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**THE LAW OF LIEN WAIVERS**

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# The Law of Lien Waivers

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A mechanic's lien is "[a] claim created by state statutes for the purpose of securing priority of payment of the price or value of work performed and materials furnished in erecting, improving, or repairing a building or other structure, and as such attaches to the land as well as buildings and improvements erected thereon."<sup>1</sup> Lien laws date back to the establishment of the United States. After the Revolution, the United States began construction of its capital. To facilitate the construction of the new capital city, the Maryland General Assembly enacted the first lien law.<sup>2</sup> Although the first lien law only applied to the part of Maryland that was ceded to the United States for the capital, similar laws were enacted in other states.<sup>3</sup>

There are public policy principles that support lien laws. In Louisiana, the principles supporting lien law are that "persons who contribute to the improvement of an immovable are entitled to legal protection so that an owner or his creditors do not appropriate the value of their efforts without reimbursing them and owners, who initiate the work, should take reasonable steps to see that their contractors do not appropriate the price of the work and leave their laborers and suppliers unpaid."<sup>4</sup>

Lien statutes provide a remedy to contractors and subcontractors and various other individuals.<sup>5</sup> The risk that a subcontractor will not be paid is transferred from the payee to the owner. It is possible that an owner, who has paid the contract price of a project to the general contractor, will be required to pay persons who worked for or supplied the general contractor despite the fact that the owner remitted the entire contract price to the general contractor. The lien waiver is a tool an owner may use to limit the risk that lower tier subcontractors and suppliers will file liens on the owner's property due to the failure of the general contractor to perform his obligation to pay the lower tiers. Although there are a variety of ways in which a contractor may lose lien rights,<sup>6</sup> this Paper examines the express waiver of a contractor by a

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<sup>1</sup> BLACK'S LAW DICTIONARY (6th ed. 1991).

<sup>2</sup> See Laws of Maryland 1791, ch. 45 § 10; *Barry Properties, Inc. v. Flick Bros. Roofing Co.*, 353 A.2d 222, 224 (Md. App. 1976).

<sup>3</sup> *Barry Properties*, 353 A.2d at 224-35.

<sup>4</sup> Expose de Motifs, LA. REV. STAT. ANN. §§ 9:4801–9:4961 (Louisiana Private Works Act).

<sup>5</sup> Typically, the lien statute specifies the types of person allowed to file liens to secure claims in construction projects. It varies from state to state how many tiers of a construction project are granted lien rights.

<sup>6</sup> "A mechanics lien may be lost or extinguished by other acts or omission such as: failure to take proper and timely steps to obtain or enforce a lien, intentional overstatement of the amount due, inclusion in such claim of both lienable and nonlienable items in a manner such that they cannot be segregated, or failure to comply with a statute requiring that an itemized statement be furnished upon request of the owner." 53 AM. JUR. 2D *Mechanics Liens* § 285, p. 328.

formal writing.<sup>7</sup>

Generally, lien waivers take two forms. First, contractors or subcontractors may waive lien rights in the contract governing their performance on a project, typically called general lien waivers.<sup>8</sup> General lien waivers are executed before the contractor begins work on the project as they typically are contained in the contract governing the construction work. Second, contractors or subcontractors may waive lien rights as their performance progresses to the extent that the contractor or subcontractor is paid for the work performed.<sup>9</sup> In this instance, there are several executed writings waiving lien rights as the job progresses or perhaps one waiver upon completion of all work and payment by the general contractor. These types only waive lien rights for the performance completed and do not impinge upon lien rights relative to future or remaining performance. The Uniform Construction Lien Act provides two alternative provisions vis-a-vis waiver of lien rights.<sup>10</sup> The first, Alternative A, specifically allows general lien waivers.

