

Understanding Arizona's Statutory Lien Waiver Forms

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Understanding AZ Lien Waiver Forms: Why is it Important?

- 1. To avoid waiving rights and claims**
- 2. To assure that lower tier subs and suppliers have been paid (never pay twice for the same stuff)**
 - At a minimum, get lien waivers from any entity that furnished 20-day notices**
 - And you probably should get lien waivers from any other entity you know is furnishing labor or material to your project**

Arizona Statutory Lien Waiver Forms

Four Statutory Lien Release Forms

- **Conditional Waiver and Release on Progress Payment**
- **Conditional Waiver and Release on Final Payment**
- **Unconditional Waiver and Release on Progress Payment**
- **Unconditional Waiver and Release on Final Payment**

Why Does AZ Have Statutory Lien Waiver Forms?

Forms were adopted in 1992

Before statutory forms were adopted, owners and contractors used their own forms

An Arizona court decision in 1985 enforced a waiver even though the form suggested that a supplier's intent was not to waive all claims

How Do the Statutory Lien Waiver Forms Work?

Rules Governing Statutory Forms

- Lien Claimant Can Only Waive Rights By Executing a Lien Waiver that **Substantially Follows** a Statutory Form.
- Any Lien Waiver that Does Not Follow a Statutory Form Is Ineffective and Lien Claimant releases or waives rights only to the extent of payment

Conditional or Unconditional Waiver Forms?

Rules Governing Statutory Forms

- **Conditional Form Should Be Used In Exchange for a Payment Check**
- **Unconditional Waiver form includes the following Notice language:**

This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional release form.

Conditional or Unconditional Waivers?

A.R.S. § 33-1008(D)(1) provides:

“Where the claimant is required to execute a waiver and release in exchange for or in order to induce the payment of a progress payment and **the claimant is not in fact paid in exchange for the waiver** or release or a single payee or joint payee check is given in exchange for [a Conditional Waiver and Release on Progress Payment]”

Conditional or Unconditional Waiver Forms?

Rules Governing Statutory Forms

- **Conditional Lien Waiver Plus a Cancelled Check Equals an Unconditional Waiver**
- **Conditional Lien Waiver form provides: “when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective”**

Conditional or Unconditional Waiver Forms?

What happens if the check bounces after you sign an unconditional release?

In the only reported case that addressed this issue, the Ninth Circuit Bankruptcy Appellate Panel held *In re JWJ Contracting Co., Inc.*, 287 B.R. 501 (B.A.P. 9th Cir. 2002) that despite the lack of consideration (the check bounced), an unconditional lien waiver that complied with A.R.S. § 33-1008(D)(2) “must be give[n] effect.”

But other states require the showing of “detrimental reliance” by an upchain party when consideration fails.

Look at Conditional Waiver Form

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT
(Pursuant to A.R.S. § 33-1008)

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of \$ _____ payable to _____
(Amount of Check) (Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position that the undersigned has on the job of _____ located at _____
(Owner)

(Job Description)

to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____

(Person with whom undersigned contracted)

through _____ only and does not cover any retention, pending
(Date) modifications and changes or items furnished after that date. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

DATE: _____
(Company Name)

By: _____
(Signature)

(Title)

Look at Conditional Waiver Form

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT (Pursuant to A.R.S. § 33-1008)

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of \$ _____ payable to _____
(Amount of Check) (Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for

What Are You Releasing?

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT (Pursuant to A.R.S. § 33-1008)

and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position that the undersigned has

What Are You Releasing?

**Key Point: Arizona's lien waiver forms are CLAIM WAIVER
AND RELEASE FORMS**

What Is the Extent of the Release?

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT (Pursuant to A.R.S. § 33-1008)

Project: _____

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(Owner)

_____ (Job Description)

to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____

_____ (Person with whom undersigned contracted)

through _____ only and does not cover any retention, pending
(Date)

modifications and changes or items furnished after that date. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

DATE: _____
(Company Name)

By: _____
(Signature)

(Title)

What is the Extent of the Release?

“to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____

(Person with whom undersigned contracted)

through _____ only and does not cover any retention, pending

(Date)

modifications and changes or items furnished after that date.”

What is the Extent of the Release?

**Key Blank on the Conditional Lien Waiver Form is the
“through _____ date”**

**The Release covers all “labor, services, equipment or
materials FURNISHED TO THE JOBSITE through the STATED
DATE with only three exceptions:**

Retention

Pending Modifications or Changes

Items Furnished AFTER THAT DATE

What is the Extent of the Release?

