

Representative Kevin S. Garn 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 relating to mechanic's liens.

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; and

▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



- 26 **38-1-11**, as last amended by Laws of Utah 2008, Chapters 3 and 382
- 27 **38-1-40**, as enacted by Laws of Utah 2009, Chapter 239
- 28 **38-11-107**, as last amended by Laws of Utah 2006, Chapter 205
- 29 **38-11-110**, as last amended by Laws of Utah 2008, Chapter 382
- 30 **38-11-204**, as last amended by Laws of Utah 2009, Chapter 183



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

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

33 **38-1-11. Enforcement -- Time for -- Lis pendens -- Action for debt not affected --**

34 **Instructions and form affidavit and motion.**

35 (1) As used in this section:

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

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

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

39 (a) except as provided in Subsection (2)(b), within 180 days [from] after the day on
40 which the lien claimant filed a notice of claim under Section 38-1-7[:]; or

41 (b) if an owner files for protection under the bankruptcy laws of the United States
42 before the expiration of the 180-day period under Subsection (2)(a), within 90 days after the
43 automatic stay under the bankruptcy proceeding is lifted or expires.

44 (3) (a) Within the time period provided for filing in Subsection (2) the lien claimant
45 shall file for record with the county recorder of each county in which the lien is recorded a
46 notice of the pendency of the action, in the manner provided in actions affecting the title or
47 right to possession of real property, or the lien shall be void, except as to persons who have
48 been made parties to the action and persons having actual knowledge of the commencement of
49 the action.

50 (b) The burden of proof is upon the lien claimant and those claiming under the lien
51 claimant to show actual knowledge under Subsection (3)(a).

52 (4) (a) A lien filed under this chapter is automatically and immediately void if an action
53 to enforce the lien is not filed within the time required by this section.

54 (b) Notwithstanding Section 78B-2-111, a court has no subject matter jurisdiction to
55 adjudicate a lien that becomes void under Subsection (4)(a).
56

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

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

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

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

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

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

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

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

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

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

87 (f) The Division of Occupational and Professional Licensing shall notify all lien

88 claimants listed in an owner's application for a certificate of compliance under Subsection
89 (6)(d) of the issuance or denial of a certificate of compliance.

90 (7) The written notice requirement applies to liens filed on or after July 1, 2004.

91 Section 2. Section **38-1-40** is amended to read:

92 **38-1-40. Notice of intent to obtain final completion.**

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

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

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

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

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

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

113 (a) that includes:

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

117 (ii) the identification of each contractor or subcontractor with whom the person has a
118 contract or contracts for supplying project labor, materials, or services; and

119 (iii) a separate statement of all known amounts or categories of work in dispute; and
120 (b) no later than 20 days after the day on which the owner or contractor files a notice of
121 intent.

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

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

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

- 135 (i) by hand delivery with a responsible party's acknowledgment of receipt;
- 136 (ii) by certified mail with a return receipt; or
- 137 (iii) as provided under Rule 4, Utah Rules of Civil Procedure.

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

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

149 (ii) the parties disagree, in good faith, as to whether there are adequate funds, or access

150 to financing or other sufficient available funds, to pay for the completion of the demanding
151 person's approved work on the construction project.

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

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

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

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

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

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

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

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

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

179 (10) This section does not create a cause of action against a person with whom the
180 demanding party is not in privity of contract.

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

182 **38-11-107. Restrictions upon maintaining a lien against residence or owner's**
 183 **interest in the residence.**

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

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

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

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

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

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

201 (A) "Contract residence":

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

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

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

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

211 (ii) A subcontractor qualified to file a lien upon a contract residence under Chapter 1,

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

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

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

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

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

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

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

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

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

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

240 **38-11-110. Issuance of certificates of compliance.**

241 (1) (a) The director [~~shall have authority to~~] may issue [~~or deny~~] a certificate of
242 compliance only after determining through an informal proceeding, as set forth in Title 63G,

243 Chapter 4, Administrative Procedures Act[-];

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

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

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

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

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

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

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

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

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

262 **38-11-204. Claims against the fund -- Requirement to make a claim --**

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

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

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

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

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

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

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

273 (iii) the basis for the claim.

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

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

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

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

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

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

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

291 (A) for the performance of qualified services;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

334 (III) made reasonable efforts to obtain asset information from the supplemental
335 proceedings; and

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

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

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

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

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

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

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

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

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

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

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

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

364 (9) The director shall have equitable power to determine if the requirements of
365 Subsections (4)(a) and [(4)](b) have been met, but any decision by the director under this
366 chapter shall not alter or have any effect on any other decision by the division under Title 58,

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3rd Sub. (Ivory) S.B. 107

367 Occupations and Professions.

S.B. 107 3rd Sub. (Ivory) - 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.
