Lien Waivers & Releases

A "How to" Legal Primer . . .

Mechanics Lien Manual # 102

Lien Waivers and Lien Releases—Get Paid and Protect Your Future Mechanic's Lien Rights

Whether giving or receiving them, there is no way around dealing with lien waivers, lien releases, and joint checks as to payment on a construction project. In this brief manual, we will cover the legal basics and examine the practical day-to-day issues that come up so you are fully informed of how to use and benefit by them. In the last analysis, the goal is to insure you not only get paid on a timely basis, but do not inadvertently waive future mechanic's lien rights. This manual will discuss:

- Kinds of waivers and releases
- Practical tips and pointers
- State requirements
- Penalties for non-compliance
- Signing a form and not getting paid
- Optimal contract clauses
- What am I waiving?
- Forms you should never sign
- Disputed change orders
- Settlement agreements
- Joint checks
- No lien contracts

Introduction. Unfortunately, there is no such thing as a national lien waiver form or release of lien form valid in every state. Although there have been attempts to enact a model code, states have not done so to date. As a result, each state has its own body of law. For this reason, pay particular attention to your state's law when signing such forms. NationalLienLaw has separate forms for each state which comply with local statutes.

The problem. Whether you are preparing the form or being asked to sign it, lien waivers and releases have for years been plagued with a number of problems, including:

- The battle of the forms. Which form do I sign?
- Inconsistency. There are so many different forms out there, and many have contradictory provisions.
- What happens when I am required to sign the lien waiver before payment?
- What if I sign a lien waiver and the tendered check bounces?
- What if I am asked to sign a clearly unreasonable waiver and refuse to do so? Can I still receive payment?
- How can I prevent wasted time and attorneys fees reviewing and arguing about whose form should be signed?
- Am I waiving my rights to contested change orders?
- Am I waving my rights to a 10% retention?
- With releases, how to get the money first before tendering the release of lien form?

Hopefully, these unnecessary confusions will be straightened out in this brief manual.

What is a lien waiver? Before we begin, let us come up with a clear definition. A lien waiver is defined as waiving your <u>future rights to file a mechanic's lien</u> to the extent of and in exchange for receipt of a partial payment.

Example—Partial or Interim Waiver: Frank is a plumbing subcontractor working directly with the prime on a large residential project having five progress draws. The base contract is $50,000 and each installment represents a payment of $10,000. On the first installment, Frank is asked to sign a waiver of lien form whereby he releases the right to file mechanic's lien in the future to the extent of the $10,000 payment. This is a simple lien waiver on partial payment.

Example—Final Waiver: In the same example, assume Frank finishes his services, the punch list is signed-off, and the building inspection department finalizes the permit for his portion of the work. Assuming he is paid for all amounts owed, including change orders, he will be asked to sign a final lien waiver stating he is giving up any future rights to file a mechanic's lien for any aspect of the job.

What is a lien release? Now this is where it becomes rather confusing. Even state statutory law may have unclear nomenclature. A lien release applies only if a <u>mechanic's lien has been recorded</u>, you have been paid, and you are then canceling the

lien as a matter of public record. Quite simply, in the example above as to Frank, he is not signing a release—only a waiver.

This clear distinction is blurred by forms commonly in usage and even state statutes which call the document Frank is signing such things as: “Waiver and Release”, “Waiver and Release of Lien”, “Lien Waiver and Release”, “Waiver and Release of Lien Form”, or “Lien Waiver Release From”. Confused yet? Unfortunately, there is little we can do about this. Simply be aware of the essential nature of the document you are signing and don’t be hung up on the title, even though from a strict legal standpoint it is erroneous.

Here’s the point. Don’t get hung up on the wording, only the effect. If the document satisfies rights in the future, you know you are getting paid in exchange for not filing a lien later. If it satisfies a lien you already have, you are being paid in full and that is the end of the matter. For those curious by nature, here he is a list of the various forms you may encounter:

Waivers:

- Waiver of lien,
- Lien waiver,
- Lien waiver form,
- Waiver of lien form
- Unconditional lien waiver,
- Conditional lien waiver,
- Waiver forms,
- Mechanic’s lien waiver,
- Construction lien waiver,
- Conditional lien waiver,
- Partial lien waiver,
- Partial waiver of lien,
- Final lien waiver,
- Final waiver of lien,
- Unconditional lien waiver.

