Scribbles Squibs #31 (January 30, 2015):*

SIX THINGS YOU SHOULD KNOW BEFORE YOU SIGN YOUR NEXT LIEN WAIVER

By Attorney Jonathan Sauer

I. INTRODUCTION.

Other than reviewing and negotiating and preparing contracts and proposal forms, one of the things that we are most often asked to look at are lien waivers. Contractors are uneasy about them, both because they know that by signing them they are giving up rights but, at the same time, by *not* signing them, they may not get paid.

Frank Sinatra began one of his signature songs (One For My Baby And One More For the Road) with these two lines:

> "It's quarter to three, there's no one in the place except you and me
> So, set 'em up, Joe, I got a little story you oughta' know."**

And here's *my* little story you oughta' know if you are a material supplier, subcontractor or general contractor: how to sign a lien waiver or a release, particularly partial lien waivers and releases. Or else. While the song above is about a lost love, not understanding this subject can leave you with a lot of lost money. And, then, you might have *plenty* of time to drink until three in the morning because you don't actually have to get up the next morning at any fixed time. Being unemployed is not what it is cracked up to be, especially at the first of the month when all of those bills enthusiastically come rolling in.

In this *Squib*, we want to address a thorny issue, one that many material suppliers, subcontractors and general contractors don't completely understand. That is, how does one protect one's interests when signing lien waivers and releases? *Can* you protect your interests when signing such documents? Along the way, we'll give some examples of other documents that may not make much sense signing in the form presented to you, including certain kinds of change orders and surety ratification agreements.

This subject matter is addressed at some length in Construction Article Number 19 "Making Sense of Lien Waivers and Releases" (The Article), found in our website, www.sauerconstructionlaw.com. This explains how lien waivers differ from releases and provides various forms in which the issues are demonstrated and then analyzed. It is necessary reading for those performing private work in Massachusetts. Failing to understand that subject matter could lead to just that: business failure. A word to the wise is sufficient!

But, now is the time for the *Squib* version: shorter and more to the point. While much of this may have application outside of Massachusetts, this *Squib* is written with the laws of

Massachusetts in mind. And, while a lien waiver is something different than a release, since more of the documents you will be asked to sign will be entitled lien waivers (whether they are really lien waivers or only releases masquerading as lien waivers) we'll use that word to also include general comments on releases, recognizing that there will be some substantive differences between the two.

In an upcoming *Squib* we'll discuss some ways and theories to get around some lien waivers that have been signed, recognizing, however, that these will usually be exceptions to the otherwise full enforcement of what you have signed and of what you have given up. That is why it is so critical when you are asked to take a step that you don't thoroughly understand to seek advice from an attorney who will (should) understand the issues better than you do.

We have had some success in getting monies for our clients in some situations where the collection effort looked quite difficult at the outset because of lien waivers that were signed. In one such case we were able to negotiate a settlement with a surety in the presence of several difficult, signed lien waivers in the amount of 1.5 million dollars. In another such case, we were able to reach and apply monies due an out-of-state general contractor and obtain a six figure recovery. I must reiterate, however, that these will be exceptions to the general rule, not substitutions for the general rule that such documents can and generally will be enforced.

In terms of what to look for and to protect in looking at a lien waiver, there are six things you have to look for, understand and, in many cases, fight for.

But, first . . . . .

II. LIEN WAIVERS AS COMPARED WITH RELEASES: THE BASIC DIFFERENCES.

A lien waiver is a document, strictly speaking, that simply gives up some portion of the 'remedy' of a mechanic's lien.

There are two basic ideas underlying what a 'remedy' is.

First, this is a specific kind of claim – a mechanic's lien - that might be made in litigation. Ultimately, to perfect a mechanic's lien in Massachusetts, a suit will have to be filed. So, a mechanic's lien action is a specific type of claim or action that can be made which, nonetheless, requires an underlying contract claim.

Secondly, the concept of a remedy sometimes is a type of claim that secures *other* claims (provides a potential funding mechanism) that might be made, such as contract claims. A claim against a payment bond is another such mechanism. 'Securing' a claim simply means that a plaintiff is able to find some potential source for the payment of the contract claim, such as making a payment bond claim or filing a mechanic's lien. Without such security, the ability to actually recover the amount of any money judgment obtained is doubtful, particularly in these (still) hard times.

