

Construction Lien Waivers: Conditional vs. Unconditional Waivers, Retainage, Reservation of Rights

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Today's faculty features:

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Mark A. Cobb

Mark is the founder of the Cobb Law Group a firm dedicated to the practice of construction law. He regularly speaks and publishes on contracting, payment bonds, mechanic's liens, and other construction-related subjects. Most recently, he served on the Georgia legislative drafting committee for the 2021 changes to Georgia's lien waivers.



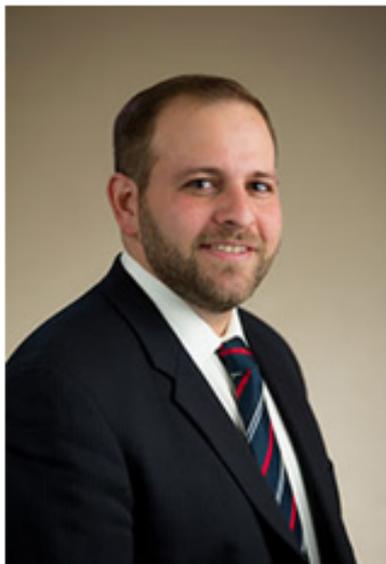
Ariel Weinstock, Esq.

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Ariel Weinstock is a partner at Katsky Korins LLP, where he is a member of the firm's Real Estate Department.

Ariel handles a broad array of real estate and construction matters, representing and advocating for the interests of owners, developers, contractors, architects, lenders, borrowers, landlords, tenants, purchasers, sellers, condominium boards, family offices, and not-for-profit entities.





Ms. Williams is Senior Counsel and a litigator in Peckar & Abramson's Dallas Office. She has been litigating for over twenty years and has practiced in the area of construction law for over thirteen years where she has successfully represented contractors, developers, owners and subcontractors in resolving their construction disputes.



Mechanic's Liens, generally

- Creature of Statute and/or Constitution
- Not recognized in English Common Law or in Courts of Equity
- Common denominator: a right to lien granted to parties who have improved real property
- Can obligate owner despite claimant's lack of privity with the owner

Waiver, generally

“Waiver” is an intentional relinquishment of a known right or conduct inconsistent with claiming the right.

What is a construction lien waiver?

- Written waiver of potential lien claimant's right to file a lien against a project (or make a claim on a payment bond) in exchange for payment
 - Could release all claims for payment, not just lien rights
- Typically required to be submitted with monthly payment applications as part of the payment processing requirements for a project
- Typically not the same document used to release a mechanic's lien filed of record; purpose is to prevent the filing of liens
 - Documents filed with the county clerk may have additional requirements not satisfied by lien waiver and release
- Can be conditional or unconditional, or a combination of both
 - The “Condition” = Payment
- Can be used for progress or final payments
- Certain restrictions may apply, depending on the jurisdiction
- May have to meet certain requirements to be enforceable, depending on the jurisdiction

Conditional Lien Waivers

In **TEXAS**, conditional lien waivers are **unenforceable** unless:

- Statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is in writing
- Substantially complies with statutory form (Tex. Prop. Code § 53.284)
 - If contract entered into before 1/1/2022, forms must be notarized
- Is signed by the claimant or claimant's authorized agent
- Claimant has actually received payment in good and sufficient funds
- If residential construction (single family, townhouse or duplex), statement is in construction contract made before labor or material are provided (not applicable to claimant furnishing material only)

Lien Waivers

In **New York**, a contractor cannot validly waive its right to file a lien:

- Prior to filing of the lien or receipt of payment
- Conditional and Unconditional lien waivers are valid
- “Pay-if-paid” clauses are only valid in agreements governed by laws of other jurisdictions
- “Pay-when-paid” clauses are valid when drafted as scheduling devices and not as a “pay-if-paid” clause
- Contractors must be given an opportunity to identify any pending claims otherwise a lien waiver may be considered a “mere receipt”
- Waivers need not be limited to receipt of payment/waiver of right to file:
 - Due payment downstream
 - Affirmative statements from payee
 - Indemnification against downstream liens/claims
 - Duty to obtain downstream waivers

Unconditional Lien Waivers

In **TEXAS**, unconditional lien waivers are **unenforceable** unless:

- Statement purporting to waive, release, or otherwise adversely affect a lien or payment bond claim is in writing
- Substantially complies with statutory form (Tex. Prop. Code § 53.284)
 - If contract entered into before 1/1/2022, forms must be notarized
 - If contract entered on or after 1/1/2022, not required to be notarized
- Is signed by the claimant or claimant's authorized agent
- Claimant has actually received payment in good and sufficient funds
 - May not require a claimant or potential claimant to execute unconditional waiver and release unless the claimant has been paid the amount stated in the waiver (form notice contains warning at the top to this effect)
- If residential construction (single family, townhouse or duplex), statement is in construction contract made before labor or material are provided (not applicable to claimant furnishing material only)

