

## Understanding lien waivers

*A lot of confusion surrounds the lien waiver document in the construction industry — confusion that often leads companies to disregarding them and their potential effects.* by **Scott Wolfe Jr.**

**Lien waivers are exchanged** thousands of times daily and can carry significant legal consequences. Despite this, they are infrequently reviewed by legal counsel and exchanged with the nonchalance of a grocery store receipt. Interestingly, the lien waiver document is supposed to be just that: a paper receipt exchanged between the parties to evidence an exchange in funds. The process, however, has been corrupted by parties who leverage their position as the payor to gain an unfair advantage over those who need to get paid—and get paid fast. This modified and degraded process leaves electrical contractors and distributors in a precarious position with clearly defined pain points.

The first problem is that the time a lien waiver is requested usually coincides with a payment being due. The contractor or distributor, in other words, has furnished the project, billed, and waited for payment and is now ready to reach out its hands and get the cash. Signing the inconspicuous lien waiver document seems like a small price to pay to facilitate actually receiving the money, right?

The paying party is aware of that

position, however, and many use the opportunity to button up their own liability and exposure on the project as a whole. A lot of lien waiver clauses swing for the fences, asking the signing party to waive lien rights out of proportion to the payment and also to waive their rights to any claims or disputes of any kind.

Companies are well advised to give lien waiver documents close scrutiny and to negotiate compromising terms,

which leads us to the second problem: There is no time to negotiate the compromising terms mentioned earlier, and even if there was, it's extraordinarily impractical to give the lien waiver documents the close scrutiny they require.

It's difficult to require or expect company accountants, credit managers, controllers, and other administrators to put on their lawyer hat and review these intricate documents and legal terms. It's also impractical to hire an attorney to do it. Even the larger companies with in-house legal departments find it hard to justify a legal review of all lien waivers.

Match the causes and effects in the chart below, and then we'll look at how you did and dig into just how complicated the lien waiver landscape can be, underscoring the challenges facing electrical contractors and distributors.

Clauses	Effects
<p><b>Clause A:</b> <i>California's Final Lien Waiver Form:</i> This document waives and releases lien, stop payment notice, and payment bond rights that claimant has for labor and service provided.... The document is effective only on the claimant's receipt of payment from the financial institution.</p>	<p><b>Effect A:</b> The lien waiver is potentially invalid to waive all rights, claims, or causes of action because depending on the particular facts of the case, the lien waiver document may be just a "receipt of payment acknowledgement" insufficient to result in a waiver of claims.</p>
<p><b>Clause B:</b> <i>Douglas Company Partial Waiver and Lien Release:</i> In consideration of the payments made...the undersigned...hereby waive, release, and relinquish any and all rights, claims, demands, liens, claims for relief, causes of action, and the like...arising out of the...work...through the effective date of this waiver and release.</p>	<p><b>Effect B:</b> The lien waiver will eliminate and cancel all claims whatsoever that existed as of the date the document is signed.</p>
<p><b>Clause C:</b> <i>Hunt Construction Group Waiver Processed Through Textura:</i> The undersigned waives, releases, and relinquishes any and all claims, rights, or causes of action whatsoever arising out of or in the course of work...[and] no other monies are claimed to be due...except as listed on the reverse side hereof.</p>	<p><b>Effect C:</b> The lien waiver will release lien rights when payment is actually received by the potential claimant.</p>

Match the different contingent payment clauses to their possible effect in the chart above. See answers on page 50.

## HOW DID YOU DO?

Answers to chart on page 48: Clause A has Effect C. Clause B has Effect B. Clause C has Effect A. Additionally, both Clauses B and C could be declared null and void on their faces if used in one of the 12 states with statutorily mandated lien waiver forms.

Note: For this column, I searched online and found hundreds of different versions of lien waivers, both independently created and statutorily mandated (12 states have statutory waiver forms); from these, three representative waivers were selected for examination:

(1) The *California Conditional Waiver and Release upon Final Payment* form is established and mandated by California state law. It is available for free download at [zlien.com/forms/California-Lien-Waiver-Final-Conditional.pdf](http://zlien.com/forms/California-Lien-Waiver-Final-Conditional.pdf).