When a lien waiver is actually limited to mechanics' lien rights, the right to make any variety of other claims against one's contracting party is protected and reserved, including, without limitation, making claims (and filing suits) for contract claims and making claims (and filing suits) for unfair and deceptive trade practices, where applicable. This can still leave open other remedies for securing one's contract claim through making payment bond claims, demands for direct payment and filing actions to 'reach and apply' (attaching one's contracting party's rights to be paid under another contract.) With a true lien waiver, the underlying contract claim is unaffected by the execution of the lien waiver. The party signing a true lien waiver is simply giving up some or all of its rights to pursue that claim only – to *secure* the underlying contract claim – by using a mechanic's lien.

A release is a much more serious document in that a release means, strictly speaking, that one is agreeing not only to give up a remedy (such as with a true lien waiver as to a potential mechanic's lien) but to also actually *sell* that claim, which means giving up one s rights to it. So, unlike the true lien waiver which only gives up one way to try to collect one's (contract) claim, the release gives up the claim so that some or all of it no longer even exists. With the execution of a full release, one no longer has any rights to seek further payment for that job. The execution of a release is as serious as a heart attack.

This is really serious stuff. Reading (and understanding) and re-reading (and further understanding) The Article is likely to both make you money and to save you money being the value of a contract claim that might be released. And, it's *really* important to understand what a lien waiver is and what a release is and how one differs from the other. A White Castle hamburger and a Kobe Beefsteak are both made from cattle but are ultimately almost completely dissimilar as are true lien waivers as compared with true releases.

This is made all the more difficult when a lien waiver is often a release dressed up in sheep's clothing. Meaning that a contract – which both lien waivers and releases are - is interpreted by its content, not by its title. Therefore, the uninitiated (or less initiated) may think that they are alright in executing a partial lien waiver with a title such as 'partial lien waiver' because, after all, they wouldn't call it a partial lien waiver if it was intended to cover the entire job. But, the 'partial lien waiver' could actually be a partial or even complete release, causing you to surrender some or all of your rights to get paid. For more on the details, I suggest you read The Article. At our law firm, one of our sayings is that 'knowledge is money in your pocket. It really is'. Unfortunately, sometimes a *lack* of knowledge may mean just the opposite.

And, keep in mind that in Massachusetts, one can't lien public lands or a public building. So, when *anyone* asks you to sign 'partial lien waivers' on a Massachusetts public project, you are really being asked to sign some form of a release.

III. THE SIX THINGS YOU MUST UNDERSTAND AND PROTECT.

These are the basic six exceptions to be considered with each partial lien waiver, which should be made in writing on or with regard to the lien waiver document:

1. The lien waiver should always state that it is given 'in consideration of the payment of _____'. With this language, this would cause this lien waiver to be specifically conditioned upon your actually receiving the amount indicated. Thus, the executed lien waiver would be in the nature of a conditional release because actually receiving the money stated in the release is a condition precedent to the lien waiver's taking effect. Otherwise, and without this information, the document might be an unconditional release, meaning that irrespective of your understanding that you would be receiving a check in exchange for the executed lien waiver, if you don't receive the check, the document is probably still effective. So, make sure that each lien waiver or release that you sign states the amount of money you are going to actually receive 'in consideration' for signing the lien waiver.

2. Retention should be explicitly reserved in each partial lien waiver, if the lien waiver doesn't specifically do so. This is not something that can simply be inferred. Most lien waivers are designed to cover a specific period of time, your giving up your right to make any further claim up to the effective date of the lien waiver, either for the specific remedy of a mechanic's lien (a true lien waiver) or as all claims you might have up to that effective date (a release). So, if one releases its claims through January 30, 2015 without anything further said about retention, you might be waiving your rights to receive retention which, by definition, are monies you have already earned by that point in time but which are not generally payable to very late in the job.

3. If there are previously-submitted requisitions, some of which have not yet been paid, whether in whole or in part, then you have to reserve your rights to payment as to them or they could be released. Again, with a lien waiver that is effective through a certain period of time – for our example, January 30, 2015 – these are monies that were both earned and due *before* this date. The fact that they have not yet been paid to you does not change the fact that if a lien waiver releases claims through a certain period of time, those words may be given effect. This issue is particularly important with jobs where there will be a series of requisitions, which would generally be the case on probably most of your larger jobs.

4. Work performed of an extra nature but not yet reduced to change order up to the effective date of the lien waiver needs to be protected, even when this work is supported by various signed slips, is supported by some form of written record and/or is the subject of a pending change order. Again, since most lien waivers are structured around covering work through a certain period of time, if the extra work was performed *before* the operative date of the lien waiver, it has to be specifically excepted *from* the lien waiver.

