

## **Conditional and Unconditional Waiver and Release Forms: Friend or Foe?**

Use of these forms can help you to stay lien free, not overpay, and keep projects moving on time. The other side of the coin is no one likes even more paperwork - but failing to use proper documentation can be devastating.

**Unhappy Circumstance.** General contractor J.J. Reliant was doing a home remodel which included a new basement. He hired a foundation subcontractor, C.J. Shady, to furnish the materials and do the necessary foundation work. Ever reliable, Reliant paid his final payment to Shady when the foundation work was done, but failed to have a conditional or unconditional waiver and release executed by Shady **and** his material supplier.

As it turned out, Shady had blown his dough at the track and had **not** paid his material supplier - and then disappeared. The supplier had filed a lien. Reliant was coming up on his next scheduled draw but the mechanic's lien by the supplier stood in his way. He was at a point where his project would stall indefinitely if he tried to negotiate with the material supplier and Shady could no longer be found. Alternatively, he could pay the supplier the full cost of the materials, even though he already paid the sub for labor and materials.

Reliant fell into the unhappy circumstance of relying on a friendly handshake with a known subcontractor. (This is still very much a part of the construction

business and this scenario is not uncommon.) Fortunately, it can be prevented by properly executing conditional or unconditional waiver and release documents. These forms can be used for, and by, generals, subs, and many other categories of construction professionals.

### **The Several Forms/Required.**

There are four waiver and release forms:

- (1) Conditional waiver and release in exchange for progress payment  
(California Civil Code § 8132);
- (2) Unconditional waiver and release in exchange for progress payment  
(California Civil Code § 8134);
- (3) Conditional waiver and release in exchange for final payment (California Civil Code § 8136);
- (4) Unconditional waiver and release in exchange for final payment  
(California Civil Code § 8138).

### **Use the Form! It Is Required!**

As indicated, these are statutory forms found in the California Civil Code. And, unusually, the statutes actually have the language to be used.

If the claimant is required to execute a waiver and release in exchange for, or in order to induce a payment, one of these forms must be used.

If a claimant's waiver and release is not in substantially the same form as provided in Civil Code sections for each type of waiver and release, the waiver and release shall be null, void, and unenforceable.

Use of these forms is required by Business and Professions Code Section 7159. Section 7159 is the same code section that provides many of the requirements for home improvement contracts. Section 7159(c)(4) mandates that when a payment is made for any portion of work performed, the contractor, prior to any further payments, shall furnish to the person contracting for the home improvement or swimming pool work, a full and unconditional release from any potential lien claimant's claim or mechanic's lien.

Essentially, you must state in the contract that the client is entitled to an unconditional release for each payment. The contractor is responsible for furnishing such release prior to the next payment.

**The Unconditional Release - Careful.** Be very cautious in using the unconditional releases; these are binding even if payment has not been received. An unconditional waiver and release should only be used if you have already received payment – and the check actually cleared.

**Note:** The unconditional waiver and release is required for works of home improvement pursuant to Business and Professions Code Section 7159.

**Use The Conditional Release.** Conditional waiver and release forms should be used whenever possible – they only become effective upon execution of the waiver and release coupled with evidence of actual receipt of payment. (That means the check cleared.) Evidence of receipt of payment can be either (1) a copy of claimant’s endorsed check; or (2) written acknowledgement of payment by claimant.

**Small Stuff (Literally and Figuratively).** As stated above, waiver and release should be used for all payments – even a purchase of \$20 of nails. However, this may not be practical for very small items such as this. Because it is unlikely that contractors will be accepting progress payments in amounts this small it may not be much of an issue. While our advice naturally is to use the waiver and release forms for all payments, we have seen contracts requiring them only if over a certain amount, such as \$200-\$500. This may constitute substantial compliance.

**Moral.** Use the statutory waiver and release forms, and always for large sums. Again, the actual statutory verbiage can be found by looking up the Civil Code Sections for each type of waiver and release. In the alternative, and as to any

variation, you should contact your counsel if you wish to discuss specific needs/questions.

\*\*\*\*\*

For my previous articles, please visit SFBA NARI's website and click on the link "In the News/Newsletter" under "For the Trade." They are also available on my website under "Articles." As always, my articles are summary discussions only - to simply give you a heads up on various construction topics.

Bryant H. Byrnes, Esq. practices construction law in the San Francisco Bay Area and is counsel to the SFBA NARI Board of Directors. Brian Trowbridge, Esq. of Trowbridge Law Office contributed to this article. Questions? Bryant's website is [www.bryantbyrnes.com](http://www.bryantbyrnes.com). Feel free to contact him by email at [Bryant@bryantbyrnes.com](mailto:Bryant@bryantbyrnes.com)