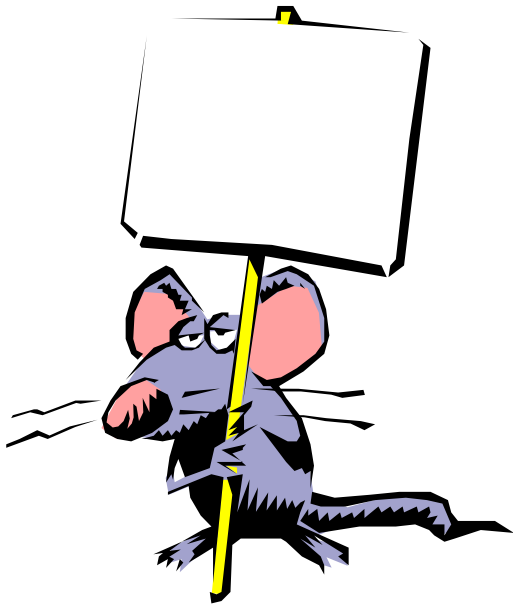


SAUER SCRIBBLES EMAIL

VOLUME ONE, ISSUE ONE

July, 2010

“Here we go again!”



I. SAUER THOUGHTS

**LIEN WAIVERS AND RELEASES: WHAT YOU SHOULD KNOW
BEFORE YOU SIGN ON THE DOTTED LINE . . .**

I have seen many good claims lost by one hand not knowing what the other is doing. In other words, someone in the office might sign lien waivers and partial releases as part of the requisitioning process without being aware of what claims the project manager and superintendent are watching (and, perhaps, nurturing).

Here's what the case law (decisions by various courts) says:

In absence of fraud, person who signs written agreement is bound by its terms regardless of whether person reads and understands those terms. Tiffany v. Sturbridge Camping Club, Inc., 32 Mass.App.Ct. 173, 587 N.E.2d 238 (Mass.App.,1992). In absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not, or whether he can read or not. Cohen v. Santoianni, 330 Mass. 187, 112 N.E.2d 267 (Mass.,1953) Where what is given by one to another purports on its face to set forth terms of a contract, one who receives it, whether he reads it or not, by accepting it assents to its terms and is bound by any limitation of liability therein contained, in absence of fraud. Kergald v. Armstrong Transfer Exp. Co., 330 Mass. 254, 113 N.E.2d 53 (Mass.,1953) Ignorance through negligence does not relieve a party from his contractual obligations, unless the negligence is not inexcusable. Century Plastic Corp. v. Tupper Corp., 333 Mass. 531, 131 N.E.2d 740 (Mass.,1956). Where what is given to a person purports on its face to set forth terms of a contract, a person assents to its terms by accepting it, whether he reads it or not, and is bound by any limitation of liability therein contained, in absence of fraud; but where what is received does not purport to be a contract the person receiving it is not bound by limitation of liability unless actually known to him. Polonsky v. Union Federal Sav. & Loan Ass'n, 334 Mass. 697, 60 A.L.R.2d 702, 138 N.E.2d 115 (Mass.,1956).

Therefore, you sign something in a language you don't understand: you're probably bound. You don't read what you sign: you're probably bound. And if someone (wanting you to sign it) explains to you what the document means - or what he or she wants you to *believe* it means - at variance with the correct legal interpretation of its meaning, this won't excuse your signing the document in the ordinary case.

Now, what are the issues?

1. What is a 'lien waiver'?

A lien waiver is simply a document giving up the right to file a mechanic's lien.

Now, in Massachusetts, that right exists only as to private land. This is because of the specific statutory provision contained in the Massachusetts General Laws:

CHAPTER 254, 6. Public property; exemption

“No lien shall attach to any land, building or structure thereon owned by the commonwealth, or by a county, city, town, water or fire district.”

As statutes go, this provision is short. However, it is clear and unassailable and not capable of more than the plain meaning these words hold. As a matter of statute and of public policy in Massachusetts, there are no mechanic's lien rights on public lands. (In some states, that may be different: New Hampshire, for example, was - perhaps still is - an exception.) Therefore, when someone attempts to get you to sign a lien waiver on a public job, this is an act that has no legal significance, at least in terms of the mechanic's lien law. For, you can not release a lien that you never could have filed in the first place!

Therefore, to the extent that documents/contracts pertaining to public jobs discuss/describe/require lien waivers, what is really being required - to one extent or another - is a *release*.

