

# VIRGINIA ACTS OF ASSEMBLY -- 2015 SESSION

## CHAPTER 409

*An Act to amend and reenact §§ 54.1-1118, 54.1-1120, 54.1-1123, 54.1-1124, 54.1-2112, and 54.1-2114 through 54.1-2117 of the Code of Virginia, relating to the Department of Professional and Occupational Regulation; Virginia Contractor and Real Estate Transaction Recovery Funds.*

[H 1965]

Approved March 23, 2015

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 54.1-1118, 54.1-1120, 54.1-1123, 54.1-1124, 54.1-2112, and 54.1-2114 through 54.1-2117 of the Code of Virginia are amended and reenacted as follows:**

**§ 54.1-1118. Definitions.**

As used in this article, unless the context requires a different meaning:

"Act" means the Virginia Contractor Transaction Recovery Act.

"Biennium" means a two-year period beginning on July 1 of an even-numbered year and continuing through June 30 of the next even-numbered year.

"Claimant" means any person with an unsatisfied judgment involving residential construction against a regulant, who has filed a verified claim under this Act.

"Fund" means the Virginia Contractor Transaction Recovery Fund.

"Improper or dishonest conduct" includes only the wrongful taking or conversion of money, property or other things of value which involves fraud, material misrepresentation or conduct constituting gross negligence, continued incompetence, or intentional violation of the Uniform Statewide Building Code (§ 36-97 et seq.). The term "improper or dishonest conduct" does not include mere breach of contract.

"Judgment" includes an order of a United States Bankruptcy Court (i) declaring a claim against a regulant who is in bankruptcy to be a "Debt Nondischargeable in Bankruptcy," ~~or~~ (ii) extinguishing a claim against a regulant who is in bankruptcy and for which claim no distribution was made from the regulant's bankruptcy estate but excluding any such claim disallowed by order of the bankruptcy court, *or (iii) extinguishing a claim against a regulant who is in bankruptcy and for which claim only partial distribution was made from the regulant's bankruptcy estate. An order of dismissal shall not be considered a judgment.*

"Regulant" means any individual, person, firm, corporation, association, partnership, joint venture or any other legal entity licensed by the Board for Contractors. "Regulant" shall not include contractors holding only the commercial building contractor classification or individuals licensed or certified in accordance with Article 3 (§ 54.1-1128 et seq.) or Article 4 (§ 54.1-1140 et seq.).

"Verified claim" means a completed application, on a form designed by the Board, the truthfulness of which has been attested to by the claimant before a notary public, along with all required supporting documentation, ~~which that~~ has been properly received by the Department in accordance with this chapter.

**§ 54.1-1120. Recovery from Fund generally.**

*A. The claimant shall be (i) an individual whose contract with the regulant involved contracting for the claimant's residence located in the Commonwealth or (ii) a property owners' association as defined in § 55-509 whose contract with the regulant involved contracting for improvements to the common areas owned by the association.*

*The claimant shall not himself be (a) an employee of such judgment debtor, (b) a vendor of such judgment debtor, (c) another licensee, (d) the spouse or child of such judgment debtor or the employee of such spouse or child, or (e) a financial or lending institution or any person whose business involves the construction or development of real property.*

*B. Whenever any person is awarded a judgment in a court of competent jurisdiction in the Commonwealth of Virginia against any individual or entity which involves improper or dishonest conduct occurring (i) during a period when such individual or entity was a regulant and (ii) in connection with a transaction involving contracting, the claimant may file a verified claim with the Director to obtain a directive ordering payment from the Fund of the amount unpaid upon the judgment, subject to the following conditions:*

*1. If any action is instituted against a regulant by any person, such person shall serve a copy of the complaint upon the Board by certified mail or the equivalent.*

*2. A copy of any pleading or document filed subsequent to the initial service of process in the action against a regulant shall be provided to the Board. The claimant shall submit such copies to the Board by certified mail, or the equivalent, upon his receipt of the pleading or document.*

*3. A verified claim shall be filed with the Director no later than 12 months after the date of entry of the final judgment from which no further right of appeal exists.*

4. The claimant shall be (i) an individual whose contract with the regulant involved contracting for the claimant's residence(s) located in the Commonwealth or (ii) a property owners' association as defined in § 55-509 whose contract with the regulant involved contracting for improvements to the common area owned by such association.

5. The claimant shall not himself be (i) an employee of such judgment debtor, (ii) a vendor of such judgment debtor, (iii) another licensee, (iv) the spouse or child of such judgment debtor nor the employee of such spouse or child, or (v) any financial or lending institution nor anyone whose business involves the construction or development of real property.