Releases:

- Release of lien,
- Lien release,
- Form lien release,
- Lien Release form
- Release of lien form
- Lien mechanic’s release,
- Construction lien release,
- Mechanic’s lien release,
- Final lien release,
- Unconditional lien release,
- Lien release form,

- Lien release partial,
- Conditional lien release,
- Release of mechanic's lien form.

Waiver and release combined:

- Waiver and release,
- Waiver and release of lien,
- Lien waiver and release,
- Waiver and release of lien form,
- Lien waiver release form.

What form do I use for a particular state? There are two types of states. One that has a special statutory law describing the exact wording of a waiver and/or release and other states that do not have a law at all on the subject.

Obviously, in states with a specific statute, you must use that exact wording. In the other states, you are entitled to use release of lien forms that are "commonly accepted in the industry." As to the latter, our forms incorporate the reasonable and customary provisions that are used in the industry.

Here is a summary of the states having a specific statute with exact wording to be placed in the waiver and/or release. Note that all other states not mentioned use generic forms:

States with a specific statute: Alaska, Arizona, California, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, South Carolina, Texas, Utah, Virginia, and West Virginia.

What if I sign a waiver that does not have the correct statutory language? As a basic legal proposition, that means the lien form you have signed has no legal effect. It does not thereby constitute a waiver of your future rights to file a mechanic's lien.

Example: John is a general contractor specializing in light commercial tenant improvement work. He is constructing a project in California. At the end the job, the owner gives him a final waiver in exchange for $50,000 which can only be described as a "home baked" form. It does not comply with the requisite California statutory provisions. But John signs it anyway and receives $50,000. During the course of construction, there were five contested change orders, only one of which was signed (totally $22,500). There was also an impasse as to the punch list. John dutifully performed the list twice, but the owner was still not satisfied.

After signing the waiver of lien form, the owner thought it was a done deal and John would never be able to file mechanics lien for the change orders. Wrong. John is now entitled to file a mechanic's lien for the $22.500. Alternatively, If John did not receive the $50,000, even though he signed the form, he could file a mechanic's lien for $72,500.

What kind of forms –Waivers. Most states have two types of waiver forms:

- Partial lien waiver. As seen above, this would be for an installment payment.
- Final lien waiver. When you receive the final payment on the job.

Other states, for example Arizona, California, Georgia, Texas, Michigan, Nevada, and Utah law, have the following variations:

- Conditional lien waiver on partial payment. A partial installment payment that is conditioned upon the check you receive clearing the bank.

- Unconditional lien waiver on partial payment. After receiving good funds on the previous payment, you are in a position to unconditionally waive your future lien rights as to that amount. For example, assume you have five installments. On the first installment you will sign a conditional waiver on partial payment. By the time of the second installment, you know the previous check has cleared. You would then sign a conditional waiver on partial payment for the second installment and an unconditional waiver on partial payment for the first installment.

- Conditional lien waiver on final payment. A final payment conditioned upon the check you receive clearing the bank.

- Unconditional lien waiver on final payment. After that final payment has cleared, you are in a position to waive all mechanic's lien rights on the project.

What kind of forms – Lien Releases. There is only one type of form. It is a single document which releases a mechanic's lien upon final payment. Although the language of the various states may vary, they look very much the same.

Only good when paid. Almost without exception, all states take the position that you waive your lien rights only if the check you receive actually clears the bank. So just receiving the check and cashing it is not enough. You have to receive good funds.

What am I waiving? Your right to file in mechanic's lien, stop notice, or a claim against the payment bond to the extent of the money received and interest/finance charges. In most states, this also includes signed change orders that are not listed as an exception in the form.

What am I not waiving? There is some confusion as to the extent of the lien waiver as to causes of action other than a mechanic's lien, stop notice, or a payment bond right. If you look carefully at most waivers, they make no mention of the following types of claims:

- Damages for delay.
- Disputed change orders.
- Lost profits.

- Impact damages. This would include more expensive or extended overhead, wages to employees who have to perform duplicative work, or wages to employees during idle times not caused by you.
- Increased cost of materials or equipment if the delay was caused by the other party.
- Loss of business. For example, because you are not paid, you were unable to take on other jobs.

Be very careful that the waiver of lien does not contain a release of these elements. In most cases it will not. You would then be able to bring a lawsuit for these additional damages.