(2) The *Douglas Company Partial Waiver and Lien Release* is the document the Douglas Company may require its

subcontractors and suppliers to sign to receive payment: [douglascompany.com/TheDouglasCompany/media/Douglas-Company/Documents/2-Partial-Lower-Tier-Your-Vendors-Waiver.pdf](http://douglascompany.com/TheDouglasCompany/media/Douglas-Company/Documents/2-Partial-Lower-Tier-Your-Vendors-Waiver.pdf).

(3) Language in the *Hunt Construction Group Waiver Processed through Textura* waiver form required its subcontractors to submit through the Textura Construction Payment Management system, according to the recent Supreme Court of New York case, *The Laquila Group, Inc. v. Hunt Construction* (2014). It is available at [constructlawph.files.wordpress.com/2014/08/2014\\_n\\_y\\_misc\\_lexis\\_2824.pdf](http://constructlawph.files.wordpress.com/2014/08/2014_n_y_misc_lexis_2824.pdf).

### • Clause A: "Twelve states make things easy."

Clause A is the simplest of the three because its language is taken straight from the California lien statutes.

Those doing business in California may have recognized the language immediately because California is one of

12 states that have mandatory lien waiver language within their laws. In other words, every lien waiver in these states must look exactly as required by the statute. Contractors and owners who try to slip in additional waivers or use the waiver for other legal positioning are just wasting their time because such attempts are typically invalidated as a matter of rule.

This makes life a lot easier for contractors and suppliers. But more importantly, it makes life more fair.

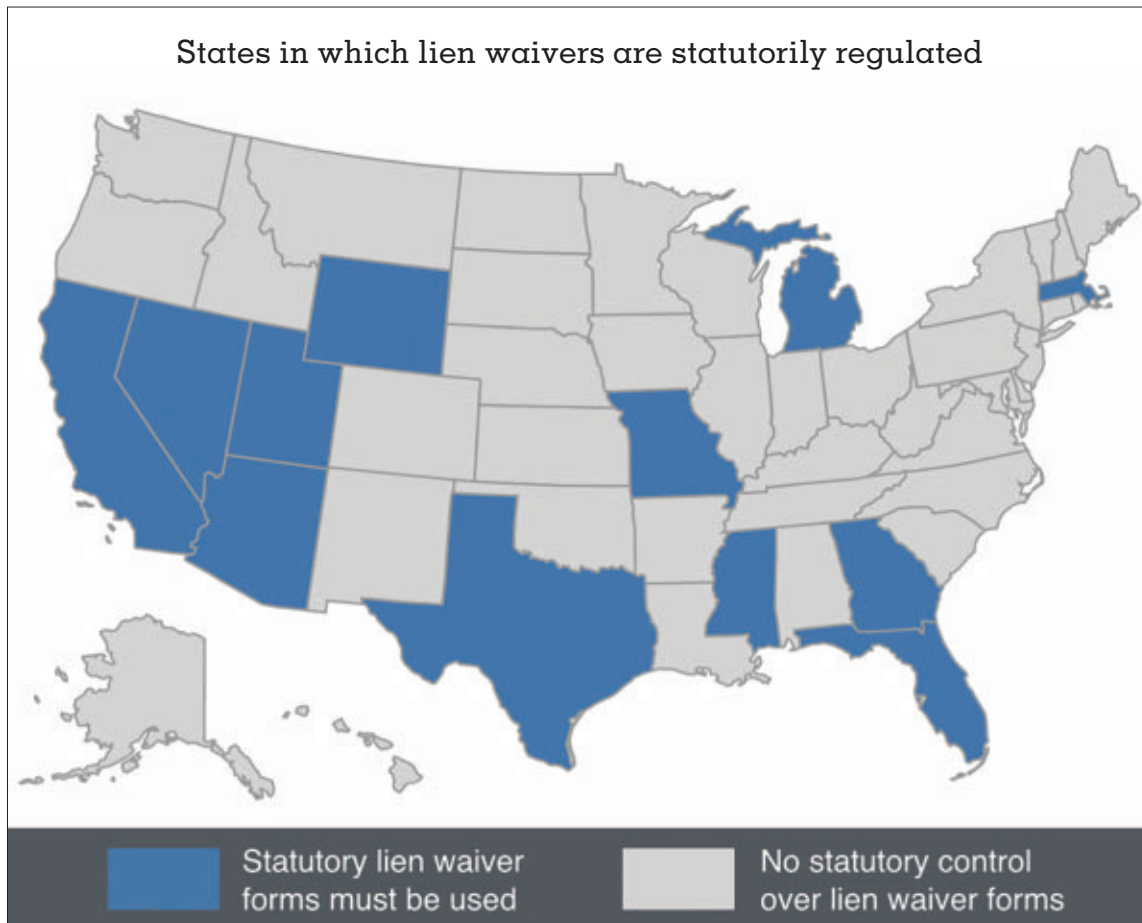
The 12 states in which lien waivers are statutorily regulated (shown in the chart below) have all taken measures to restrict owners, lenders, and general contractors from using the lien waiver moment to take advantage of subcontractors and suppliers.

