

# Fund of Last Resort

## Real Estate Recovery Trust Account Explained

Kerri Lewis  
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**F**or the first time since 2003, the Texas Legislature has raised the statutory amount consumers can recover from the Real Estate Recovery Trust Account (Trust Account), recognizing inflation and increased costs of claims.

Senate Bill 1577 raised the amount that can be recovered arising out of a single transaction from \$50,000 to \$125,000 and increased the cumulative cap that can be collected from each license holder from \$100,000 to \$250,000. The bill also gave the Texas Real Estate Commission (TREC) rule-making authority to set and collect fees to cover maintenance of the Trust Account.

These updates, which take effect Jan. 1, 2024, provide a good opportunity to review the Trust Account’s history, purpose, and how it operates.

### Protecting Consumers, Maintaining Integrity

The Trust Account was established in the mid-1970s to replace surety bond requirements for real estate license holders. Its purpose is to reimburse consumers for out-of-pocket damages caused by real estate license holders when the

### Takeaway

The Real Estate Recovery Trust Account was established to reimburse consumers for the cost of damages caused by license holders when the license holders cannot pay for those damages. The statutory amount consumers can recover through the Trust Account has increased.

license holders cannot pay for those damages. It is considered a “fund of last resort.” This means it is only available to consumers who have been unable to recover their damages through other means, such as from the license holder himself, from another party responsible for the damage, or through insurance.

Over the years, the Texas Legislature has made several amendments to the Trust Account to enhance its effectiveness and ensure its sustainability. These amendments have included changes to eligibility criteria, claim processes, and fund management.

According to TREC’s May 2023 staff report on the Trust Account, TREC has paid out almost \$17 million from the Trust Account since its inception (see table), with the average size of a claim paid being \$20,417.

### Payment History

Fiscal Year	Number of Payments	Total Payments
Through 2013	712	\$13,639,550.68
2014	13	297,028.02
2015	15	490,540.91
2016	20	636,691.80
2017	14	319,142.23
2018	7	193,671.65
2019	22	458,766.76
2020	7	223,285.53
2021	11	374,581.34
2022	5	147,546.65
2023	4	165,164.53
<b>Total</b>	<b>830</b>	<b>\$16,945,970.10</b>

Source: Texas Real Estate Commission

The Trust Account has served as a vital resource for consumers who have suffered financial losses due to the actions of licensed real estate professionals. It provides a means for affected individuals to seek compensation and recover a portion of their losses. By ensuring the availability of financial restitution, the Trust Account plays a crucial role in protecting consumers and maintaining the integrity of the real estate profession in Texas.

### Funding

The Trust Account was initially created by the Texas Legislature with a balance of \$1 million. It has since been continuously funded through the collection of annual assessments from real estate agents, brokers, and easement/right-of-way agents at their biennial renewals. In addition, any administrative penalty collected by TREC through disciplinary action is deposited into the Trust Account.

TREC invests the Trust Account’s outstanding balance in conservation investments to generate investment income to help replenish and grow the account.

As of the May 2023 TREC staff report, the available balance of the Trust Account was just over \$3.4 million. Any amount over \$3.5 million at the end of a fiscal year is required to be turned over to the state’s general fund.

### Eligibility for a Claim

The Trust Account can be used to reimburse consumers for damages caused by licensed real estate brokers, sales

agents, easement/right-of-way agents, or a license holder’s employees.

To be eligible for reimbursement from the fund, a consumer must have obtained a civil judgment against a licensed real estate professional, the license holder must be unable or unwilling to pay the judgment, and the consumer must comply with other requirements detailed later in this article.

The lawsuit in the civil court must be filed within two years after the event giving rise to the consumer’s claim. In addition, the consumer must file a claim with TREC within two years of the date of the civil court judgment.

The fund has been used to compensate consumers for a variety of losses, including:

- fraudulent or deceptive practices,
- failure to disclose material facts,
- negligence, and
- breach of contract.

### Filing a Claim for Reimbursement

Filing an application for payment from the Trust Account is completely separate and independent of filing a complaint with TREC’s Enforcement division. Although a consumer may file both, they are two unrelated independent processes.

The process for filing a claim for reimbursement from the Trust Account can be long and complicated. If a consumer hires an attorney to assist in the process, reasonable attorney’s fees can be paid from the Trust Account, but only up to the Trust Account’s payment limit. Before TREC will review a claim, the consumer must obtain from or file in a civil court each of the following documents:

- **Final Judgment.** The judgment must be against a real estate license holder involving damages incurred while the license holder was engaged in real estate activities that require a license and the license holder’s action falls under the statutory grounds for suspension or revocation of a license. For example, damages caused by defects in a custom home built by a builder who also happened to have a real estate license would not qualify for reimbursement from the Trust Account because the damages were not caused by real estate brokerage activity. Note that if the consumer is going to get an Agreed Judgment (an order all parties agree to submit to the judge in the case), it must be submitted to TREC for review prior to being signed by the judge to be eligible for reimbursement from the Trust Account.

