

Senator Curtis S. Bramble proposes the following substitute bill:

LIEN AMENDMENTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis S. Bramble

House Sponsor: Kevin S. Garn

LONG TITLE

General Description:

This bill modifies provisions of the Residence Lien Restriction and Lien Recovery Fund Act.

Highlighted Provisions:

This bill:

- ▶ modifies the time for filing an action to enforce a mechanic's lien if an owner files bankruptcy;
- ▶ changes a notice of intent to file a notice of completion into a notice of intent to obtain final completion and modifies a provision relating to its filing;
- ▶ bars a person otherwise qualified to file a lien from maintaining a lien on an owner-occupied residence under certain circumstances, including if the general contract is no more than \$5,000;
- ▶ modifies provisions relating to the issuance of a certificate of compliance; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None



26 **Utah Code Sections Affected:**

27 AMENDS:

28 **38-1-11**, as last amended by Laws of Utah 2008, Chapters 3 and 38229 **38-1-40**, as enacted by Laws of Utah 2009, Chapter 23930 **38-11-107**, as last amended by Laws of Utah 2006, Chapter 20531 **38-11-110**, as last amended by Laws of Utah 2008, Chapter 38232 **38-11-204**, as last amended by Laws of Utah 2009, Chapter 183

33

34 *Be it enacted by the Legislature of the state of Utah:*35 Section 1. Section **38-1-11** is amended to read:36 **38-1-11. Enforcement -- Time for -- Lis pendens -- Action for debt not affected --**37 **Instructions and form affidavit and motion.**

38 (1) As used in this section:

39 (a) "Owner" is as defined in Section 38-11-102.

40 (b) "Residence" is as defined in Section 38-11-102.

41 (2) A lien claimant shall file an action to enforce the lien filed under this chapter:

42 (a) except as provided in Subsection (2)(b), within 180 days [from] after the day on
43 which the lien claimant filed a notice of claim under Section 38-1-7[.]; or44 (b) if an owner files for protection under the bankruptcy laws of the United States44a **§→ before the expiration of the 180-day period under Subsection (2)(a) ←§** .45 within 90 days after the automatic stay under the bankruptcy proceeding is lifted or expires.46 (3) (a) Within the time period provided for filing in Subsection (2) the lien claimant
47 shall file for record with the county recorder of each county in which the lien is recorded a
48 notice of the pendency of the action, in the manner provided in actions affecting the title or
49 right to possession of real property, or the lien shall be void, except as to persons who have
50 been made parties to the action and persons having actual knowledge of the commencement of
51 the action.52 (b) The burden of proof is upon the lien claimant and those claiming under the lien
53 claimant to show actual knowledge under Subsection (3)(a).54 (4) (a) A lien filed under this chapter is automatically and immediately void if an action
55 to enforce the lien is not filed within the time required by this section.

56 (b) Notwithstanding Section 78B-2-111, a court has no subject matter jurisdiction to

57 adjudicate a lien that becomes void under Subsection (4)(a).

58 (5) This section may not be interpreted to impair or affect the right of any person to
59 whom a debt may be due for any work done or materials furnished to maintain a personal
60 action to recover the debt.

61 (6) (a) If a lien claimant files an action to enforce a lien filed under this chapter
62 involving a residence, the lien claimant shall include with the service of the complaint on the
63 owner of the residence:

64 (i) instructions to the owner of the residence relating to the owner's rights under Title
65 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

66 (ii) a form to enable the owner of the residence to specify the grounds upon which the
67 owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and
68 Lien Recovery Fund Act.

69 (b) The instructions and form required by Subsection (6)(a) shall meet the requirements
70 established by rule by the Division of Occupational and Professional Licensing in accordance
71 with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

72 (c) If a lien claimant fails to provide to the owner of the residence the instructions and
73 form required by Subsection (6)(a), the lien claimant shall be barred from maintaining or
74 enforcing the lien upon the residence.

75 (d) Judicial determination of the rights and liabilities of the owner of the residence
76 under this chapter and Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery
77 Fund Act, and Title 14, Chapter 2, Private Contracts, shall be stayed until after the owner is
78 given a reasonable period of time to establish compliance with Subsections 38-11-204(4)(a)
79 and (4)(b) through an informal proceeding, as set forth in Title 63G, Chapter 4, Administrative
80 Procedures Act, commenced within 30 days of the owner being served summons in the
81 foreclosure action, at the Division of Occupational and Professional Licensing and obtain a
82 certificate of compliance or denial of certificate of compliance, as defined in Section
83 38-11-102.