Example: Mary runs the accounting department of subcontractor ABC Company and was very careful the other day in signing a waiver that only waived future mechanic's lien rights. On this project, there were substantial delays caused entirely by the incompetence of the project engineer in failing to process change orders, decide upon requests for information, taking his time approving shop drawings, halting construction for no apparent reason, being unavailable, and a raft of other unjustified reasons. As a result, the company has incurred over $25,000 in lost and unproductive man hours and overhead. Even though the final payment has been made for the base contract, her company can still sue for these losses against the owner.

Note also that just because you have waived your mechanic's lien rights against an owner, you can still sue the person you have a contract with for breach of contract damages.

Example: In the same example above, assume there were no delay damages, but there were three contested change orders that were signed and authorized by the prime contractor. Mary signs a final lien waiver and so waives all rights to a mechanic's lien against the owner. But, there has been a breach of contract between her and the prime contractor and she has not waived those rights for the amount of the change orders.

But remember, it would be foolish to proceed in this manner. The best and fastest way of getting paid for those change orders would be making sure they are contained in the payment from the owner and that person's waiver form. Otherwise, you would simply be inheriting an expensive lawsuit against the prime contractor.

This is similar to the rule that if you wait too long and the time has expired to file a mechanic's lien against the owner, you can still sue for breach of contract (within two years for a verbal contract and four years for a written contract) against the party in which you have a direct contract.

Just how picky are these rules? Unfortunately, they are very technical. The common reaction is: "A court is really not going to strike down a waiver and release form just because it is missing a few clauses!" In matters that are not specifically regulated by a statute, including general rules of common law, a court may give you a break and refuse to enforce an agreement if it is ambiguous, unreasonable, not subject to offsets, has a bona-fide excuse, has a past pattern and practice among the parties, industry

standards, unequal bargaining power, or if it is an adhesion contract. But not so as to forms set out by statute. If they are not done just right, they are not enforced—period. Thus, there are numerous cases where the court fails to go to your aid even if a few words are missing. Remember, a judge is not going to turn your situation into a test case or make exceptions just for you.

Can I waive my lien rights before the project begins? No state will allow this. This is usually attempted in a "no lien contract". That is a contract which specifies a general contractor or sub is not entitled, under any circumstances, to record a mechanic's lien for nonpayment. Such contracts are considered so unreasonable as to be against public policy.

(The only exception is for Pennsylvania residential property where the no-lien contract is valid, but it must be recorded to put people on notice. There is also some confusing case law in Ohio which might allow such contracts, but if valid, the same provision would have to be placed in a subcontract as well).

Note how this differs from a "pay-if-paid" or "pay-when-paid" clause. In the former, the contract states a general contractor will pay a sub only on condition money is received from the owner. The latter clause states there is not a complete condition precedent to the payment, but only specifies <u>when</u> it will be paid, namely a certain number of days after receipt from the owner (or within a reasonable time if not specified). Very few states allow today a "pay-if-paid" clause which would leave the subcontractor in the cold. The exception would be if the language in the contract is clear, conspicuous, and unambiguous. However, many states enforce "pay-when paid" clauses.

The major exception is North Carolina in which subcontractors are not entitled to file mechanic's liens, but only freeze the funds. That is why many subcontractors in this state insist the owner sign or countersign their contract to prevent this situation (by doing so they are considered a general).

What kind of form you should never sign. If the person who is asking you to sign a partial lien waiver is acting reasonably, you are waiving only future mechanic's lien rights to the extent of the payment. Nothing else. Not only is this reasonable, it is within industry custom. For this reason, be very careful that you do not sign a waiver that has these provisions:

- ***Waiving all claims through a certain date***. The problem here is that you might be waiving previous invoices that were not paid.

  Example: Jim is performing masonry work for an apartment complex retaining wall. After installing the stone facing to half the wall, the general contractor (per the owner) claims the particular stone was not as specified. Jim disagrees. Nevertheless, the project continues with the general contractor attempting to convince the owner the stone is correct. On the second installment, because of the dispute, Jim only receives $5,000 on an invoice of $10,000. But he is OK with this it because he was only waiving a lien to the extent of the $5,000.00.

But then the next payment comes for another $10,000 and it specifies Jim is waiving all lien rights through that date. He justifiably refuses to sign because that would waive his $5,000 in the previous invoice.