Unconditional Lien Waivers

In **NEW YORK**, unconditional lien waivers are **enforceable**; provided:

- If an unconditional lien waiver is required in connection with an application for payment/as a condition to payment, then the ‘waiver’ within is considered a “mere receipt”

Hybrid Lien Waivers

In **Georgia**, a statutory form is the only enforceable lien waiver:

- There are two statutory forms – one to be used for interim payments and one to be used for final payments
- Both forms are conditioned upon payment for 89 days from the date of the lien waiver
- On the 90th day, the lien waivers become unconditional unless the potential lien claimant files an Affidavit of Nonpayment to void the lien waiver
- Substantially complies with statutory form (O.C.G.A. § 44-14-366)
- Intended to be submitted along with invoice or pay app
- Must include language regarding the lien waiver's switch to an unconditional waiver on the 90th day from the date of the waiver
- Is signed by the claimant or claimant's authorized agent
- Does not need to be notarized
- Lien waivers also apply to payment bonds (public and private in Georgia)
- Historically, also waived contract rights to payments

Lien Waivers for Progress Payments

- With the exception of the initial payment application, conditional and unconditional lien waivers may be required to be submitted with each payment application
 - Conditional lien waiver relates to current progress payment request and is given in exchange for payment and does not become effective unless payment is received
 - Unconditional lien waiver relates to prior progress payment request that has been funded
- Should, at a minimum, identify the specific payment request to which it applies

Lien Waivers; Practice Tips

- Use Conditional vs. Unconditional correctly
- Not limited to payment; include indemnification and downstream obligations
- Require waivers once “pencil req’s” are finalized so that payments match final, approved pay application/waiver amounts
- Know the specific requirements for the waivers in the state where the project is located
- Review to make sure that waivers only waive lien rights (and that they don’t include a waiver of other rights), if possible

Lien Waivers for Final Payment

- Associated with last payment application submitted or final payment on project
 - Conditional lien waiver is submitted with final payment request and is given in exchange for payment and does not become effective unless payment is received
 - Unconditional lien waiver is provided after final payment has been received in good and sufficient funds

Retainage

- What is retainage?
 - The amount of the payment application that is not required to be paid
 - Withholding authorized by statute
 - Contractual retainage
- When is it billed?
 - Final payment application is generally the retainage billing

Retainage

- When do lien rights in retainage arise?
 - In **New York**, lien rights arise immediately upon the performance of any work and expire:
 - Commercial - 8 months after last work performed
 - Residential - 4 months after last work performed
 - Retainage (only) - 90 days after retainage *should* have been released
 - All - 1 year after filing of a lien, unless extended for an additional year
 - Note: Although right to file a lien expires, contract claims remain viable for duration of SOL

Reservation of Rights

- Retainage
 - Whether statutory or contractual, may need to specifically exclude from waiver if not already carved out
 - In Texas, statutory form excludes retainage from waiver and release so no additional language is necessary
- Change orders and other pending claims for compensation
 - Labor or material provided beyond scope of contract
 - Contract may disallow billing of unapproved change orders
 - In Texas, statutory forms for progress payments exclude “pending modifications and changes, or other items furnished” from waiver and release. Similar language is not contained in statutory forms for final payment.

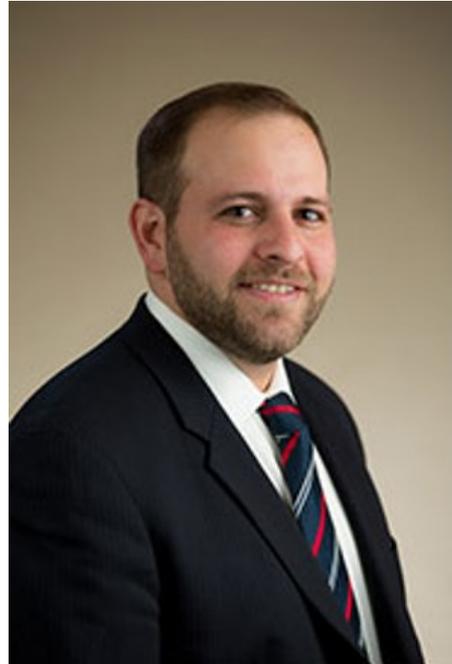
Conclusion

- Waivers are intended to protect parties upstream (including lenders)
- Waivers are also intended to protect parties downstream
- It is vital to follow the law regarding lien waivers in the state where the project is located—use the correct forms if applicable
- Conditional lien waivers are generally conditioned upon payment
- Unconditional lien waivers should not be used unless payment is in hand
- Read each waiver to make sure that there is not any additional waivers or release of rights

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