84 (e) An owner applying for a certificate of compliance under Subsection (6)(d) shall
85 send by certified mail to all lien claimants:

86 (i) a copy of the application for a certificate of compliance; and

87 (ii) all materials filed in connection with the application.

88 (f) The Division of Occupational and Professional Licensing shall notify all lien
89 claimants listed in an owner's application for a certificate of compliance under Subsection
90 (6)(d) of the issuance or denial of a certificate of compliance.

91 (7) The written notice requirement applies to liens filed on or after July 1, 2004.
92 Section 2. Section **38-1-40** is amended to read:

93 **38-1-40. Notice of intent to obtain final completion.**

94 (1) An owner, as defined in Section 14-2-1, of a construction project that is registered
95 with the database [~~who intends to file a notice of completion in accordance with the provisions~~
96 ~~of Subsection 38-1-33(1)(a)] under Section 38-1-33, or a contractor of a commercial
97 nonresidential construction project that is registered with the database [~~who intends to file a~~
98 ~~notice of completion in accordance with the provisions of Subsection 38-1-33(1)(a)] under
99 Section 38-1-33, shall [~~first~~] file with the database a notice of intent to [~~file a notice of~~] obtain
100 final completion [~~with the database in accordance with the provisions of Section 38-1-40~~] as
101 provided in this section if:~~~~

102 (a) the completion of performance time under the original contract is greater than 120
103 days;

104 (b) the total original construction contract price exceeds \$500,000; and

105 (c) the contractor or owner has not obtained a payment bond in accordance with
106 Section 14-2-1.

107 (2) The notice of intent described in Subsection (1) shall be filed at least 45 days before
108 the day on which the owner or contractor of a commercial nonresidential construction project
109 files or could have filed a notice of completion under Section 38-1-33.

110 (3) A person supplying labor, materials, or services to an owner, a contractor, or
111 subcontractor who files a notice of intent in accordance with Subsection (1) shall file an
112 amendment to the person's preliminary notice previously filed by the person as required in
113 Section 38-1-32:

114 (a) that includes:

115 (i) a good faith estimate of the total amount remaining due to complete the contract,
116 purchase order, or agreement relating to the person's approved labor, approved materials, and
117 approved services;

118 (ii) the identification of each contractor or subcontractor with whom the person has a

119 contract or contracts for supplying project labor, materials, or services; and

120 (iii) a separate statement of all known amounts or categories of work in dispute; and

121 (b) no later than 20 days after the day on which the owner or contractor files a notice of
122 intent.

123 (4) (a) A person identified in accordance with Subsection (3)(a)(i) who has complied
124 with, or is exempt from, the provisions of Section 38-1-22, may demand a statement of
125 adequate assurance from the owner, contractor, or subcontractor with whom the person has
126 privity of contract no later than 10 days after the day on which the person files a balance
127 statement in accordance with Subsection (3) from an owner, contractor, or subcontractor who is
128 in privity of contract with the person.

129 (b) A demand for adequate assurance as described in Subsection (4)(a) may include a
130 request for a statement from the owner, contractor, or subcontractor that the owner, contractor,
131 or subcontractor has sufficient funds dedicated and available to pay for all sums due to the
132 person filing for the adequate assurances or that will become due in order to complete a
133 construction project.

134 (c) A person who demands adequate assurance under Subsection (4)(a) shall deliver
135 copies of the demand to the owner and contractor:

136 (i) by hand delivery with a responsible party's acknowledgment of receipt;

137 (ii) by certified mail with a return receipt; or

138 (iii) as provided under Rule 4, Utah Rules of Civil Procedure.

139 (5) (a) A person identified in accordance with Subsection (3)(a)(i) who has complied
140 with, or is exempt from, the provisions of Section 38-1-32 may bring a legal action against a
141 party with whom the person is in privity of contract, including a request for injunctive or
142 declaratory relief, to determine the adequacy of an owner's, with whom the demanding person
143 contracted, contractor's, with whom the demanding person contracted, or subcontractor's, with
144 whom the demanding person contracted, funds if, after the person demands adequate assurance
145 in accordance with the requirements of this section:

146 (i) the owner, contractor, or subcontractor fails to provide adequate assurance that the
147 owner, contractor, or subcontractor has sufficient available funds, or access to financing or
148 other sufficient available funds, to pay for the completion of the demanding person's approved
149 work on the construction project; or

150 (ii) the parties disagree, in good faith, as to whether there are adequate funds, or access
151 to financing or other sufficient available funds, to pay for the completion of the demanding
152 person's approved work on the construction project.