6. Prior to submitting the verified claim, the claimant shall:

a. Conduct or make a reasonable attempt to conduct debtor's interrogatories to determine whether the judgment debtor has any assets that may be sold or applied in whole or partial satisfaction of the judgment; and

b. Take all legally available actions for the sale or application of any assets disclosed in the debtor's interrogatories.

B. C. If the regulant has filed bankruptcy, the claimant shall file a claim with the proper bankruptcy court. If no distribution is made, or the distribution ordered by the bankruptcy court fails to wholly or partially satisfy the claim, the claimant may then file a claim with the Board. *The verified claim shall be received by the Board within 12 months of the date of bankruptcy discharge or dismissal. In the event the judgment is silent as to the conduct of the regulant, the Board shall determine* (i) whether the conduct of the regulant that gave rise to the claim was improper or dishonest and (ii) what amount, if any, such claimant is entitled to recover from the Fund.

**§ 54.1-1123. Limitations upon recovery from Fund; certain actions not a bar to recovery.**

A. The maximum claim of one claimant against the Fund based upon an unpaid judgment arising out of the improper or dishonest conduct of one regulant in connection with a single transaction involving contracting, is limited to \$20,000, regardless of the amount of the unpaid judgment of the claimant.

B. The aggregate of claims against the Fund based upon unpaid judgments arising out of the improper or dishonest conduct of any one regulant involving contracting, is limited by the Board to \$40,000 during any biennium. If a claim has been made against the Fund, and the Board has reason to believe there may be additional claims against the Fund from other transactions involving the same regulant, the Board may withhold any payment(s) from the Fund involving such regulant for a period of not more than one year from the date on which the claimant is awarded in a court of competent jurisdiction in the Commonwealth the final judgment on which his claim against the Fund is based. After this one-year period, if the aggregate of claims against the regulant exceeds \$40,000, during a biennium, \$40,000 shall be prorated by the Board among the claimants and paid from the Fund in proportion to the amounts of their judgments against the regulant remaining unpaid.

C. Excluded from the amount of any unpaid judgment upon which a claim against the Fund is based shall be any sums representing interest, or punitive or exemplary damages, or any amounts that do not constitute actual monetary loss to the claimants. Such claim against the Fund may include court costs and attorneys' attorney fees.

D. If, at any time, the amount of the Fund is insufficient to fully satisfy any claims or claim filed with the Board and authorized by this Act, the Board shall pay such claims, claim, or portion thereof to the claimants in the order that the claims were filed with the Board.

E. Failure of a claimant to comply with the provisions of subdivisions A B 1 and A 2 and subsection B C of § 54.1-1120 and the provisions of § 54.1-1124 shall not be a bar to recovery under this Act if the claimant is otherwise entitled to such recovery.

F. The Board shall have the authority to deny any claim which otherwise appears to meet the requirements of the Act if it finds by clear and convincing evidence that the claimant has presented false information or engaged in collusion to circumvent any of the requirements of the Act.

**§ 54.1-1124. Participation by Board or Director in proceeding.**

Upon service of process *the complaint* as provided in subdivision B 1 of subsection A of § 54.1-1120, the Board, the Director, or duly authorized representatives of the Board shall then have the right to request leave of court to intervene.

**§ 54.1-2112. Definitions.**

As used in this article, unless the context requires a different meaning:

"Act" means the Virginia Real Estate Transaction Recovery Act.

"Balance of the fund" means cash, securities that are legal investments for fiduciaries under the provisions of subdivisions A 1, 2, and 4 of § 2.2-4519, and repurchase agreements secured by obligations of the United States government or any agency thereof, and shall not mean accounts receivable, judgments, notes, accrued interest, or other obligations payable to the fund.

"Board" means the Real Estate Board.

"Claimant" means any person with an unsatisfied judgment against a regulant, who has filed a verified claim under this act.

"Director" means the Director of the Department of Professional and Occupational Regulation.

"Fund" means the Virginia Real Estate Transaction Recovery Fund.

"Improper or dishonest conduct" includes only the wrongful and fraudulent taking or conversion of money, property or other things of value or material misrepresentation or deceit.

