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φ VIRGINIA

## **MECHANIC'S LIEN & BOND WAIVERS**

Mechanic's lien & bond claim waivers can appear in contracts and in waiver forms for progress and final payments. These waivers may permanently eliminate lien or bond rights, even for future deliveries or even if a bankruptcy court forces you to repay a payment received. Contractors must be able to review and revise waivers to preserve security rights.

### 1. Have Your Own Waiver Forms Available.

There will be times that you have the opportunity to use your own lien waiver form. Your customer may simply say "send me a waiver." You want to be able to safely do that. The form attached protects the interest of the owner or your customer without stripping you of legitimate security rights for unpaid labor or materials.

### 2. Waivers for Partial Payment.

Contractors are usually requested to sign waivers of lien at the time of each progress payment. Waiver forms presented for signature at that time vary greatly in their wording and effect.

The owner and your customer are entitled to a receipt for payments made and an agreement that you will not lien the project for payments you have received. A waiver form should not do any more than this. Owners or their title insurance companies usually produce the mechanic's lien waiver forms presented to you. They have a strong interest in making sure liens never succeed against the property. You must understand and revise these waivers.

#### a. Complete Waiver.

A complete waiver of the right to ever lien a project often appears in a partial or progress payment waiver form. Partial waivers can completely waive mechanic's lien or bond rights for unpaid deliveries in the future, even if the initial progress payment is very small and even if valuable labor and materials are supplied later. Contractors often believe that lien rights are waived only to the extent of the payment received, if the waiver form recites a specific payment amount. This is not always true and a contractor should be careful to inspect the waiver form to determine the extent of rights waived. A complete waiver often appears something like this:

In consideration of the sum of \$\_\_\_\_\_ paid on account of labor and materials supplied through the \_\_ day of \_\_\_\_\_, 20\_\_\_, and the receipt of which is hereby acknowledged, and other benefits accruing to us, and in favor of each and every party owning the property improved or in order to procure the making of one or more loans on said real estate, as improved, we do hereby waive, quit-claim in favor of each and every party making a loan on said real estate, as improved, and his or its successors and assigns, all right that we, or any of us, may now or hereafter have to a lien upon the land and

improvements above described, by virtue of the laws of the state wherein said land is situate, or any amendments of said laws; and we do further warrant that we have not and will not assign our claims for payments, nor our right to perfect a lien against said property, and that we have the right to execute this waiver and release thereof.

In this example, the contractor should strike the underlined words and add the conditional language discussed below.

b. Waiver for Retention.

Even a thinking contractor may inadvertently waive the right to lien for retention. Most contractors will sign the following waiver if put in front of them:

In consideration of the sum of \$ \_\_\_\_\_ the receipt of which is hereby acknowledged, the undersigned does hereby waive, release and quit-claim the right to lien the described real estate for labor and materials supplied through the \_\_ day of \_\_\_\_\_, 20\_\_.

This form may look acceptable. This contractor is only waiving the right to lien for labor and materials supplied up until the day the waiver is signed. If retention is still held on the project, however, the contractor has probably just waived the right to lien for that retention at a later time, since the retention is “for labor and materials supplied through today.” In this case the contractor should add the words “except for retention” and use the cover-all conditional language discussed below.

c. Waiver for Unpaid Goods Delivered.

This is similar to the previous problem on retention. A contractor may make multiple shipments or work multiple days on a job site, but now receive only partial payment for some of those materials. The contractor must expressly exclude the release of lien rights for the unpaid items. If the deliveries occurred on different days, be careful with the effective date of the release. Instead of filling in the date on which the release was signed, fill in the date of the last paid delivery.

3. Make Lien Waiver Forms Conditional. If you cannot provide your own waiver forms, the safest practice is to review and strike out offensive wording in the waiver. I am always happy to review waiver forms with clients. If clients do this a few times, they quickly learn how to deal with most waiver forms. There are only a few recurring problems on these forms. Also add the following statement just above your signature:

**"This release will be effective only to the total amount of payments actually received without any bankruptcy filing for ninety days thereafter"**

I have developed a rubber stamp with this statement, which you can put on any lien or bond waiver. Based on my understanding of the law, this stamp should avoid inadvertent waivers. This stamp is available by sending \$5.00 with a request to this office. Please keep in mind, however, that this stamp is an innovation of mine and this wording has not been tested in the courts.

4. Bankruptcy Preference Risks.

If you received a payment in the ninety days before a customer bankruptcy, you can be confident you will be sued. These preference actions have become common to the point of being expected. Preference actions are not normally filed, however, until almost two years after the bankruptcy filing. By that time, your lien and bond rights have long expired. There is no way to get these lien and bond rights back. You may need to repay the preference money, even though you had security rights at the time you received payment. There are a few essential steps to solving this problem.