153 (b) If a court finds that an owner, contractor, or subcontractor has failed to provide
154 adequate assurance in accordance with Subsection (4)(a), the court may require the owner,
155 contractor, or subcontractor to post adequate security with the court sufficient to assure timely
156 payment of the remaining contract balance for the approved work of the person seeking
157 adequate assurance, including:

- 158 (i) cash;
- 159 (ii) a bond;
- 160 (iii) an irrevocable letter of credit;
- 161 (iv) property;
- 162 (v) financing; or
- 163 (vi) another form of security approved by the court.

164 (6) (a) A person is subject to the civil penalty described in Subsection (6)(b), if the
165 person files a balance statement described in Subsection (3):

- 166 (i) that misrepresents the amount due under the contract; and
- 167 (ii) with the intent to:
 - 168 (A) charge an owner, contractor, or subcontractor more than the actual amount due; or
 - 169 (B) procure any other unfair advantage or benefit on the person's behalf.

170 (b) The civil penalty described in Subsection (6)(a) is the greater of:

- 171 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
172 the amount actually remaining due under the contract for completion of construction; or
- 173 (ii) the actual damages incurred by the owner, contractor, or subcontractor.

174 (7) A court shall award reasonable attorney fees to a prevailing party for an action
175 brought under this section.

176 (8) Failure to comply with the requirements established in this section does not affect
177 any other requirement or right under this chapter.

178 (9) A person who has not complied with, or is not exempt from, the provisions of
179 Section 38-1-32 may not be entitled to a right or a remedy provided in this section.

180 (10) This section does not create a cause of action against a person with whom the

181 demanding party is not in privity of contract.

182 Section 3. Section 38-11-107 is amended to read:

183 **38-11-107. Restrictions upon maintaining a lien against residence or owner's**
184 **interest in the residence.**

185 (1) (a) A person qualified to file a lien upon an owner-occupied residence and the real
186 property associated with that residence under [~~the provisions of Title 38,~~] Chapter 1,
187 Mechanics' Liens, who provides qualified services under an agreement effective on or after
188 January 1, 1995, other than directly with the owner, [~~shall be~~] is barred after January 1, 1995,
189 from maintaining a lien upon that residence and real property or recovering a judgment in any
190 civil action against the owner or the owner-occupied residence to recover monies owed for
191 qualified services provided by that person if:

192 [~~(a)~~] (i) an owner meets the conditions described in Subsections 38-11-204(4)(a) and
193 [~~(4)~~](b); or

194 [~~(b)~~-(i)] (ii) (A) a subsequent owner purchases a residence from an owner;

195 [(ii)] (B) the subsequent owner who purchased the residence under Subsection
196 (1)[~~(b)~~-(i)](a)(ii)(A) occupies the residence as a primary or secondary residence within 180 days
197 from the date of transfer or the residence is occupied by the subsequent owner's tenant or lessee
198 as a primary or secondary residence within 180 days from the date of transfer; and

199 [(iii)] (C) the owner from whom the subsequent owner purchased the residence met the
200 conditions described in Subsections 38-11-204(4)(a) and [~~(4)~~](b).

201 (b) (i) As used in this Subsection (1)(b):

202 (A) "Contract residence":

203 (I) means the owner-occupied residence for which a subcontractor provides service,
204 labor, or materials; and

205 (II) includes the real property associated with that owner-occupied residence.

206 (B) "General contract" means an oral or written contract between an owner and an
207 original contractor for providing service, labor, or materials for construction on an
208 owner-occupied residence.

209 (C) "Subcontractor" means a person who provides service, labor, or materials for
210 construction on an owner-occupied residence under an agreement other than directly with the
211 owner.

212 (ii) A subcontractor qualified to file a lien upon a contract residence under Chapter 1,
213 Mechanics' Liens, is barred from maintaining a lien upon that contract residence or from
214 recovering a judgment in a civil action against the owner, the contract residence, or, as
215 provided in Subsection (1)(b)(iii), a subsequent owner to recover for service, labor, or materials
216 provided by the subcontractor:

217 (A) if the amount of the general contract under which the subcontractor provides
218 service, labor, or materials totals no more than \$5,000; and

219 (B) whether or not the original contractor is licensed under Title 58, Chapter 55, Utah
220 Construction Trades Licensing Act.