“to the following extent. This release covers a progress payment for all labor, services, equipment or materials **furnished to the jobsite** or to _____

(Person with whom undersigned contracted)

through _____ **only and does not cover any retention, pending**

(Date)

modifications and changes or items furnished after that date.”

Furnished to Jobsite?

Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298 (1992)

- Sub places order with Halbert's for glu lam beams and miscellaneous lumber
- Halbert's orders glu lam beams from manufacturer to be shipped directly to project
- Halbert's practice was not to bill customers until it received proof that the materials were on the job site

Furnished to Jobsite?

Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298 (1992)

- **Glu lam beams delivered to jobsite on May 12 and May 15**
- **On May 20, subcontractor requested a release through May 19**
- **As of May 19, Halbert's had only billed Sub for miscellaneous lumber totaling \$24,000**
- **Halbert's signed release covering "materials furnished" through May 19 only and "does not cover any retention or items furnished after that date."**

Furnished to Jobsite?

Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298 (1992)

- Halbert's billed SUB for glu lam beams on June 9
- Halbert's was paid \$24,000 covered by the conditional release
- But Halbert's was never paid for the beams and recorded a lien for \$70,000—for the materials INVOICED after May 19
- The Court held: “the release covered all mechanic's lien rights which potentially existed as of the release date.

Furnished to Jobsite?

Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298 (1992)

“A release should not be a weak stick which, if one leans on it, breaks and splinters in one's hand. Accordingly, we hold the release covered the glu lam beams.”

Supplier's Solution to the *Halbert's*

“to the following extent. This release covers a progress payment for all labor, services, equipment or materials **furnished INVOICED** to the jobsite or to _____

(Person with whom undersigned contracted)

through _____ only and does not cover any retention, pending

(Date)

modifications and changes or items **furnished INVOICED** after that date.”

Supplier's Solution to the *Halbert's*

“to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____

(Person with whom undersigned contracted)

through **Cross Out Date**** _____ only and does not cover any retention, pending

(Date)

modifications and changes or items furnished after that date.”

****Invoices 001 and 002 only**

Pending Modifications and Changes?

“to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____

(Person with whom undersigned contracted)

through _____ only and does not cover any retention, **pending**

(Date)

modifications and changes or items furnished after that date.”

Pending Modification or Change

J.A. Jones Construction Company v. Superior Court, 33 Cal.
Rptr. 2d 206 (1994)

How Do You Guard Against a *J.A. Jones* Release?

Reserve claims on the FACE OF EVERY PROGRESS PAYMENT LIEN WAIVER:

This waiver does not cover claims for [whatever]

Another Option: Make sure any claims are “pending modifications or changes” under the terms of your contract.

How Do You Guard Against a *J.A. Jones* Release?

ASA recommends the following language:

Lien Waiver Reservation of Rights

Notwithstanding anything to the contrary in this waiver, Subcontractor is not waiving any lien or bond rights securing payment of retainage, unbilled changes, and claims which have not been asserted in writing or which have not yet become known to Subcontractor, and this waiver shall either apply only through the date of work covered by Subcontractor's last payment application that has been paid in full, or shall be conditional upon receipt of funds to Subcontractor's account. No waiver or release shall be construed to commence or flow from or through any date in time for any reason and the existence of any such dates on this document is for reference only.

Look at Conditional Waiver and Release on Final Payment

This release covers the final payment to the undersigned for all labor, services, equipment or materials furnished to the jobsite or to _____.

(Person with whom Undersigned Contracted)

except for disputed claims in the amount of \$_____. Before any recipient of this document relies on it, the person should verify evidence of payment to the undersigned.

Compare AZ Form with California Lien Waiver Form

Exceptions

This document does not affect any of the following:

- (1) Retentions.
 - (2) Extras for which the claimant has not received payment.
 - (3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:
 - Date(s) of waiver and release: _____
 - Amount(s) of unpaid progress payment(s): \$ _____
 - (4) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.
-

Joint Checks and Lien Waivers

FACTS

January 2020: Supplier bills \$100,000 to Sub for materials

February 15, 2020: GC issues \$150,000 joint check payable to Supplier and Subcontractor

Supplier endorses check in exchange for \$100,000 check from Sub

Sub's \$100,000 check bounces

ISSUE—Does Supplier have lien rights for \$100,000 for billing?