- **Abstract of Judgment.** An Abstract of Judgment must be obtained and filed with the county clerk in the real property records of the county in which the civil court judgment was obtained. Each Texas county may have different requirements for getting an Abstract of Judgment, so the consumer should check with the county clerk's office where the judgment was obtained and follow their instructions.
- **Writ of Execution Returned Nulla Bona.** After the Abstract of Judgment is filed in the county real property records, the consumer must ask the court where the final judgment was obtained to issue a Writ of Execution order. This order directs the constable or sheriff to try to locate the defendant, demand payment, and seize eligible assets. If the defendant cannot be located and there are no available assets, the sheriff will return the Writ of Execution order to the court with the words *nulla bona* (Latin for "no goods") stamped or written on the writ. That phrase or its equivalent must appear on the sheriff's return that is delivered to TREC with the application.
- **Filing an Application for Order Directing Payment from the Trust Account.** After obtaining the three previously listed items, the consumer is ready to file an Application for Order Directing Payment from the Real Estate Recovery Trust Account. This application is filed in the same court from which the consumer obtained the final judgment and with the same case number that is on the final judgment. The consumer then needs to submit a file-stamped copy of the application, along with copies of the Final Judgment, Abstract of Judgment, and Writ of Execution (returned *nulla bona*) to TREC. A hearing date in the civil court does not need to be set unless TREC indicates it is necessary. Most claims are settled by TREC without a civil court hearing.

## Review and Payment of Claim

On receipt and initial review of an application, TREC will send the consumer an acknowledgement letter describing any additional information that is needed to review the claim.

According to TREC's website, common additional information requested includes "a file-stamped copy of the original petition, an explanation of the facts and circumstances surrounding the case, and attorney billing statements."

If TREC determines the claim is eligible for payment from the Trust Account, staff will recommend payment and the amount of payment to the Commission at its next scheduled

meeting. The Commission discusses the specifics of each case in executive session so they can get advice from their general counsel regarding settlement of each claim. However, the recommendation of a payment and a vote to approve payment are always done in open session.

Once approved by the Commission, TREC staff will prepare an Order Directing Payment and an Assignment of Judgment that assigns payment of the judgment to TREC. These documents are sent to the Office of the Attorney General for approval. Once approved, the Attorney General will send the documents to the consumer with instructions on how to sign and file the documents with the court and return them to the Office of the Attorney General. The Attorney General will send the executed and filed documents back to TREC, who then processes the payment to the consumer within two to three weeks of receipt.

If the application is denied by the Commission, the consumer can appeal that decision to the Office of the Attorney General.

## No Free Ride for License Holders Following Payment of Claim

Some license holders incorrectly believe TREC will investigate and defend the license holder's actions once the consumer makes a claim against the Trust Account, even going as far as to not defend themselves in the civil suit that results in a default final judgment.

License holders need to understand that this is not like a complaint that is filed with TREC where TREC investigates and determines whether the license holder violated the statute or rules. The judgment of what the license holder did and whether the license holder is liable to the consumer for damages is determined in civil court. TREC cannot change the judgment. TREC's function when an application is received is to determine whether the claim meets the criteria set out in the statute as detailed in this article. Once an application claim is paid, TREC is obligated by law to pursue collection of the amount paid from the license holder.

Under §1101.612 of the Texas Occupations Code, TREC is subrogated to all rights of a judgment creditor under the final order and has priority for repayment on any subsequent recovery on a judgment. TREC works with the collection division of the Office of the Attorney General to try to recover assets and payments from license holders on whose behalf TREC made Trust Account payments.

In addition, §1101.655 of the Texas Occupations Code provides that TREC shall revoke a license after TREC makes a payment from the Trust Account on behalf of a license

holder if the license holder does not repay the full amount paid from the Trust Account to TREC before the 31<sup>st</sup> day after the date TREC provides notice of the payment to the license holder. Although TREC does have the authority to probate this revocation, it's rarely done and then only with an aggressive repayment plan in place.

The statute also provides that once revoked, a new license cannot be obtained until the amount, with accrued interest, is fully repaid. It is also important to note that a claim against a business entity license holder is also considered a claim against the business entity's designated broker.

Any funds repaid by or recovered from a license holder are deposited back into the Trust Account.

## **Note on Real Estate Inspection Recovery Fund**

Effective Jan. 1, 2024, House Bill 1363 eliminates the real estate inspection recovery fund.

This was done in recognition that the statute requires inspectors to carry liability insurance and the fact that the recovery fund has paid out only three claims in the last ten years. 🍀

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*Lewis (kerrilewis13@gmail.com) is a member of the State Bar of Texas and former general counsel for the Texas Real Estate Commission.*

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