221 (iii) A subsequent owner is protected under Subsection (1)(b)(ii) to the same extent as
222 an owner if:

223 (A) the subsequent owner purchases the contract residence from the owner; and

224 (B) (I) the subsequent owner occupies the residence as a primary or secondary
225 residence within 180 days after the date of transfer; or

226 (II) the subsequent owner's tenant or lessee occupies the residence as a primary or
227 secondary residence within 180 days after the date of the transfer.

228 (2) If a residence is constructed under conditions that do not meet all of the provisions
229 of Subsection (1)(a) or (b), that residence and the real property associated with that residence as
230 provided in Section 38-1-4 shall be subject to any mechanics' lien as provided in Section
231 38-1-3.

232 (3) A lien claimant who files a mechanics' lien or foreclosure action upon an
233 owner-occupied residence is not liable for costs and attorneys' fees under Sections 38-1-17 and
234 38-1-18 or for any damages arising from a civil action related to the lien filing or foreclosure
235 action if the lien claimant removes the lien within 15 days from the date the owner obtains a
236 certificate of compliance and mails a copy of the certificate of compliance by certified mail to
237 the lien claimant at the address provided for by Subsection 38-1-7(2)(a)(v). The 15-day period
238 begins accruing from the date postmarked on the certificate of compliance sent to the lien
239 claimant.

240 Section 4. Section **38-11-110** is amended to read:

241 **38-11-110. Issuance of certificates of compliance.**

242 (1) (a) The director [~~shall have authority to~~] may issue [~~or deny~~] a certificate of

243 compliance only after determining through an informal proceeding, as set forth in Title 63G,
244 Chapter 4, Administrative Procedures Act[?];

245 (i) that the owner is in compliance with Subsections 38-11-204(4)(a) and [~~4~~](b)[?]; or

246 (ii) subject to Subsection (2), that the owner is entitled to protection under Subsection
247 38-11-107(1)(b).

248 (b) If the director determines through an informal proceeding under Subsection (1)(a)
249 that an owner seeking the issuance of a certificate of compliance under Subsection (1)(a)(i) is
250 not in compliance as provided in that subsection, the director may not issue a certificate of
251 compliance.

252 (2) (a) An owner seeking the issuance of a certificate of compliance under Subsection
253 (1)(a)(ii) shall submit an affidavit, as defined by the division by rule, affirming that the owner
254 is entitled to protection under Subsection 38-11-107(1)(b).

255 (b) If an owner's affidavit under Subsection (2)(a) is disputed, the owner may file a
256 complaint in small claims court or district court to resolve the dispute.

257 (c) The director may issue a certificate of compliance to an owner seeking issuance of a
258 certificate under Subsection (1)(a)(ii) if:

259 (i) the owner's affidavit under Subsection (2)(a) is undisputed; or

260 (ii) a small claims court or district court resolves any dispute over the owner's affidavit
261 in favor of the owner.

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

263 **38-11-204. Claims against the fund -- Requirement to make a claim --**

264 **Qualifications to receive compensation -- Qualifications to receive a certificate of**
265 **compliance.**

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

267 (a) meet the requirements of [~~either~~] Subsection (4) or [~~7~~] (6);

268 (b) pay an application fee determined by the division under Section 63J-1-504; and

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

271 (i) that the person meets the requirements of [~~either~~] Subsection (4) or [~~7~~] (6);

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

274 (iii) the basis for the claim.

275 (2) To recover from the fund, the application required by Subsection (1) shall be filed
276 no later than one year:

277 (a) from the date the judgment required by Subsection (4)(d) is entered;

278 (b) from the date the nonpaying party filed bankruptcy, if the claimant is precluded
279 from obtaining a judgment or from satisfying the requirements of Subsection (4)(d) because the
280 nonpaying party filed bankruptcy within one year after the entry of judgment; or

281 (c) from the date the laborer, trying to recover from the fund, completed the laborer's
282 qualified services.