- ***Waiving claims for "all work performed".*** This means you are waiving compensation for everything, including change orders, additions to the contract, adjustments, and the like. By signing an unconditional lien waiver form with this clause, you might unavoidably be throwing away some of your important rights to compensation.

  Example: In the same example above, Joe is told to extend the retaining wall another 50 feet, which is clearly outside the original specifications of the base contract. He prepares a written change order, but it is never signed. He is told verbally not to worry about it, but is still concern about retaining his rights. Sure enough, the waiver form on the next installment has a provision of waiving compensation for "all work performed". He should not sign it.

  Some states correctly resolve this dilemma (for example California) by specifying there is a waiver only for signed and authorized change orders as of the date of the waiver. The theory being that the change order then becomes an amendment to the contract and if someone receives money at that point, it must be understood it is covering that agreed-upon change order.

- ***Waiving consequential damages.*** Make sure you are only waiving rights to a future mechanic's lien, stop notice (freezing the funds) or payment bond claim. Not waiving other damages which are called "consequential". An example would be delay damages or extended overhead. In other words, you would not want to sign a waiver that has the following language:

  "In exchange for the receipt of $10,000, claimant waives any and all rights to a mechanic's lien, bond claim, stop notice, or any other claims, costs, or expenses at law or equity, including but not limited to, direct or indirect damages, including consequential damages, change orders, interest, lost profits, delay damages, extended overhead, interference with other projects, trade libel, or emotional distress."

- ***Waiving retention.*** This is nothing short of being unscrupulous. If you have a 10% retention, it is to be paid a certain time after completion and you should not have to waive that in previous installments. Possible solution. You can agree that you are waiving it in the installment payment, but it is retained as your legal right in the final payment.

- ***Waiving claims against others.*** This is also overstepping common boundaries. An example would be a form given by the owner which waives future mechanic's liens but also the right of a subcontractor to go against the general for breach of contract.

Disputed change orders. We have already touched upon this above. If you have extra work you are entitled to extra compensation. It is that simple. If the waiver does not include that additional money, make sure you have a paragraph as follows:

"Exception: This lien waiver does not apply to the following contested change orders, of which the claimant reserves its rights to request additional compensation and the filing of a mechanic's lien or breach of contract action. Both parties reserve their rights to make appropriate arguments either way as to enforceability:

C/O 136. Extension of the retaining wall 50 ft. at the northeast section of the parking lot. $7,432.00.

Etc.

Can I sign a lien waiver under protest? This is an extremely dangerous situation. Here is why. When a subcontractor or supplier signs a lien waiver and gives it to the general contractor, it ends up in the hands of the lender or owner. That person is not privy to any private understandings between the general and the sub. They are looking at an unconditional document that waives lien rights. And they have the right to rely upon it.

For this reason, most courts will not go to your aid. Not having notice to any private understanding (such as the right to later claim additional monies for an extra) and having no reason to suspect otherwise, you are a estopped from contradicting those clear terms.

So in most cases you can not record the mechanics lien for that extra. Your only redress would be to sue the general contractor for breach of contract.

There are some minor exceptions. If you sign lien waiver and release, but for some reason do not receive the money, in Texas and Georgia you can file a special affidavit within 60 days, informing the owner the waiver is no longer valid for nonpayment. But this would not apply to the situation above as disputed amounts in the change order; only to cases in which you never actually receive money.

Do I get my money first before signing a lien release? Yes, you should. Unlike some lien waivers, a lien release form is absolutely unconditional and has language to the effect you are canceling the mechanic's lien. And, there is no such thing as a conditional release, namely conditioned upon the check clearing the bank. Once you sign it, that's it. This is because it will be recorded shortly after signing.

Here are the possibilities: 1) if you have already been paid and the funds are good, simply give the owner or general contractor your notarized release. Sometimes they want you to record it, but in the majority cases they want to get their hands on it and do that recording. Option 2) is more common. Someone wants to give you a check in exchange for receiving the notarized lien release form. You can ask for certified funds. Or you can fax/e-mail them a fully executed release writing "Sample" across so they know you are serious but at the same time cannot recorded until you get the funds. You can meet them at their bank where their check can be converted, right at the counter, to

a cashier's check. You can meet them in person—you hand them the release and they hand you the check (although this does have a risk because it might bounce). Or, you can do what attorneys do: the money is first paid into the trust account of your attorney and when it clears, he/she sends the owner's attorney the release.