Now, a lien waiver - reduced to its bare minimum - is *only* a document in which the releasing party releases *mechanic's lien* rights. Therefore, if you have carefully qualified your lien waiver, you have still reserved whatever contractual and bond rights that may be available to you. Also, in a carefully-worded lien waiver, you have not foreclosed other rights that may be available to you to collect your debt such as, for example, trustee process (bank account attachment to fund your expected recovery, if the matter goes to suit) or reach and apply actions (attaching your contracting party's other contract receivables to fund your expected recovery, if the matter goes to suit).

Issues with regard to lien waivers

Initially, inasmuch as lien waivers frequently overlap with releases (and their issues) and where sometimes through inadvertence or intentionally the party giving you the lien waiver to sign *really* intends for you to execute a release, to fully understand lien waivers, you have to understand releases and issues pertaining to releases.

A. Make sure the lien waiver is specifically limited to time and lists its consideration

One of the biggest problems with lien waivers is that they are too broadly written. And why not? Since they are prepared by either the Owner or the general contractor, each party is interested in getting the maximum amount of protection that is possible, the biggest bang for parting with the fewest possible bucks. When you are executing a lien waiver, make sure that

it is limited to whatever requisition period you are currently involved with. To the extent that the lien waiver is given in advance of the payment - usual situation - make sure that there is language in the lien waiver to the effect that this lien waiver is given "in consideration of a future payment in the amount of X" and that said lien waiver will only take effect on the actual receipt of said payment.

II. What is a 'release'?

A release is, to one extent or another, a sale of your possible claims. In other words, think of a release as a bill of sale of whatever claim is contained therein. (In fact, when you sign a bonding company release, that form usually is titled "Release and Assignment" in that the claim you are releasing against the principal is sold to - or 'assigned' - to the bonding company.) A release is more global in nature than a lien waiver, when each document is tightly and narrowly drafted. A lien waiver, at bare minimum, only indicates that you give up your lien rights, partially or fully. A release indicates that you have given up the underlying cause of action, partially or fully. Therefore, a release is far more serious than a pure lien waiver, keeping in mind that savvy generals and owners often include release language in a lien waiver or simply title their releases as lien waivers. Please keep in mind that when a court construes the import or legal significance of a document, it is more concerned with its content than with its title. Therefore, you may be executing a release even though the document is titled 'lien waiver' and the document will be construed by the Court as a release and people often lose big in the process.

Issues with regard to releases

A. Is it a complete release? First of all, is it a complete release of any and all claims and not just limited to a specific job? If that is the case, then most forms for release indicate that the release is a release of all claims "from the beginning of the word to the date executed". While this may seem somewhat hyperbolic, the key to good legal drafting of this kind of document is to leave *no wiggle room*. Therefore, if you are looking for a 'final release' of any and all possible conceivable claims the party you are paying may have, make sure the release has this type of language in it.

B. Is the release authorized/ratified by the company giving it? Remember that as a matter of corporations' law, the authority of a corporation is vested in the board of directors only. The corporate seals that many of you may have in your 'corporation kit' is evidence of the authority of the board of directors in that the board of directors is presumed to only make the seal available to those acting on its behalf and with its authority. Therefore, and particularly on larger/more troublesome matters, make sure that the release is embossed with the corporate

seal of the corporation giving you the release whenever possible. Otherwise, if something 'new' comes up and the party signing the release attempts to wiggle out of it, you don't want to give the corporation the possibility of raising the argument that the execution of the release was not an authorized act of the corporation - a so-called '*ultra vires*' act. If the party giving you the release claims not to have a corporate seal or that it isn't available, insist on a "Corporate vote", which would be a document evidencing a meeting of the board of directors, signed by the secretary or clerk of the corporation, authorizing the signatory to sign such a document. Realistically, I don't see as many corporate votes or corporate seals used on releases in recent years, which I would attribute to convenience and carelessness rather than to any change in the law.

C. Don't release too many parties. Many times, releases include a whole kitchen sink worth of people: owners, architects, consultants, lawyers, etc. Check to see *who* you're releasing and be sure that you intend on releasing all those indicated. Remember, that a release executed as "a sealed instrument" may deprive any court considering the legal effect of the release from looking into the fact of whether or not there was adequate - or any - consideration flowing from the parties released. (A sealed instrument is a document bearing language such as 'executed as a sealed instrument (or contract)').

D. If the release is given with regard to a litigation - a lawsuit - make sure that there is language in the release to indicate that the release covers all claims (or counterclaims) that are contained within a certain case in whatever county bearing whatever docket number (court file number) is associated with the name of the case.

