division accompanied by supporting documents establishing:

(i) that the person meets the requirements of either Subsection (3) or ~~[(4)]~~ (6);

(ii) that the person was a qualified beneficiary or laborer during the construction on the owner-occupied residence; and

(iii) the basis for the claim.

(2) To recover from the fund, the application required by Subsection (1) shall be filed no later than 120 days:

(a) from the date the judgment required by Subsection (3) (c) is entered;

(b) from the date the nonpaying party filed bankruptcy, if the claimant is precluded from obtaining a judgment [because the person described in Subsection (3) (b) filed bankruptcy, from the date the person filed bankruptcy] or from satisfying the requirements of Subsection (3)(c) because the nonpaying party filed bankruptcy **§ WITHIN 120 DAYS AFTER THE ENTRY OF**

**JUDGMENT** § ; or

(c) if a laborer, the date the laborer completed the laborer's qualified services.

(3) To recover from the fund, regardless of whether the residence is occupied by the owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified

beneficiary shall establish that:

(a) (i) the owner of the owner-occupied residence or the owner's agent entered into a written contract with an original contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the performance of qualified services, to obtain the performance of qualified services by others, or for the supervision of the performance by others of qualified services in construction on that residence; or

(ii) the owner of the owner-occupied residence or the owner's agent entered into a written contract with a real estate developer for the purchase of an owner-occupied residence;

(b) the owner has paid in full the original contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or both, under Subsection (3)(a)(i) or (ii) with whom the owner has a written contract in accordance with the written contract and any amendments to the contract, and:

(i) the original contractor or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, subsequently failed to pay a qualified beneficiary who is entitled to payment under an agreement with that original contractor or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for services performed or materials supplied by the qualified beneficiary;

(ii) a subcontractor who contracts with the original contractor or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, failed to pay a qualified beneficiary who is entitled to payment under an agreement with that subcontractor or supplier; or

(iii) a subcontractor who contracts with a subcontractor or supplier failed to pay a qualified beneficiary who is entitled to payment under an agreement with that subcontractor or supplier;

(c) (i) the qualified beneficiary filed:

(A) an action against the nonpaying party to recover monies owed him within 180 days from the date the qualified beneficiary last provided qualified services, unless precluded from doing so by the nonpaying party's bankruptcy filing within the 180 days after completion of services; and

(B) [~~filed with the division~~] a notice of commencement of action with the division within 30 days from the date the qualified beneficiary filed [~~an~~] the civil action [~~to recover monies owed~~]

him] if a civil action was filed as required by Subsection (3)(c)(i)(A);

(ii) the qualified beneficiary has obtained a judgment against the ~~[person described in Subsection (3)(b)]~~ nonpaying party who failed to pay the qualified beneficiary under an agreement to provide qualified services for construction of that owner-occupied residence;

(iii) (A) the qualified beneficiary has obtained from a court of competent jurisdiction the issuance of an order requiring the judgment debtor, or if a corporation any officer of the corporation, to appear before the court at a specified time and place to answer concerning the debtor's or corporation's property ~~[and]~~, has received return of service of the order from a person qualified to serve documents under the Utah Rules of Civil Procedure, Rule 4(b), and has made reasonable efforts to obtain asset information from the supplemental proceedings; and

(B) if assets subject to execution are discovered as a result of the order required under Subsection (3)(c)(iii)(A) or for any other reason, to obtain the issuance of a writ of execution from a court of competent jurisdiction; or

(iv) ~~[has been precluded from obtaining a judgment against that person because that person filed bankruptcy; and]~~ the claimant timely filed a proof of claim where permitted in the bankruptcy action, if the § [original contractor, subcontractor, or real estate developer] NONPAYING PARTY § has filed bankruptcy; and

(d) the qualified beneficiary is not entitled to reimbursement from any other person.

(4) The requirements of Subsection 38-11-204(3)(c) need not be met if the qualified beneficiary has been precluded from obtaining a judgment against the nonpaying party or from satisfying the requirements of Subsection 38-11-204(3)(c) because the nonpaying party filed bankruptcy.

~~[(e)]~~ (5) If a qualified beneficiary fails to file the notice with the division required under Subsection (3)(c)(i)(B), the claim of the qualified beneficiary shall be paid:

(i) if otherwise qualified under this chapter;

(ii) to the extent that the limit of Subsection 38-11-203(4)(a)(i) has not been reached by payments from the fund to qualified beneficiaries who have complied with the notice requirements of Subsection (3)(c)(i)(B); and

(iii) in the order that the claims are filed by persons who fail to comply with Subsection (3)(c)(i)(B), not to exceed the limit of Subsection 38-11-203(4)(a)(i).

~~[(4)]~~ (6) To recover from the fund a laborer shall:

(a) establish that the laborer has not been paid wages due for the work performed at the



site of a construction on an owner-occupied residence; and

(b) provide any supporting documents or information required by rule by the division.

~~[(5)] (7)~~ A fee determined by the division under Section 63-38-3.2 shall be deducted from any recovery from the fund received by a laborer.

Section 6. Section **38-11-205** is amended to read:

**38-11-205. Subrogation.**

(1) (a) (i) The state, on behalf of the fund, has the right of subrogation only to the extent of payments made from the fund.

(ii) Upon payment from the fund to a claimant, any payment to the claimant that was the basis of the claimant's claim against the fund shall be assigned to the fund for the enforcement of subrogation rights by the attorney general.

(iii) A claimant's judgment or bankruptcy claim against the nonpaying ~~§ [original contractor; subcontractor, or real estate developer]~~ **PARTY** § shall be automatically assigned to the state, to the extent paid by the fund on a particular residence, upon the state's filing of the director's order of payment of claim with the appropriate court.

(b) The state's right of subrogation under Subsection (1)(a) has priority over any rights of the qualified beneficiary under the judgment or any civil penalties imposed.

(c) The state shall be awarded attorney's fees and court costs incurred in recovering claims paid from the fund.

(2) (a) The attorney general shall enforce all subrogation claims and may contract with private attorneys as necessary to adequately enforce subrogation claims.

(b) (i) In addition to the subrogation claims the attorney general may seek a civil fine of \$5,000 per residence for failure to reimburse the Residence Lien Recovery Fund within 90 days after any disbursement from the fund resulting from the registrant's failure to pay qualified beneficiaries under this chapter.

(ii) All claims under the judgment have priority over the civil penalty.

(3) The attorney general may charge the fund for costs incurred by the attorney general under this chapter.

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**Legislative Review Note**

**as of 2-9-99 6:24 PM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**