Exceptions: Settlement Agreements and Accord and Satisfaction. As mentioned above, if the waiver form does not strictly comply with statutory law, it is invalid. Further, most states hold that unless the contractor receives full consideration, there cannot be a waiver of the mechanic's lien. But there are exceptions.

Anyone can enter it into a settlement agreement, whether before or after litigation, in which the competing claims of the parties are settled. In fact, the very definition of a settlement is that everyone gives up something. Such agreements are clearly valid.

Example: Adam has just installed $600,000 worth of expensive carpeting to a law firm comprising four floors of a large office building. Unfortunately, the first batch had factory defects and after installation, was rejected by the law firm. Then there were delays in supplying the replacement carpeting. In the end, the job was over-extended for more than three months. Although the law firm could still operate, the offices were in disarray. Technically, because the entire job was completed satisfactorily the second time to the exact specifications, Adam would be entitled to the full $600,000. But because of delay damages, a written settlement agreement after filing a lawsuit was reached whereby he would receive only $550,000. This is entirely proper.

Another example is the concept of accord and satisfaction. This means that the terms of a contract are modified in exchange for new and adequate consideration. It is a settlement of an unliquidated debt.

Example: Bert is a homebuilder who has contracted to add a mother-in-law quarter to the home of Mr. and Mrs. Johnson. The contract is for $100,000 to be paid in four installments. After completion, the homeowner complained that even though Bert had worked on four successive punch lists, there were still substantial defects. On the other hand, Bert disagreed. However the parties decided to resolve matters with Bert receiving only $10,000 of the $25,000 final payment. As a result, it is as if a new contract was entered into with the requisite offer, acceptance, and additional consideration. The consideration is that for a $15,000 savings, the homeowners gave up that which they were entitled, a well-constructed project. Bert gave up his right to full price to avoid suit for inferior performance. When accord and settlement has occurred, the homeowner and builder have given up their right to sue for more money under this settlement agreement.

Bill Paid Affidavits. Many times you will run into these by seeing such a clause inserted into the waiver form. Basically it is the representation that all trades and suppliers in contract with the claimant have been paid. So the argument goes, unless this is stated, the owner is not willing to write a check.

The only catch is the claimant has to receive the money first in order to pay the lower tiered subcontractors and suppliers. For this reason, such a clause should read as follows:

"As a further consideration in executing this waiver, claimant represents that immediately after receiving good funds, it shall pay and satisfy all workers, subcontractors, as well as equipment and material suppliers of which it has a contract as to this specific work of improvement."

You would not sign a form that is worded as follows:

"As a further consideration in executing this waiver, claimant represents that before receiving this payment it has paid all workers, subcontractors, as well as equipment and material suppliers of which it has a contract as to this specific work of improvement."

Joint Checks

What is a joint check? This is a two party check written to satisfy all obligations that may be owed to the two payees for services rendered. Although it can be used in many industries, it is predominately used in the construction trades. It allows the payor to be assured that to the extent of the amount of the check, any potential obligations as of the date of the check to the payees are extinguished.

Example: ABC construction is a prime contractor who has employed Joe as his electrical subcontractor. ABC knows that Joe frequently secures his materials from DEF supply house. ABC has no knowledge as to the arrangements between the two nor how much is owed. The general wants to be assured that once payment is made, in this case for $10,000, that the supplier will not be able to file a mechanic's lien to the extent of the $10,000 payment. As soon as the check is signed by both parties, DEF supply house is deemed to have received all monies owed as of that date up to that amount. The same rule would apply if instead of a supply house, one of Joe's sub-subcontractors was the co-payee.

One of the primary purposes of a joint check is to prevent money going into the pocket of Joe and never being paid to the supplier, who then files a mechanic's lien.

Joint checks are especially well liked by bonded general contractors working on public works projects. The last thing they want is a claim against their payment bond by a supplier.

Who gets the proceeds of the joint check? The primary purpose of a joint check is to take care of material and equipment suppliers as well as sub-subcontractors. Remember: proceeds first pay the supplier in full, and then if there is anything left, it goes to the other payee. First dollars always go to the supplier.

