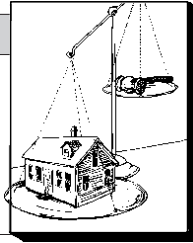


Waiving Your Rights Away

by David R. Glissman, Esq.



Although mechanic's lien statutes vary from state to state, one thing never changes. Everyone wants you to waive your rights to file a mechanic's lien prior to getting paid. Some general contractors and owners even go so far as to insist that you waive these rights prior to starting the job. Others ask you to do so just before they go to their lender for a draw on construction financing. Although some still pay you in exchange for the waiver of mechanic's liens, their numbers are dwindling while the use of prepayment waivers is increasing. This article is intended to offer some practical guidance in protecting your rights while recognizing the practical necessity for lien waivers.

Don't Sign It All Away

At the outset, it is necessary to distinguish between a lien waiver and a general release. It is not uncommon to see forms floating around entitled "Waiver" or "Contractor's Waiver" that contain language such as:

...in consideration of One Dollar (\$1.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged, the undersigned hereby remises, releases, and forever discharges...any and all claims and demands whatsoever in law or in equity...from the beginning of the world to the day of these presents.

Language like this or any variation of it releases the owner or general contractor from any and all claims you may have against them on any matter whatsoever—including the job you're doing for them down the street and your personal claim against them for the dent in your Mercedes. Watch for this language because it is not a lien waiver, but is in fact a very broad release of any and all claims. By giving a lien waver only, you merely extinguish your right to file a mechanic's lien against the property and you retain a number of other alternatives including various other forms of legal attachment on their property. Check the language in the release that you are signing to make sure that it is in fact a mechanic's or materialman's lien waiver and not a general release. The language should read something like the following:

... does hereby waive, release, and relinquish any and all right to assert a mechanic's or materialman's lien which _____ may now have upon certain premises.

Match the Waiver to Your Facts

The lien waiver's protective language should match the situation you are dealing with. We frequently see four types of requests for waivers. The first is for a broad waiver prior to commencement of the job. The second is a waiver at the time of each payment for work to date. The third is a waiver at the time of a substantial payment (i.e. 50 percent completion). The fourth and final is a waiver at the

end of the job upon full and final payment. While the best course of action continues to be the refusal to give a lien waiver until your services are complete and you are paid in full, there are situations in which interim waivers must be given.

Waiver at Commencement

Where a mechanic's lien will constitute an event of default in the owner's lease or where a conservative lender refuses to advance any funds whatsoever without one, you may be asked to give a full mechanic's lien waiver. In this case, there are three possible alternatives:

Conditional lien waiver. Although this type of waiver comes in many forms, the concept is always the same—to make the waiver ineffective until payment—for example:

Notwithstanding anything herein contained to the contrary, and because the undersigned has been asked to furnish this lien waiver prior to its receipt of full payment of all sums due and owing under the contract and any change orders by and between _____ and the undersigned for services or materials to be provided with respect to the improvements upon the premises [Note: this should be defined somewhere in the document], it is agreed that this lien waiver shall take effect and shall be enforceable only upon and after receipt by the undersigned of payment in full of all sums now and hereafter due and owing in accordance with the contract and any change orders with respect thereto [Note: if you can put in a definite sum, that is more precise and useful in litigation. They either paid it or they didn't]. This lien waiver is given by the undersigned and accepted by the company subject to the preceding condition.

Up-front Deposit. The second alternative is to give a full and unconditional lien waiver, but to insist upon a large up-front deposit and bill against the deposit. When the deposit is used up, get another one and so on. Don't perform any work unless you have a deposit to cover it. Insert a provision in your contract which calls for payments to be made to you from the deposit and new funds deposited by the owner or general contractor upon attainment of easily identifiable milestones (for example, \$5,000 to contractor upon removal of existing interior walls as set forth on Schedule 1 to the contract; \$15,000 to contractor upon erection of new interior walls as set forth on Schedule 2 to the contract). The contract should provide you with clear-cut job termination rights and remedies if they fail to make one of the required sequential payments at the time designated.

Trust or escrow. The third alternative (to be used only if the preceding two don't work) is to use a

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trust or escrow agreement with respect to the delivery of the mechanic's lien waiver. In this approach, you deliver a lien waiver in trust to the party or in escrow to a third party. Basically, in this approach the waiver is not truly in effect until payment is actually made. If the party uses it as if it were in effect, say with a lender who is not aware of the trust or escrow arrangement, you could possibly argue that the lender should have known, but chances are you would lose that argument. However, you would be able to argue that the owner has not only breached the contract, but has breached the trust or escrow agreement.

The Interim Waiver

The second and third situations can both be categorized as interim waivers. The owner or general contractor may request a lien waiver from you at the time of each payment or at the time of a substantial payment. The focus of your efforts in these situations should be upon limiting the effect of the waiver to work performed for which payment has been or is being received. The type of language that one would look for in this situation might be as follows:

...the undersigned does hereby waive, release, and relinquish all right to assert a mechanic's or materialman's lien which the undersigned may now have upon certain premises... for or on account of labor or material or both furnished by the undersigned to _____ as of this date and used or intended for use upon or at the premises; providing, however, that the undersigned reserves all rights to assert mechanic's or materialman's liens for services rendered or materials supplied or to be rendered or supplied, to the extent that payment has not yet been received therefor.

One common problem with the interim waiver results from delayed billing. Frequently the document will waive all rights to file a mechanic's lien for work performed up to and including the date of the lien waiver. In exchange for that lien waiver, you receive a check for the most recent bill. That bill, however, is 10 to 20 days old, and therefore a gap occurs. This can be easily rectified by billing up to the date of the waiver and by utilizing language that limits the lien waiver to work performed that has been paid for. The interim waiver language above serves that purpose.

Final Waiver

In the fourth and final situation, the owner or general contractor asks you to execute a full lien waiver upon final payment. The simple lien language set forth in the first section will suffice for this purpose as will the

use of an interim waiver form; although most will insist upon the full lien waiver at that point rather than the interim waiver. If there is any retainage or punch list work for which extra charges will be made, the interim waiver should be used.

Conclusion

In sum, the general release should be avoided at all costs, and the lien waiver, if it must be given, should be carefully limited so that it only affects work and materials that have been fully paid for. If you are paid by check, you may wish to insert language into the lien waiver indicating that you have been paid by check and that the lien waiver is effective only upon a bank's honoring of that check.

A lien waiver is nothing more than a contract and as such it should be made to accommodate the needs of the owner or general contractor while retaining your important right to lien a site for non-payment. But finally, a word of caution. Mechanic's lien statutes vary from state to state. It is possible that your state may place limitations on language used in lien waivers. Consult your association or legal counsel before you re-work your forms. ■

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