

## Claims Against the Utah Residential Lien Recovery Fund

The claims process required to receive payment from the Recovery Fund is cumbersome. There are numerous ways a claimant can inadvertently make an error that will prevent payment from the Recovery Fund. Accordingly, a brief overview of the claims process follows.

### 1. Notice of Lien

A lien claimant does not need to definitively determine an owner's eligibility for protection under the Recovery Fund prior to filing a notice of lien. Rather, at the time of filing the notice of lien, all the lien claimant must do is (1) determine whether the lien is on an owner-occupied residence; and if so, then (2) include a statement on the lien describing what steps an owner may take to require a lien claimant to remove the lien. Utah Code Ann. § 38-1-7(2)(a)(ix) (Lexis 2005). If the owner follows the steps outlined in the Notice of Lien and obtains a certificate of compliance, then the lien claimant is required to remove the lien within 15 days after receiving a copy of the certificate of compliance by certified mail (the 15 day period begins accruing from the date postmarked on the certificate of compliance sent to the lien claimant). Utah Code Ann. § 38-11-107(3) (Lexis 2005). Absent any kind of affirmative action on the part of the owner to obtain a certificate of compliance and have the lien removed, the lien will remain on the owner's property, and the lien claimant can proceed to foreclosure.

### 2. Filing Suit

The next step in the claims process is to file suit to foreclose the lien. The Act requires that the claimant file suit to recover monies owed for qualified services against the nonpaying party within 180 days from the date on which the qualified beneficiary filed a notice of lien under Utah Code section 38-1-7, or within 270 days from the completion of the original contract pursuant to Utah Code section 38-1-7(1),. Utah Code Ann. § 38-11-204(4)(d)(i) (Lexis 2005). Additionally, the claimant is required to obtain a judgment and order against the nonpaying party even if that person is not the one responsible for non-payment. *Id.* § 204(4)(d)(ii). Thus, a lien foreclosure suit should name the owner as well as the nonpaying party in the Complaint, and should include actions against the nonpaying party for breach of contract and any other appropriate causes of action. That way, if the owner is ultimately successful in obtaining a certificate of compliance and having the lien removed, the lawsuit can still proceed on the other causes of action against the nonpaying party. The Act contains an exception for cases where the nonpaying party's filing bankruptcy precludes filing suit within 180 days of last providing goods or services.

Upon filing of the lien foreclosure suit, the claimant must satisfy additional owner-notification requirements. Upon service of the complaint, the claimant must serve the owner with (1) instructions relating to the owner's rights under the Recovery Fund; and (2) a form with which the owner can specify the grounds upon which the owner is exercising available rights under the Recovery Fund. Utah Code Ann. §

38-1-11(6)(a)(Lexis 2007). Under DOPL rules, the form affidavit is essentially an application for a Certificate of Compliance, coupled with a sworn statement testifying to the truthfulness of the contents of the application. Utah Admin. Code § R-156-38a-109 (2006). The application that will satisfy the requirement that the owner be provided with a form affidavit can be found at DOPL's website: <http://www.dopl.utah.gov/programs/rlrf/forms/096.pdf>

Once the lien foreclosure suit is filed, an owner has the opportunity to stay the foreclosure action for a time to allow the owner to make application to the Recovery Fund for a "certificate of compliance." Utah Code Ann. § 38-1-11(6)(d) (Lexis 2007). If the Recovery Fund determines that the owner qualifies for the protection of the Fund, it issues a certificate of compliance which is filed with the court. Once the certificate of compliance is filed with the court, the lien is ordered to be release, and the case dismissed against the owner. The claimant's only recovery at that point is from the nonpaying person or entity with whom the claimant contracted, and if that does not work, the claimant can seek payment, from the Recovery Fund, assuming the claimant can otherwise qualify for payment from the Fund.

### 3. Collection Attempts

Within one year after a judgment is obtained against the person with which the claimant contracted, the claimant must make reasonable efforts to collect the judgment. Reasonable efforts include filing a Motion and Order in Supplemental Proceedings and executing on any assets which are discovered through that process or discovered through any means during the one year period. Utah Code Ann. § 38-11-204((4)(d)(iii) (Lexis 2005). The claimant must also prove that he is not entitled to reimbursement from any other person. Id. § 204(4)(e). Only after failing to collect a judgment against the nonpaying party, may the claimant make a claim on the Fund.

### 4. Claim Form

Within one year after a judgment is obtained against the person with whom the claimant contracted, or within one year after the debtor files bankruptcy, the claimant must file a completed claim form with the Recovery Fund. Id. §§ 204(1) and -(2). The claim form is very detailed, complicated and requires substantial supplemental documentation. As many as 75% or more of all claims submitted are rejected on technical grounds for failure to strictly comply with the application process. The Recovery Fund Board and staff review all Recovery Fund claims for compliance with the Act, the administrative rules and the requirements of the claim process, in order to determine eligibility for payment. For a claim application form, see <http://www.dopl.utah.gov/programs/rlrf/forms/097.pdf>

### 5. Bankruptcy of Debtor

If the person with whom the claimant contracted files bankruptcy before a judgment can be obtained, the claimant must file a claim form with the Recovery Fund within one year after the bankruptcy filing. Utah Code Ann. § § 204(2)(b) (Lexis 2005). Since

the claimant is prevented from obtaining a judgment which establishes the amount of the Recovery Fund claim, the Recovery Fund must hold an evidentiary hearing.

## 6. Evidentiary Hearings

After a claim form is timely filed by a claimant who is prevented from obtaining a judgment against the person with whom the claimant contracted, the Recovery Fund must hold an evidentiary hearing to determine whether the claimant is entitled to recovery, the amount of the claim, and whether the claimant is entitled to an award of attorneys' fees pursuant to the contract. Utah Code Ann. § 38-11-105 (Lexis 2005); Utah Admin. Code R-156-38a-105a (2005). The Recovery Fund Board will serve as the finder of fact and an administrative law judge will conduct the proceedings. Although these hearings may be somewhat less formal than a trial in a more traditional court, the administrative law judge may conduct a very formal hearing. In any event, the claimant must be prepared to present documentary and testimonial evidence which supports the claim for recovery.

## E. Payment

If the claim is approved, the Recovery Fund will pay the claim in the amount which has been approved by the director of DOPL. Utah Code Ann. § 38-11-203 (Lexis 2005). The process can take anywhere from a few months to several years to successfully pursue a claim through payment from the Recovery Fund. Although this may not be as fast as claimants would like, it may be the best option since the Act may prevent collection through filing or maintaining a traditional mechanic's lien.

The unfortunate reality is that the Utah Legislature has repeatedly expressed its frustration with the payment problems in the residential construction industry by punishing lien claimants under the Recovery Fund Act. For example, the Utah Legislature recently limited the amount of interest a claimant could collect from the Recovery Fund. Id. § 203(3)(c). In addition, the ability of a lien claimant to collect even a reasonable portion of the attorneys' fees required to pursue a Recovery Fund claim has been significantly compromised by the Utah Legislature in recent years. Id. § 203(3)(f). Thus, while the Recovery Fund has never been a good source of collection, it continues to devolve into a less and less viable source of recovery for those who need it most, small lien claimants whose businesses hang in the balance of the collection process.

This article is intended for general information purposes only. It does not constitute legal advice; competent legal counsel should be consulted if you have questions concerning your legal right and obligations. Randy B. Birch, is a shareholder with Bostwick & Price, P.C., a law firm in Salt Lake City, Utah. He has practiced law for over 24 years and has tried civil and criminal cases of all sizes to both the bench and juries.