Example: In the example above, if DEF is owed $8,500 and Joe is owed $5,000.00, the entire obligation of DEF is paid off first, and then Joe is credited $1,500.

So, as long as the check equals or exceeds the amount DEF is owed, they are fully discharged as to materials/equipment furnished through that date.

Common uses of a joint check. Here are some of the more popular uses when a general uses this device:

- Never done business before with a sub.
- Sub lacks experience.
- Sub has never had a large contract.
- Sub does not have high credit limits with a supplier.
- Suspicion that the sub may be having financial problems.
- Gives more incentive to a supplier to furnish larger amounts of material or equipment.
- Demanded by a bank.
- Demanded by a surety company.

What if the supplier or sub-subcontractor payee gets less than owed? It's too bad, because that company will not have any further legal redress or right to file a mechanic lien to the extent of the payment. Any mechanic's lien rights of the supplier/sub-sub will be waived to the full extent of the amount of the check.

Example: In the example above, Joe was able to persuade DEF to split the $10,000 check. Even though the supplier has received only $5,000, its entire $8,500 obligation is extinguished. That is because the amount of the check was enough to satisfy the obligation. Obviously, if the check was only for $5,000, that amount only would be credited against the supplier's obligation. The supplier would then be entitled to an additional payment of $3,500.00.

In the example above, Joe is waiving future mechanic's liens only to the extent of $1,500, which is the amount left over after paying DEF.

What if the supplier or sub subcontractor payees get none of the money from the check? Under the traditional joint check rule, it does it make any difference—DEF is still discharged as to the full amount of the check. So, for example, if Joe is able to persuade DEF to give him all the money under the promise he will repay it all with interest in the next progress draw, but it never happens, DEF is still out of luck. The reason is the payor, in this case the general, has no knowledge of these private arrangements and has the right to rely upon the effectiveness of the joint check.

What if the joint check is issued but there are no instructions or a joint check agreement? Some contractors and owners mistakenly believe that simply writing a joint check will mean the joint check rule has to be followed. This is not true. That rule is followed only if a) there is a joint check agreement or b) there are specific disbursement instructions that go along with the check.

There is loose language in some states that allow the rule to be applied even without an agreement, but the better rule is that does not apply.

If there is no agreement, the payees can use the money for any purpose they wish or for any project. Back to our example, if there is no agreement, DEF can file a mechanic's lien for any amount of money it has not actually received since there is no agreement specifying how the proceeds will be distributed.

Can a subcontractor be forced to accept a joint check? No. The subcontractor may refuse the joint check and insist it be re-written to him or her alone. A joint check can only be required by a written signed agreement, either a separate joint check agreement or the original subcontract agreement.

There is some loose talk to the effect if the general contractor in good faith believes that the sub is having financial problems or has reason to believe the money will not filter down to the suppliers, he can unilaterally requires a joint check. This is not the law. One cannot insist upon further adequate insurances without a provision in the contract, regardless of the financial condition of the sub. Or even if the supplier refuses to supply more material.

The only exception is if the subcontractor materially breaches the contract and the general elects termination. If the general wishes later to continue business with the subcontractor, he or she can insist upon entering into a new contract which provides for joint checks as a condition precedent to further payments.

Be careful about agreements between an owner and general contractor which gives the owner the option (not the obligation) to issue joint checks.

For example, a joint check arrangement at the owner's sole option is provided in the 2007 edition of the AIA General Conditions (the A201 document). This language requires a decision by the architect and a failure on the part of the subcontractor to make payment before use of the joint check. Moreover, the AIA language may not be satisfactory where the project architect is not involved in progress payments. Remember, this language directly pertains to owner joint checks to a subcontractor. The language does not relate to general contractor joint checks to a sub.

Does the joint check rule apply to all states? No. But most have case law supporting it. To be safe, you should consult with your construction attorney in the state in which you perform services.

Can the joint check rule be changed by a written understanding? Sure. In the example above, with a check for $10,000, if the Joe gets ABC to agree the funds are to be allocated 50-50, then that would be proper. But good luck. This almost never happens and it may be a breach of the joint check agreement which the supplier signed as a condition to furnishing materials.