283 (3) ~~[To obtain]~~ The issuance of a certificate of compliance [an owner or agent of the
284 ~~owner shall establish with the division that the owner meets the requirements of Subsections~~
285 ~~(4)(a) and (4)(b)] is governed by Section 38-11-110.~~

286 (4) To recover from the fund, regardless of whether the residence is occupied by the
287 owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified
288 beneficiary shall establish that:

289 (a) (i) the owner of the owner-occupied residence or the owner's agent entered into a
290 written contract with an original contractor licensed or exempt from licensure under Title 58,
291 Chapter 55, Utah Construction Trades Licensing Act:

292 (A) for the performance of qualified services;

293 (B) to obtain the performance of qualified services by others; or

294 (C) for the supervision of the performance by others of qualified services in
295 construction on that residence;

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

299 (iii) the owner of the owner-occupied residence or the owner's agent entered into a
300 written contract with a factory built housing retailer for the purchase of an owner-occupied
301 residence;

302 (b) the owner has paid in full the original contractor, licensed or exempt from licensure
303 under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or
304 factory built housing retailer under Subsection (4)(a) with whom the owner has a written

305 contract in accordance with the written contract and any amendments to the contract;

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

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

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

319 (d) (i) unless precluded from doing so by the nonpaying party's bankruptcy filing
320 within the applicable time, the qualified beneficiary filed an action against the nonpaying party
321 to recover monies owed to the qualified beneficiary within the earlier of:

322 (A) 180 days from the date the qualified beneficiary filed a notice of claim under
323 Section 38-1-7; or

324 (B) 270 days from the completion of the original contract pursuant to Subsection
325 38-1-7(1);

326 (ii) the qualified beneficiary has obtained a judgment against the nonpaying party who
327 failed to pay the qualified beneficiary under an agreement to provide qualified services for
328 construction of that owner-occupied residence;

329 (iii) (A) the qualified beneficiary has:

330 (I) obtained from a court of competent jurisdiction the issuance of an order requiring
331 the judgment debtor, or if a corporation any officer of the corporation, to appear before the
332 court at a specified time and place to answer concerning the debtor's or corporation's property;

333 (II) received return of service of the order from a person qualified to serve documents
334 under the Utah Rules of Civil Procedure, Rule 4(b); and

335 (III) made reasonable efforts to obtain asset information from the supplemental

336 proceedings; and

337 (B) if assets subject to execution are discovered as a result of the order required under
338 Subsection (4)(d)(iii)(A) or for any other reason, to obtain the issuance of a writ of execution
339 from a court of competent jurisdiction; or

340 (iv) the qualified beneficiary timely filed a proof of claim where permitted in the
341 bankruptcy action, if the nonpaying party has filed bankruptcy;

342 (e) the qualified beneficiary is not entitled to reimbursement from any other person;
343 and

344 (f) the qualified beneficiary provided qualified services to a contractor, licensed or
345 exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act.

346 (5) The requirements of Subsections (4)(d)(ii) and (iii) need not be met if the qualified
347 beneficiary is prevented from compliance because the nonpaying party files bankruptcy.

348 (6) To recover from the fund a laborer shall:

349 (a) establish that the laborer has not been paid wages due for the work performed at the
350 site of a construction on an owner-occupied residence; and

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

352 (7) A fee determined by the division under Section 63J-1-504 shall be deducted from
353 any recovery from the fund received by a laborer.

354 (8) The requirements of Subsections (4)(a) and ~~[(4)]~~(b) may be satisfied if an owner or
355 agent of the owner establishes to the satisfaction of the director that the owner of the
356 owner-occupied residence or the owner's agent entered into a written contract with an original
357 contractor who:

358 (a) was a business entity that was not licensed under Title 58, Chapter 55, Utah
359 Construction Trades Licensing Act, but was solely or partly owned by an individual who was
360 licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act; or

361 (b) was a natural person who was not licensed under Title 58, Chapter 55, Utah
362 Construction Trades Licensing Act, but who was the sole or partial owner and qualifier of a
363 business entity that was licensed under Title 58, Chapter 55, Utah Construction Trades
364 Licensing Act.

365 (9) The director shall have equitable power to determine if the requirements of
366 Subsections (4)(a) and ~~[(4)]~~(b) have been met, but any decision by the director under this

367 chapter shall not alter or have any effect on any other decision by the division under Title 58,
368 Occupations and Professions.

S.B. 107 1st Sub. (Green) - Lien Amendments

Fiscal Note

2010 General Session
State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