5. Any claims you have as of the effective date of the lien waiver - either the date stated as the effective date in the document or the date you sign it - must be explicitly (in writing) reserved. This would include claims that you have not even asserted yet but plan on asserting later, the activities underlying which are covered by the time period included within the effective date of the lien waiver. Examples of this could include claims for delay, hindrance, acceleration, loss of efficiency and wage escalation claims as to jobs that have run long. These are the types of claims that will be most resisted by your contracting party because they don't reflect, strictly speaking, labor and material and equipment incorporated

into the job. Contractors often try to keep from asserting such claims until as late as possible in the job so as to not put into jeopardy the receipt of periodic requisitions. But, if the lien waiver really is a release, by not advising your contracting party of the claim as of the time you have signed it could mean that you have lost it. Parenthetically, for first tier material suppliers and subcontractors, it is also important to submit claims to the general contractor in a timely manner to protect the general contractor's rights to make a pass-through claim to the owner, where appropriate. (Claims made by a material supplier or subcontractor against the general contractor which pertain to acts and omissions solely on the part of the general contractor may not be 'pass through' claims to the owner, as there is no owner responsibility for what occurred or didn't occur.) There is case law which says that the late submission of a claim could cause such a claim to fail even where otherwise appropriate in situations where such a claim wasn't asserted within the time period within which the general contractor itself had to assert a claim as contained within its contract. Good claims are lost in just this manner!

6. Never agree to language similar to the following: "This document is to take effect as a sealed instrument". With regard to contracts executed under seal, this limits a court's potential inquiry into the sufficiency of the 'consideration' (money, mostly) that was given for the execution of the document. Put another way, with an 'unsealed' contract, there is the *possibility* that a court might not fully enforce a lien waiver or even at all if the consideration for the obtaining of the lien waiver was not comparable to the rights that were being given up. One must keep in mind that this possibility would most definitely be *sparingly* applied because courts are not ordinarily in the business of rewriting contractual undertakings freely entered into. It is, however, a principle of contract law that when one assumes an additional burden beyond that which is contained in the initial contractual undertaking, there should be some compensation for it. This is especially true for situations where, for example, an employee 'agrees' to a covenant not to compete after the employment relationship was commenced. Since agreeing to a covenant not to compete gives up very real, substantive rights, courts generally like to see the employee receiving something for this as compensation. For various technical reasons, this ability to examine the consideration is drastically reduced with regard to 'sealed contracts' as compared with 'unsealed contracts'. I could explain this to you. But, then I might have to kill you!

IV. OTHER STRATEGIES AND SOME EXAMPLES OF WHEN NOT SIGNING ANY PARTICULAR CONTRACTUAL DOCUMENT MAKES MORE SENSE THAN SIGNING IT.

I know that you probably won't be able to assert all of these exceptions as to any particular lien waiver. For some of your customers, you may not be able to get *any* of these exceptions. This is particularly so where your contracting party clearly had a lawyer draw up this language.

There are some strategies in such situations.

For example, if you are a filed subbidder or a trade contractor on a public project, both of whom have specific forms of contracts provided for by statute, when such contracts do not require the submission of lien waivers to get paid, you might argue with your contracting party that his unilateral insistence of a non-contractual term (the execution of the lien waiver) in order to get paid is an unfair and deceptive trade practice which could result in a claim for double or triple damages plus actual attorneys' fees. Before making such a claim, be sure to first make certain that there is no provision in the general contract requiring the general contractor to submit lien waivers to the owner in order for the general contractor to get paid. Since your subcontract will generally incorporate the terms of the general contract by reference, you would ordinarily be subject to this requirement as well.

And, keep in mind that sometimes *not* signing a contract or contractual amendment makes more sense than signing one. For example, your execution of a change order for money usually gives up your right to make claim for additional time for the same subject matter, which is something that some subcontractors may not realize. By *not* signing such a change order may make more sense than actually signing one when one wishes to preserve its right to seek time in addition to money, something that may not be available in the offered change order.

Another similar example is when a surety asks a subcontractor to sign a 'ratification agreement' when the general contractor's surety is completing the work of the general contract for any number of reasons, including that the general contractor has been defaulted or has even gone out of business. Such agreements usually contain extensive release language, including claims for interest for late payments which are overdue and claims for delay and then, possibly, the necessary acceleration which follows. In addition, many of these agreements limit the ability of subcontractors to collect for extra work that has been performed prior to the effective date of the ratification agreement, which work is not the subject of an actual (existing) change order. Particularly with regard to Massachusetts public projects, there can sometimes be a greater advantage for a subcontractor in just completing the subcontract work without signing the ratification agreement. This is because a subcontractor's ability to recover against a general contractor's payment bond under MGL C. 149, s. 29 will almost always be greater and broader than a subcontractor's right to recover under any particular ratification agreement, particularly where that agreement would require the subcontractor to give up more claims than the subcontractor wishes to.

