

PUBLICATION

Mechanic's Lien Waivers: Understand What You Are Waiving [Ober|Kaler]

September 2013

In Maryland and elsewhere, a mechanic's lien safeguards a contractor's entitlement to payment on a private project. It is a statutory device that, if properly pursued, provides a contractor a security interest in the real property improved by the contractor. While a project is under construction, an owner almost always requires that the general contractor and its subcontractors execute and deliver a partial waiver of lien as a condition of receiving a progress payment. The partial lien waiver may either be unconditional, which means the waiver is effective whether or not the contractor is paid, or conditional, which means that the waiver is effective only if the contractor is paid. The Maryland lien statute, however, does afford contractors protection by prohibiting waivers in executory contracts (i.e., before the work is performed) of the right to claim a mechanic's lien or to sue on a contractor's bond.

Generally, by executing a partial lien waiver, a contractor surrenders certain rights to a mechanic's lien. In addition to whether or not the partial waiver is conditional or unconditional there remains the key question as to precisely what lien rights has the contractor surrendered.

Lien waivers may waive liens either to the extent of payment ("waiver of payment") or to the extent of work performed ("waiver of performance"). The waiver of payment is preferable from the contractor's perspective because the waiver is limited to the amount of payment received and it does not extend to work performed for which the contractor has not yet been paid.

A lien waiver of performance will typically say that the contractor waives any right to a lien for all work it has performed through a certain date. By signing a lien waiver of performance the contractor gives up its right to pursue a mechanic's lien for additional payment for work performed before the date specified in the lien waiver even if the contractor has not been fully paid for that work. This may include, for example, waiving a lien for claims previously submitted to but not paid by the owner.

It can get worse. The performance lien waiver also may include a release of liability by the contractor of the owner for all work performed before the specified date. The consequence can be that the contractor who has a contract with the owner not only gives up its right to a mechanic's lien but also it releases the owner from an action for breach of contract or other causes of action.

In short, a contractor and its subcontractors should sign a partial lien waiver for a progress payment only if it (1) is conditioned upon receiving payment, (2) waives a lien only to the extent of the amount of payment received and not for work performed, and (3) does not include a release of liability of the owner. If a contractor remains unpaid at the end of a project for work it performed, it will be glad it followed these steps.