*E. If the release is **partial** only, make sure it is titled that way and that the claims not released are specifically identified and **excepted** from the release.*

Many times releases may not contemplate situations where retention has not been paid and may not be paid for a period of time *after* the giving of the release. In that case, the release should clearly indicate that "specifically exempted from this release is undersigned's claim for retention in the amount of X". Or, there may be a claim (for example, for an extra or equitable adjustment) pending or to be asserted later. To the extent that some claim is not resolved - or may even be asserted after the release is given - this claim or right to make a claim should be reserved and clearly identified. Otherwise, it may be lost. So, if you play it too coy and don't want to telegraph that you have a claim coming - especially around requisition time - *not doing so* might cause you to lose the opportunity to do so later. And, generally speaking, you do not want to sign releases and lien waivers that don't indicate the specific sum they are given in exchange for, which would typically be the current amount being requisitioned. *Don't* sign lien waivers and releases which don't reference what that sum is. In

the first instance, if you don't get paid the amount indicated, then your lien waiver or release is probably not enforceable due to a failure of consideration. On the other hand, if you simply sign a lien waiver or release that just references a specific date - no amount indicated - then you don't have the pendency of a payment to be made to turn this document into being something conditional.

This stuff is important! If someone gives you something to sign and you don't know what it means, get someone to explain it to you. This isn't something you can count on being able to undo once it's done. Too often, clients go to lawyers to try to salvage Mrs. O'Leary's empty barn, when the cows have clearly already gone on to better - possibly unreachable - pastures. Put another way, you don't have to cry over spilled milk, if it doesn't get spilled in the first place! More on this at our website www.sauerconstructionlaw.com in the Articles section: "Making Sense of Lien Waivers and Releases".

II. RECENT COURT CASES

A. A long term lease may be subject to the competitive bidding statute. A developer was to assume the risks of construction and maintain ownership of the land and buildings as to dormitory facilities for the University of Massachusetts, Lowell, which provided detailed specifications for the facility and retained significant control over the construction process. A superior court judge concluded that the competitive bidding statute – MGL C. 149, s. 44A-H – did not apply because the agreement was for a lease of the completed facility. The Supreme Judicial Court (SJC) held that a contract for a long term lease may in some circumstances be subject to the requirements of the competitive bidding statute. The Court found that a 'totality of the circumstances' test, which examines the circumstances in each case in detail is the best approach for determining whether build to lease agreements are subject to the competitive bidding statute. Factors involved with such a determination include: extent of control retained by the public agency during construction; the length of the proposed lease; whether the source of money is public funds; whether payments made under the agreement essentially cover the costs of construction; whether the state agency retains an option to purchase the building for a nominal sum at the end of the lease, along with other factors. In this case, with a dormitory subject to a thirty year lease, the SJC found that the bidding statute is applicable to the agreement between the developer and the owner. Brasi Development Corp. v. Attorney General, et al.

B. A mechanic's lien is limited to what the general contractor is due at the time the lien is filed. In an action against a lien bond, Defendant's motion for summary judgment was allowed in their favor. The Superior Court pointed out that by the time the notice of contract was filed by the subcontractor, the general contractor had abandoned the project and there were no remaining monies due the general contractor including retention, which was only payable upon substantial completion, which had not occurred, and which the court held was intended to limit the owner's damages, not to provide security to the subcontractors. In trying to decide if there were any amounts still due Pinncon or would become due Pinncon, the court referenced a decision by the SJC which said that the word

'due' was to be construed consistently with its standard dictionary definition and meant an amount owed or payable by the owner to the general contractor. Therefore "to become due" means "to become owed" or "to become payable." The name of the case is Soarmar, Inc. v. Pinnconn, LLC. (ED. Many subcontractors are unaware of the fact that the lien law specifically limits the amount of the subcontractor's lien to monies owed the general contractor at the time of the filing of the lien. By our experience, most liens are filed very near the end of the job, a time where if there are going to be disputes between the general and the owner, they will then occur or will have already occurred, meaning that the owner is now looking at whatever funds it is holding as possible security for its own claims for late completion or defective or incomplete construction. And, this is a time when usually most of the money has already been paid the general. Remember, a subcontractor has a statutory right to file a mechanic's lien as soon as it has a written contract and, by our experience, earlier liens (say, mid-job) tend to get paid more often and more quickly than liens filed at the very end of the job, particularly in situations where there are multiple liens.)