V. CONCLUSION.

Standing up for one's rights in our contractual dealings - as well as in life - can be difficult and often very stressful. But, there are any number of good things that can come about by doing so.

First of all, when dealing with a bully, standing up to the bully may earn you some level of respect, which might mean that future dealings with this party may be easier. Being an avid reader, I recall reading one particular hard-boiled detective novel where the writer had a character think that punching a bad guy in the nose can often be a good strategy, as maybe the bad guy had never experienced it before and who, after all, wants a bloody or broken nose? I hasten to add that this is not a strategy I advocate, except in only a metaphorical sense!

I had a situation many years ago representing a subcontractor who was working for an extremely difficult even brutal general contractor where the general contractor threatened the subcontractor and yours truly that if the lien we had filed were not taken off, he would sue us both for triple damages. I don't recollect what the specific claim was that the lien was defective. For whatever reason, it seemed to make sense to take the lien off. Many months later, I asked the subcontractor how he did in getting paid on this job. He said he got all of his money and he was the only subcontractor who did.

A possible lesson to be learned? 'Players' tend to recognize others who are players or who *might* be players. After all, someone smart enough and tough enough to file a mechanic's lien against a tough general contractor on a difficult project was likely to file another such lien if he didn't get fully paid.

Secondly, following the above steps in terms of executing lien waivers with sufficient exceptions will preserve your legal rights if you subsequently have to take any legal action.

And, ***thirdly***, by protecting those legal rights, this will enable your lawyer to better protect those rights, often recovering amounts due easier, earlier and at less cost to you.

What people not familiar with legal processes don't initially realize is that lawyers are usually limited in what they can do for a client by the law and by the facts of the case, including the documents which have been executed. They can't undo your performing without a written contract when that performance has been done or when the absence of a written contract prevents your filing an effective mechanics' lien, written contracts being a statutory requirement for the filing of mechanics' liens. Similarly, if you have given up significant rights through the improvident execution of lien waivers, this is something that usually can't be changed.

Having said that, there *are* some things that can assist you in certain limited situations in getting around lien waivers you signed but shouldn't have.

This is the subject of an upcoming *Squib.*

Stay tuned!

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."
** Personally, I am *way* too young to even know who Frank Sinatra was. Old Blue Eyes, from Joisey. His body of work was demonstrated to me by my great grandfather, who played some of his vinyl Frank Sinatra records for me on his Victrola. Records? Victrola? What the heck is a

Victrola? The Beatles? I read about *them* in an on-line encyclopedia. What's an encyclopedia, you might ask. Ask *your* great grandfather. In reality, I'm a true Millenial, although possibly from a different century, one that is once removed from the usual reference. I am told that this 'removed' business is something to do with remote nephews and cousins. Since one probably can't marry a *first* cousin but might be able to marry a *second* cousin, this is something that some should thoroughly understand, particularly, but not limited to, in areas of the country in which the theme from *Deliverance* is regularly played on the radio and in situations where your second cousin is particularly hot! *That* was explained to me by my *grand*father. I was comforted when I learned he didn't know what a Victrola was either. But, he *did* know what a book is, which he explained to both me and to my father and at some length. And, after having done so, we all went to a museum where we saw some examples. Barnes & Noble? Some say that if that currently isn't a museum it is likely to end up as such in that one commonly-accepted spelling for 'book' is 'Amazon.com'. Books were nonetheless quite confusing. What happened to the *screen?* Why isn't it *backlit*? What does this baby have for *RAM*? And, what is this thing that there is no *connectivity*? Are we talking Fred Flintstone here? Like, how do *you* spell the word 'primitive'? Spelling is quite important in our household, my wife being a former practically world class champion speller. After looking at examples of books, we all went out and had ice cream cones. Mine was tutti frutty. Non-Italians might not understand the reference. Italians? You gotta' love 'em. For some reason, they call spaghetti sauce 'gravy'. Only good gravy is brown, which is a *terrible* color for spaghetti sauce, especially when it has lived in the back of the refrigerator for an inordinate amount of time. Makes as much sense as the French calling the Maginot Line adequate defenses against the Germans, the Germans having overrun these before their morning Schnapps break. Go figure.

Until next time, *Ciao*, baby!

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