"Judgment" includes an order of a United States Bankruptcy Court (i) declaring a claim against a regulant who is in bankruptcy to be a "Debt Nondischargeable in Bankruptcy," (ii) extinguishing a claim against a regulant who is in bankruptcy and for which claim no distribution was made from the regulant's bankruptcy estate but excluding any such claim disallowed by order of the bankruptcy court, or (iii) extinguishing a claim against a regulant who is in bankruptcy and for which claim only partial distribution was made from the regulant's bankruptcy estate. An order of dismissal shall not be considered a judgment.

"Regulant" means a person, partnership, association, corporation, agency, firm or any other entity licensed by the Real Estate Board as a real estate broker or real estate salesperson.

"Verified claim" means a completed application, on a form designed by the Board, the truthfulness of which has been attested to by the claimant before a notary public, along with all required supporting documentation, that has been properly received by the Department in accordance with this chapter.

**§ 54.1-2114. Recovery from fund generally.**

A. The claimant shall not himself be (i) a regulant, (ii) the personal representative of a regulant, (iii) the spouse or child of the regulant against whom the judgment was awarded or the personal representative of such spouse or child, or (iv) a lending or financial institution or any person whose business involves the construction or development of real property.

B. Whenever any person is awarded a final judgment in any court of competent jurisdiction in the Commonwealth of Virginia against any individual or entity for improper or dishonest conduct as defined in the act, and the improper or dishonest conduct occurred during a period when the individual or entity was a regulant and occurred in connection with a transaction involving the sale, lease, or management of real property by the regulant acting in the capacity of a real estate broker or real estate salesperson and not in the capacity of a principal, or on his own account, the person to whom such judgment was awarded may file a verified claim with the Director for a directive ordering payment from the fund of the amount unpaid upon the judgment, subject to the following conditions:

1. If any action is instituted against a regulant by any person, such person shall serve a copy of the process complaint upon the Board in the manner prescribed by law. Included in such service shall be an affidavit stating all acts constituting improper or dishonest conduct. The provisions of § 8.01-288 shall not be applicable to the service of process required by this subdivision by certified mail or the equivalent.

2. A copy of any pleading or document filed subsequent to the initial service of process in the action against a regulant shall be provided to the Board. The claimant shall submit such copies to the Board by certified mail, or the equivalent, upon his receipt of the pleading or document.

3. For judgments entered on or after July 1, 1996, the A verified claim shall be filed with the Director no later than twelve 12 months after the date of entry of the final judgment becomes final from which no further right of appeal exists.

4. The claimant shall not himself be (i) a regulant, (ii) the personal representative of a regulant, (iii) the spouse or child of the regulant against whom the judgment was awarded, nor the personal representative of such spouse or child, or (iv) any lending or financial institution nor anyone whose business involves the construction or development of real property.

5. The claimant shall have made an investigation to determine whether or not the judgment debtor is possessed of real or personal property or other assets which are available to be sold or otherwise applied in satisfaction of the judgment and shall file an affidavit that an investigation has been made. Satisfactory evidence of the results of subdivision 6 below shall be submitted with this affidavit.

6. The investigation shall include but shall not be limited to (i) the conducting of debtor interrogatories and (ii) the investigation of Prior to submitting a verified claim, the claimant shall:

a. Conduct or make a reasonable attempt to conduct debtor's interrogatories to determine whether the judgment debtor has any assets, including any listings held by the regulant and any commissions due thereby; and

b. Take all legally available actions for the sale or application of any assets disclosed in the debtor's interrogatories.

7. The investigation shall not have disclosed such real or personal property or other assets available to be so sold or applied, or the investigation shall have disclosed certain of such assets, which shall be described in detail, and the claimant shall have taken all legally available actions and proceedings for such sale or application, and the amount so realized shall have been insufficient to satisfy the judgment, which amount shall be stated together with the balance remaining due on the judgment after the sale or application.

8. 5. If the judgment debtor has filed bankruptcy, the claimant shall file a claim with the proper bankruptcy court a complaint under 11 U.S.C. § 523 (a) and obtain an order determining dischargeability of the debt. If no distribution is made, or the distribution ordered fails to satisfy the claim, the claimant may then file a claim with the Board. The verified claim shall be received by the Board within 12 months of the date of bankruptcy discharge or dismissal. In the event the judgment is silent as to the

*conduct of the regulant, the Board shall determine (i) whether the conduct of the regulant that gave rise to the claim was improper or dishonest as defined in § 54.1-2112 and (ii) what amount, if any, such claimant is entitled to recover from the Fund.*

~~B.~~ C. The Department shall promptly consider the application, affidavit, and investigation of the verified claim. If it appears that a prima facie case has been made for payment of the claim, the Department shall provide the regulant with a notice offering the opportunity to be heard at an informal fact-finding conference pursuant to § 2.2-4019 of the Administrative Process Act (§ 2.2-4000, et seq.). Such notice shall state that if the regulant does not request an informal fact-finding conference within 30 days, with three days added in instances where the notice is sent by mail, the Department shall present the claim to the Board with a recommendation to pay the verified claim.