Joint Checks and Lien Waivers

Joint Check Rule: *Beztak v. Brown Wholesale*:

“When an owner or general contractor makes a materialman and a subcontractor joint payees on a check that includes payment for labor and material furnished, and **no other agreement exists between the materialman and the owner or general contractor as to the allocation of proceeds, the materialman, by endorsing the check, will be deemed to have been paid the money due him, **up to the amount of the joint check.**”**

Joint Checks and Lien Waivers

A.R.S. § 33-1008(B):

No oral or written statement purporting to waive, release or otherwise adversely affect a claim is enforceable or creates any estoppel or impairment of a claim unless it is pursuant to a waiver and release prescribed by this section or the claimant had actually received payment in full for the claim.

Joint Checks and Lien Waivers

Joint Check Rule: *Beztak v. Brown Wholesale*:

“When an owner or general contractor makes a materialman and a subcontractor joint payees on a check that includes payment for labor and material furnished, and **no other agreement exists between the materialman and the owner or general contractor as to the allocation of proceeds, the materialman, by endorsing the check, will be deemed to have been paid the money due him, **up to the amount of the joint check.**”**

Forged Lien Waivers: Who Bears the Risk?

- **Your subcontractor furnishes an original signed lien waiver from its supplier ABC Supply.**
- **Based on that lien waiver, you pay the subcontractor**
- **ABC Supply subsequently records a lien against the Project and you learn that the lien waiver was forged (by your subcontractor)**
- **Who bears the risk of the forged lien waiver?**

Signatures on Lien Waivers

- **Make sure the person signing the lien waiver is authorized to waive a company's rights**
- **Do you accept faxed or emailed lien waivers?**

What about Electronic Signatures?

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

DATE: _____

Northwest Floor & Wall

BY: _____
(Signature)
Julie O'Nan
Digitally signed by Julie O'Nan
DN: C=US,
E=julie@northwestfloorandwall.com,
O=Northwest Floor and Wall Co.,
CN=Julie O'Nan
Date: 2018.08.30 11:14:49-07'00'

TITLE: _____

Don't Expose Yourself to a Claim for Fraud or Misrepresentation

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT (Pursuant to A.R.S. § 33-1008)

Project: _____

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On receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of \$ _____ payable to _____
(Amount of Check) (Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position that the undersigned has on the job of _____ located at _____
(Owner)

_____ (Job Description)
to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____

_____ (Person with whom undersigned contracted)
through _____ (Date) only and does not cover any retention, pending modifications and changes or items furnished after that date. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

DATE: _____
(Company Name)

By: _____
(Signature)

(Title)

Don't Expose Yourself to a Claim for Fraud or Misrepresentation

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

Common Question: Use of Non-Arizona Form

In order to get paid, Contractor tells Subcontractor that Owner's Illinois lender required all parties on the project to furnish a lien waiver form that was substantially different than the Arizona statutory form.

Issue: How should Sub respond?

Common Question: Use of Non-Arizona Form

In order to get paid, Contractor tells Subcontractor that Owner's Illinois lender required Supplier to furnish a lien waiver form that was substantially different than the Arizona statutory form.

Issue: How should Sub respond?

Answer: First, try to educate Owner. If Sub is forced to sign form, the form will be in effective and you will only be waiving rights to the extent of payments

Case Study No. 1

Contractor signs a contract with an Owner stating that Contractor prospectively waives all lien rights on the project, including any rights of the Contractor's subcontractors and suppliers.

Issue: Is that provision enforceable against the Contractor?

Against the subcontractors and suppliers?

Case Study No. 2

In order to get paid, Contractor tells Supplier that Owner's Illinois lender required Supplier to furnish a lien waiver form that was substantially different than the Arizona statutory form.

Issue: How should Supplier respond?

Case Study No. 3

In March 2020, Supplier furnishes \$50,000 worth of materials to Subcontractor as follows: Invoice 001--\$15,000; Invoice 002---\$20,000; Invoice 003--\$7,500; Invoice 004--\$2,500; and Invoice 005--\$5,000.

Issue One: On April 9, 2020, Subcontractor requests that Supplier provide an Unconditional Waiver and Release of Lien in exchange for a check for \$50,000. How do you respond?

Issue Two: On April 9, 2020, Subcontractor calls and tells you that you can pick up a check for \$35,000, that the balance will be paid in May 2020, and you should deliver an “appropriate” Conditional Lien Waiver. How would you fill out the waiver?

Case Study No. 4

In July 2018, Supplier furnishes \$50,000 worth of materials and provides a valid 20-day notice with \$50,000 as the “estimate of total price.” In exchange for a \$50,000 payment, Supplier signs a Full and Final Lien Waiver. In January 2019, Supplier furnishes another \$10,000 worth of materials to the same project and does not send another 20-day notice.

Issue: To what extent does Supplier have lien rights on the Project?

Questions?