First, make all of your lien and bond waivers conditional. You waive your security rights against the owner or bonding company as long as your customer does not file bankruptcy within ninety days after funds clear. Remember that the ninety days starts from the day that the check clears the debtor's bank, not the day you receive the check. Without a conditional waiver, your lien rights may be permanently gone, even if you have to pay the money back. Add the conditional waiver language discussed above to all lien and bond waivers.

Second, whenever a customer files bankruptcy, you must look at all payments received in the prior one hundred days. Treat this money the same as your uncollected receivable. Determine whether you have lien or bond rights. You may need to file a lien or make a bond claim on money you have already received. This is discussed in greater detail in the Bankruptcy Primer at [www.FullertonLaw.com](http://www.FullertonLaw.com)

We have had good success seeking a resolution of preferences early in a bankruptcy, while the client still has lien or bond rights. Bankruptcy courts can shorten the time a bankruptcy trustee has to file a preference action and establish your lien or bond rights at the same time the court considers the preference claim against you. Get the bankruptcy debtor, the bonding company, the owner and the general contractor all in the same court at the same time. If you must repay the preference, the lien or bond rights still protect your receivable.

This strategy makes it more likely you can settle a preference case or get it dismissed. Preference actions are easier to resolve when the business people you know are still involved and you have easier access to witnesses and documents to establish preference defenses. The bankruptcy trustee usually brings preference actions long after all of the business people have left the bankruptcy company. You will have difficulty finding witnesses or documents you need from the owner or general contractor. The trustee has no incentive to settle and is not concerned with legal fees for a number of reasons. You will need to pay a settlement because of nuisance value.

In order to successfully establish a contemporaneous exchange defense to a future preference claim, it may be necessary for the creditor to prove that the creditor was aware of mechanic's lien and payment bond rights, that the creditor would have enforced those rights if the payment was not received and that both the creditor and the debtor intended that the payment be in exchange for those mechanic's lien and payment bond rights. Providing a waiver may actually benefit a creditor for this reason, as evidence of awareness of the rights and the intent to exchange. It is preferable to have the waiver recite that the creditor is aware of its mechanic's lien and payment bond rights, intended to promptly enforce those rights in the absence of payment and is expressly waiving those rights in exchange for payment. It would be even better to have the debtor making payment also sign the waiver to acknowledge these facts and also evidence the debtor's intent.

Turkessa B. Rollins is a partner in the law firm of Fullerton & Knowles, P.C.. Call her at (703) 818-2600 or visit the website at [www.FULLERTONLAW.com](http://www.FULLERTONLAW.com) to see a **Free** 550 page online internet **Construction Law Survival Manual**.

**WAIVER**

Date \_\_\_\_\_, 20\_\_\_\_

In consideration of the receipt of the amount of \$ \_\_\_\_\_, the undersigned company waiving mechanic's lien or bond rights (waiving company) does waive, release and quitclaim only to the total amount of payments actually received without any bankruptcy filing for ninety days thereafter all mechanic's liens or bond interests pursuant to the laws of any state for labor and materials furnished in and about the repair or construction of improvements to, or upon, the following described Project:

The undersigned companies are aware of the mechanic's lien and payment bond(s) for labor and materials provided to the described Project, acknowledge the receipt of both mechanic's lien and payment bond claims, agree that the waiving company intended to promptly enforce in the absence of this payment, is expressly waiving in exchange for this payment, and intend that the next payment or credit received on this Project by the company accepting this waiver (accepting company) will be received as a result of this waiver to the extent of this waiver. The waiving company warrants that it has not and will not assign its interests and that the person executing this waiver is authorized to do so. The accepting company agrees that all funds received shall be held in trust for the benefit of the waiving company to the extent those funds result from the labor or materials supplied and agrees it has no interest in and to promptly pay all such funds to the waiving company, although those funds may be commingled.

COMPANY WAIVING  
MECHANIC'S LIEN OR BOND RIGHTS  
IN EXCHANGE FOR PAYMENT:

COMPANY ACCEPTING WAIVER OF  
MECHANIC'S LIEN OR BOND RIGHTS  
IN EXCHANGE FOR PAYMENT:

\_\_\_\_\_  
By \_\_\_\_\_

\_\_\_\_\_  
By \_\_\_\_\_

(Title) \_\_\_\_\_

(Title) \_\_\_\_\_

STATE OF \_\_\_\_\_;  
COUNTY OF \_\_\_\_\_, to wit:

STATE OF \_\_\_\_\_;  
COUNTY OF \_\_\_\_\_, to wit:

Subscribed and sworn to before the undersigned,  
a Notary Public in and for the County and State  
aforesaid, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Subscribed and sworn to before the undersigned,  
a Notary Public in and for the County and State  
aforesaid, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

My commission expires: \_\_\_\_\_