*D. A claimant shall not be denied recovery from the Fund due to the fact that the order for judgment filed with the verified claim does not contain a specific finding of improper or dishonest conduct. Any language in the order that supports the conclusion that the court found that the conduct of the regulant meets the definition of improper or dishonest conduct in § 54.1-2112 shall be used by the Board to determine eligibility for recovery from the Fund. To the extent the judgment order is silent as to the court's findings on the conduct of the regulant, the Board may determine whether the conduct of the regulant meets the definition of improper or dishonest conduct by substantial evidence in the verified claim.*

~~E.~~ E. If the Board finds that there has been compliance with the statutory conditions to which reference is made in this section, the Board shall issue a directive ordering payment to the claimant from the fund the amount unpaid on the judgment, subject to the limitations set forth in § 54.1-2116. The claimant shall be notified in writing of the findings of the Board. The Board's findings shall be considered a "case decision" and judicial review of these findings shall be in accordance with § 2.2-4025 of the Administrative Process Act (§ 2.2-4000 et seq.). Notwithstanding any other provision of law, the Board shall have the right to appeal a decision of any court which is contrary to any distribution recommended or authorized by it.

#### **§ 54.1-2115. Investigations.**

Upon receipt of the notice of proceedings against the regulant, the ~~Board~~ Department may cause its own investigation to be conducted pursuant to § 54.1-306.

#### **§ 54.1-2116. Limitations upon recovery from fund; certain actions not a bar to recovery.**

A. The aggregate of claims by claimants against the fund based upon unpaid judgments arising out of the improper or dishonest conduct of one regulant in connection with a single transaction involving the sale, lease, or management of real property, is limited to \$50,000. If a claim has been made against the fund, and the Board has reason to believe that there may be additional claims against the fund arising out of the same transaction, the Board may withhold any payment(s) from the fund for a period of not more than one year. After such one-year period, if the aggregate of claims arising out of the same transaction exceeds \$50,000, such \$50,000 shall be prorated by the Board among the claimants and paid from the fund in proportion to the amounts of their judgments against the regulant remaining unpaid.

B. The maximum claim of one claimant against the fund based upon an unpaid judgment arising out of the improper or dishonest conduct of one regulant in connection with a single transaction involving the sale, lease, or management of real property, shall be limited to \$20,000, regardless of the number of claimants and regardless of the amount of the unpaid judgment of the claimant.

C. The aggregate of claims against the fund based upon unpaid judgments arising out of the improper or dishonest conduct of one regulant in connection with more than a single transaction involving the sale, lease, or management of real property is limited to \$100,000 during any biennial license period, the biennial periods expiring on June 30 of each even-numbered year. If a claim has been made against the fund, and the Board has reason to believe that there may be additional claims against the fund from other transactions involving the same regulant, the Board may withhold any payment(s) from the fund involving such regulant for a period of not more than one year. After the one-year period, if the aggregate of claims against the regulant exceeds \$100,000, such \$100,000 shall be prorated by the Board among the claimants and paid from the fund in proportion to the amounts of their judgments against the regulant remaining unpaid.

D. Excluded from the amount of any unpaid judgment upon which a claim against the fund is based shall be any sums included in the judgment which represent interest, or punitive or exemplary damages. The claim against the fund may include court costs and ~~attorneys'~~ attorney fees.

E. If, at any time, the amount of the fund is insufficient to satisfy any claims, claim, or portion thereof filed with the Board and authorized by the act, the Board shall, when the amount of the fund is sufficient to satisfy some or all of such claims, claim, or portion thereof, pay the claimants in the order that such claims were filed with the Board.

F. Failure of a claimant to comply with the provisions of subdivisions B 1 and 2 of ~~subsection A~~ of § 54.1-2114 and the provisions of § 54.1-2117 shall not be a bar to recovery under this act if the claimant is otherwise entitled to such recovery.

#### **§ 54.1-2117. Participation by Board in proceedings.**

Upon service of ~~process~~ the complaint as provided in subdivision A B 1 of § 54.1-2114, the Board,

the Director, or duly authorized representatives of the Board, shall then have the right to request leave of court to intervene.