C. Problems being a plaintiff in Massachusetts, particularly in tort actions. It was recently reported in a law journal (Massachusetts Lawyers Weekly, June 14, 2010) that plaintiffs' verdicts are hard to find in tort cases in Massachusetts. A plaintiff is the party making the claim or suing, as compared with the defendant, which is the party being sued and resisting the claim. (ED. Most cases involving contractors are "contract" cases, where liability and damages are established by the terms of a contract. A 'tort' case involves civil wrongs such as negligence, libel, etc., which are not contract-dependent but deal more with certain elements of a claim which must be met.) A Regional Administrative Judge recently said with regard to Norfolk County that "A plaintiff's verdict is so rare here than when we have one, it's something people really take note of." The following represent the percentages of victories through verdicts in various counties. In other words, these represent plaintiff wins in cases tried to a jury: Suffolk – 25%; Middlesex – 27%; Essex – 36%; Norfolk – 14%; Bristol – 32%; Plymouth – 22%. The Cape & Islands has plaintiffs' victories in only 11% of the cases. Can it be with our current hard times that jurors, who may be more personally conservative with their own money, are 'holding back' in awarding damages to plaintiffs from other peoples' money? We haven't seen any statistics in contract cases but wonder if similar thinking occurs there to some extent. The last statistic I have seen on the issue was that only 1% of all superior court civil cases actually goes through a complete trial.

III. ON THE LIGHTER SIDE

A little girl went to her second grade class one day and the teacher said

"I'm a Yankees fan. Who else is a Yankees fan?" The whole class raised

their hands except for the little girl, so the teacher asked her, "What's your favorite team?" When the little girl said the Red Sox, the teacher asked her why and she answered, "My Mom and Dad are Red Sox fans, so I am a Red Sox fan." The teacher became annoyed and so she asked, "Well, if your dad was an idiot and your mom was an idiot, what would that make you?" The little girl replied "That would make me a Yankees fan."

A young family moved into a house next door to a vacant lot. One day, a construction crew came in and began building a house on the empty lot. The family's 5-year-old daughter became interested in all the activity going on next door and spent much of each day observing the workers. Eventually, the construction crew, all of them gems-in-the-rough, more or less adopted her as a project mascot. They chatted with her, let her sit with them while they took coffee and lunch breaks, and gave her little jobs to do here and there to make her feel important. At the end of the first week, the men presented her with a pay envelope which contained \$5.00. The little girl took this home to her mother, who said all the appropriate words of admiration, and suggested that they take the money she received to the bank to start a savings account. When they talked to the bank teller, she was equally impressed and asked the little girl how she had earned her very own pay check at such a young age. The child proudly replied, "I worked last week with the crew building the house next door to us." "My goodness gracious," said the teller, "and will you be working on the house again this week, too?" The little girl replied, "I will if those ass***** at Home Depot ever deliver the f***** sheet rock."

Jonathan P. Sauer

Attorney at Law

Sauer & Sauer

Suite 416

1410 Providence Highway

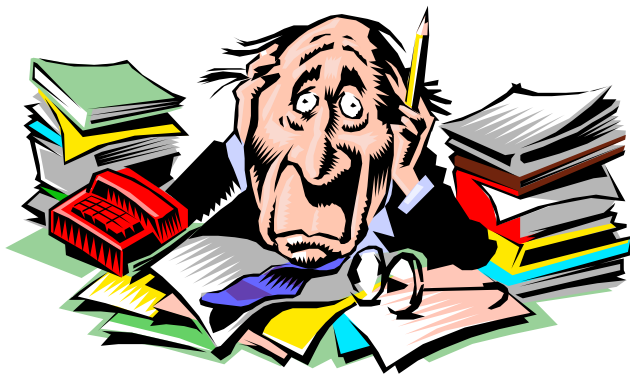
Norwood, MA 02062

Phone: 781-255-0222 / Fax: 781-255-9777

jonsauer@verizon.net

www.sauerconstructionlaw.com

These materials are not intended to be specific legal advice and should not be taken as such. Rather, they are intended for general educational purposes only. Questions of your rights and obligations under the law are best addressed to legal professionals of your choosing. Sauer & Sauer sees part of its mission as providing information and education to the material suppliers, subcontractors and general contractors it daily serves. Articles are available 24/7 on a number of construction subjects (e.g. rights under payment bonds, how to present payment bond claims, the mechanics' lien law, how to file a demand for direct payment) at our website: www.sauerconstructionlaw.com. To comply with a rule governing lawyers, these materials may be considered to be "Advertising".



“Well, at least we don’t have the aliens back . . .yet”