



## CONSTRUCTION LAW E-UPDATE

### THE USE AND ABUSE OF LIEN WAIVERS

By Henry L. Goldberg, Managing Partner, Goldberg & Connolly

OCTOBER 2012

When it comes to requisitioning for payment, a contractor's focus is typically only on obtaining timely payment. All too frequently, insufficient attention is paid to the language contained in the waiver of lien and release forms that are routinely required to be executed for partial and final project payments.

In fact, many subcontractors consider such waivers and releases to be merely an acknowledgment or receipt to be executed to facilitate payment. This may have been true in years past when the waivers required for partial payments were true "partial" waivers and releases of lien and only related to the amounts paid on the current requisition. More recently, however, owners, construction managers and/or general contractors have resorted to including "general" waiver and release language in their forms, while still labeling them "partial" waivers and releases of lien. The significance of this changed practice is that a signed general release can result in a complete waiver and release of any and all claims, including delay damage and extra work claims unless such claims are expressly reserved.

New York courts have recognized, as a general rule, that general release language that is clear and unambiguous will constitute a complete bar to actions on claims covered by the document. In a recent case upholding a release of claims, the court found the following language to unambiguously waive any and all project claims arising up to the date of the release execution:

The [contractor] further acknowledges that, except for any unpaid retainage, it has been paid in full for all work, labor, services, materials and equipment furnished for

the Project through [date] including any claims for extra or additional work or other damages or expenses alleged to have been incurred by [contractor].

The court noted that the waiver and release was more than just an acknowledgment of payment of the current requisition. Instead, the court held that the waiver and release acted as a release of any and all claims the contractor may have otherwise had up to the date of the release, even if not specifically related to the subject payment. In other words, absent fraud, misrepresentation, mutual mistake or duress on the part of the party receiving the general waiver and release, the language of the document released any claims not expressly reserved.

Contractors often argue that the parties understood that the waiver and release form to be merely a receipt for each payment received and not a release of all claims. However, in the face of an unambiguous "general" release, such as in the case above, the court will look solely to the waiver and release as evidencing an "objective manifestation of mutual assent" and will not examine other documents or evidence to interpret the waiver and release's terms.

Significantly, for a waiver and release to act as a release of all claims its language must be unqualified and clear in that regard. The parties must also act in accordance with the waiver and release, meaning that payment of the stated amount on the release should be timely paid to the contractor. In fact, subsequent payments for work theoretically released by prior payments may be considered inconsistent with and void the theory of a general release.



## CONSTRUCTION LAW E-UPDATE

### THE USE AND ABUSE OF LIEN WAIVERS

By Henry L. Goldberg, Managing Partner, Goldberg & Connolly

OCTOBER 2012

#### G&C COMMENTARY

Yes, you want to be paid. However, each waiver and release provided to a contractor for execution must signal the need to preserve all existing, or even potential, claims for delay, extra work, or other amounts due. Contractors must expressly reserve any such claims directly on the waiver and release form so that such claims will not be deemed released by the document. Today, waivers and releases of liens are being used and treated as a potential claim forfeiture device that was never their intended purpose. Historically, “partial lien waivers and releases” were only intended to release claims directly related to the subject payment. As noted above, however, owners’ recent inclusion of “general” release language in their “partial” waiver and release of lien forms could potentially result in the waiver of any and all claims up

to the date of the release and all contractors must be prepared to protect themselves accordingly.

There are certainly instances where a waiver and release may not be fatal to a contractor’s claims, such as when the language in a waiver and release may be ambiguous and open to a challenge. Additionally, the parties’ course of dealings, such as subsequent payments being made for work theoretically already released, may provide evidence of circumstances inconsistent with a theory of a complete release. However, rather than hoping that such contentions are favorably considered in litigation, the contractor would be better served by explicitly reserving its rights and exempting any and all existing and potential claims directly on each waiver and release form. Unfortunately, we have seen failure to do so result in significant financial consequences.