### • Clause B: "The back breaker."

Clause B comes from the Douglas Company form *Partial Waiver and Lien Release*. Is that company, however, tak-

ing advantage of its leverage and position by asking subcontractors and suppliers to not only waive their lien rights in exchange for a payment, but also "waive, release, and relinquish any and all rights, claims, demands, liens, claims for relief, causes of action, and the like, whether arising at law, under a contract, in tort, in equity, or otherwise...?"

The lien waiver process was not designed to be an all-encompassing waiver of any



and all contract, tort, and equity rights. Nevertheless, despite the fact that a company's field reps may not be in direct communication with the accounting and legal departments, the person who ultimately puts ink on this lien waiver is going to compromise the company's rights all across the project under every circumstance.

This type of lien waiver can be referred to as the "back breaker." It figuratively breaks the back of the contractor or supplier. Payment is held up if the agreement is not signed, and by signing the agreement, the subcontractor or supplier must just hope that everything has gone perfectly with the project and will continue to go perfectly—because the company may have no means to recover if it doesn't.

If this waiver showed up in one of the 12 regulated waiver states, it would be tossed out as invalid and against public policy. But what would happen in the other 38 states if this waiver was challenged? It's hard to say, but Clause C may paint the picture for one possible scenario.

• **Clause C: The "pigs get fatter and hogs go to slaughter" waiver.**

This Clause C waiver has been given this description because the waiver was ultimately sidestepped by a court in New York. And even though New York is an unregulated waiver state—meaning that waiver language can say anything agreed to by the parties—the New York court had this to say about the waiver's overreaching language in *The Laquila Group Inc. v. Hunt Construction*: "A general release will not be read as applying to claims the parties did not intent to waive, and the scope of a release will thus be interpreted with consideration of its purpose and context."

The Clause C waiver in this *Laquila Group* case was actually requested and processed through the Textura Construction Payment Management system, which may have created part of the problem for Hunt.

The Textura system makes the lien waiver process "electronic," but there seems to be some question as to whether that means the system is merely enabling companies to sign a document electronically instead of with ink or if the electronization (so to speak) of the process is making the lien waiver exchange even more informal and automatic than it was before.

That brings the court to wonder whether it is valid, fair, unjust, and/or against public policy to allow general contractors and owners to use the payment exchange moment to gain leverage over the signer for any and all unrelated claims. Regarding this issue, the *Laquila Group* court said that "the circumstances surrounding the execution of these documents reveal an issue of fact regarding whether the documents constituted mere receipts for payment actually received."

Another problem with this waiver was that the Textura system did not allow the signer to add disputed contract items to the "back of the page" as called for in the form, since the electronic transmittal did not have a "back of the page."

**THE UNFORTUNATE REALITY**

Lien waivers are exchanged thousands of times each day across the country and—usually—everything goes fine, and that reality can moderate a company's caution and apprehension about these documents. Accompanying the practical reality that the lien waiver process generally works is the practical pressures on contractors and distributors to make the process as smooth as possible to ensure their industry relationships are strong and their cash flow consistent.

Nevertheless, the risk presented by these documents cannot be understated. While things are usually okay, such is the case with any risk issue. Risk is definitely about problems that arise from situations when problems usually don't arise.

There are more questions than answers for subcontractors and suppliers that face these lien waiver challenges. However, these parties should be demanding more fair treatment and legislative movement on the issue. Abuse of the lien waiver process is wrong, and it's the contractors and suppliers that are put in harm's way. ■

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