Inserting a clause in the subcontract. Let's be honest: subcontractors hate joint checks. They may be reluctant to sign a separate joint check agreement. On the other hand, you may accomplish the same thing by inserting a clause in the subcontract as follows:

Sample Clause: "General contractor has the option, in its absolute discretion, if exercised in good faith, of issuing joint checks to subcontractor and its suppliers and/or sub-subcontractors ("joint payees) in the following events: a) a past failure to pay a joint payee within ten days of receipt of a draw, b) issuing an insufficient check to a joint payee, c) insolvency or filing for bankruptcy (whether voluntary or involuntary), d) any

material breach of this contract, e) reasonable grounds to believe the subcontractor is having or will have within 6 months, financial difficulties in meeting its current obligations, or f) the good faith belief subcontractor will not in the future be able to fulfill the contract adequately or on time. Joint checks under these circumstances may be issued upon five days advanced notice."

How was it made out? To be effective, it must be made out to: "Joe Smith and DEF Company". As such, they are joint payees and both must sign. If the check is made out to: "Joe Smith or DEF Company", it is considered payable to alternative payees and may be cashed by either of them without the signature of the other (and the joint check rule would normally not apply). If it simply reads: "Joe Smith/ DEF Company", it could well be considered an alternative payee check (see generally *Ryland Group, Inc. v. Gwinnett County Bank, 151 Ga. App. 148, 259 S.E.2d 152 (1979*).

Technically, there is no requirement of placing a statement on the back of the check or in the memo section such as: "In full satisfaction of all monies due for labor, materials, and equipment through July 25, 2012," but it would not hurt to do so.

Must a joint check agreement be in writing? In almost all cases, courts will insist the agreement be in writing or at least in letter form, signed by the subcontractor. It is possible to have a verbal agreement, but it is fraught with uncertainties.

Does a joint check agreement require separate consideration? Yes. Consideration is defined as the "give and take" of a bargain (one party giving and the other party receiving something of value). Because Georgia has some of the best developed law in the nation on this subject, references are made to their cases, and to attorney **Michael L. Chapman** who has done research in this area. Thus, a mere "naked promise" to provide for joint checks does not create a valid obligation to comply with that promise. *Trust Company of Columbus v. Rhodes, 144 Ga. App. 816, 242 S.E.2d 738 (1978).* Forbearance from rescinding a contract or forbearance from suing for a breach of contract does, in and of itself constitute the required legal consideration for such an agreement. *Mann Electric Co. v. Webco Southern Corp., 194 Ga. App. 541, 390 S.E.2d 905 (1990).*

What if the check is signed by only one person or the other name is scratched out? A check payable to joint payees must be signed by all. O.C.G.A. § 11-3-116(b). A bank which is presented with a joint check endorsed by only one of them should refuse payment of the check. But if the bank cashes a check endorsed by only one, then the bank, the payor, and the payor's surety (if any) all are liable to the non-signing payee. *Insurance Company of North America v. Atlas Supply Company, 121 Ga. App. 1, 172 S.E.2d 632 (1970); Refrigeration Supplies, Inc. v. Bartley, 144 Ga. App. 141, 240 S.E.2d 566 (1977); Citizens and Southern National Bank v. Sun Belt Electrical Constructors, Inc. (In re Sun Belt Electrical Constructors, Inc.), 64 B.R. 377 (N.D. Ga. 1986)*. See also Annot., 47 A.L.R.3d 537 (1973). Further, a bank does have the limited right to add an endorsement of its own depositor where the check is being deposited to that depositor's account. See O.C.G.A. § 11-4-205.

What if the name of a joint payee is scratched off by the depositor? Again, if all of the payees on a joint check have not endorsed the check, then the bank should refuse to

pay. Where a bank accepts a check and the name of a joint payee is obliterated from the check, then the bank accepting the check will be liable for its failure to dishonor the check. *First National Bank of St. Paul v. Trust Company of Cobb County, 510 F.Supp. 651 (N.D. Ga. 1981).*

The general contractor issuing the joint check should always examine it when returned by the bank to verify it is properly endorsed. In most states, there is a one-year statute of limitations on reporting improper payment due to a missing endorsement. Claims made against the bank after that one-year period are untimely. *Trust Company Bank v. Atlanta IBM Employees Federal Credit Union, 245 Ga. 262, 264 S.E.2d 202 (1980).*

Form of joint check agreement. Be careful when drafting a joint check agreement, as the provisions are very important. If you want one drafted, National Lien Law would be happy to oblige.

Good luck.