§ 215. Waiver of Claimant's Rights [Alternative A]

- (a) A written waiver of construction lien rights signed by a claimant requires no consideration and is enforceable, whether signed before or after the materials or services were contracted for or provided. Ambiguities in a written waiver are construed against the claimant.
- (b) A written waiver waives all construction lien rights of the claimant as to the improvement to which the waiver relates unless the waiver is specifically limited to a particular lien right or a particular portion of the services or materials provided.
- (c) A waiver of construction lien rights does not affect contract rights of the claimant otherwise existing.
- (d) Acceptance of a promissory note or other evidence of debt is not a waiver of construction lien rights unless the instrument evidencing the debt expressly so provides.<sup>11</sup>

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<sup>7</sup> A mechanics lien may be waived by the acts or conduct of a party or a party may be precluded from asserting lien rights because of acts or conduct constituting estoppel. *Id.*

<sup>8</sup> A provision waiving lien rights in a contract may read as follows: "Subcontractor hereby agrees to and does waive his right to file any mechanics liens or claims of any sort or kind against Owner's premises or any part thereof."

<sup>9</sup> This waiver may take a variety of forms but must be clear and unambiguous to be effective.

<sup>10</sup> See UNIFORM CONSTRUCTION LIEN ACT §§ 215(Alternative A) & 215(Alternative B), 7 U.L.A. 432, 432-34 (1997).

<sup>11</sup> See UNIFORM CONSTRUCTION LIEN ACT § 215 (Alternative A), 7 U.L.A. at 433.

The second and alternative provision in the Uniform Construction Lien Act prohibits general lien waivers but allows lien waivers after and to the extent work has been performed.

§ 215. Waiver of Claimant's Rights [Alternative B]

A construction lien under this [Act] may not be waived before services are performed or materials furnished, and any provision for an advance waiver is not enforceable.<sup>12</sup>

It should come as no surprise that the right to enforce lien waivers varies from jurisdiction to jurisdiction considering that lien rights are derived from state statute. Many states have extensive waiver of lien statutes. Florida's statute, for example, provides:

- 1) The acceptance by the lienor of an unsecured note for all or any part of the amount of his or her demand shall not constitute a waiver of his or her lien therefor unless expressly so agreed in writing, nor shall it in any way affect the period for filing the notice under § 713.06(2), or the claim of lien under § 713.08.
- (2) A right to claim a lien may not be waived in advance. A lien right may be waived only to the extent of labor, services, or materials furnished. Any waiver of a right to claim a lien that is made in advance is unenforceable.
- (3) Any person may at any time waive, release, or satisfy any part of his or her lien under this part, either as to the amount due for labor, services, or materials furnished or for labor, services, or materials furnished through a certain date subject to exceptions specified at the time of release, or as to any part or parcel of the real property.
- (4) When a lienor is required to execute a waiver or release of lien in exchange for, or to induce payment of, a progress payment, the waiver or release may be in substantially the following form:

WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of \$..., hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through ...(insert date)... to ...(insert the name of your customer)... on the job of ...(insert the name of the owner)... to the following property:

...(description of property)...

This waiver and release does not cover any retention or labor, services, or materials furnished after the date specified.  
DATED on ..., ...(year)... ...(Lienor)...

By: .....

- (5) When a lienor is required to execute a waiver or release of

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<sup>12</sup> See UNIFORM CONSTRUCTION LIEN ACT § 215 (Alternative B), 7 U.L.A. at 433-34.

lien in exchange for, or to induce payment of, the final payment, the waiver and release may be in substantially the following form:

#### WAIVER AND RELEASE OF LIEN UPON FINAL PAYMENT

The undersigned lienor, in consideration of the final payment in the amount of \$....., hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to ...(insert the name of your customer)... on the job of ...(insert the name of the owner)... to the following described property: ...(description of property)...

DATED on ..., ...(year)... ...(Lienor)...

By: .....

(6) A person may not require a lienor to furnish a lien waiver or release of lien that is different from the forms in subsection (4) or subsection (5).

(7) A lienor who executes a lien waiver and release in exchange for a check may condition the waiver and release on payment of the check. However, in the absence of a payment bond protecting the owner, the owner may withhold from any payment to the contractor the amount of any such unpaid check until any such condition is satisfied.

(8) A lien waiver or lien release that is not substantially similar to the forms in subsections (4) and (5) is enforceable in accordance with the terms of the lien waiver or lien release.<sup>13</sup>

Florida's lien statute precludes general lien waivers. Thus, a general lien waiver provision in a construction contract would not be enforced under Florida law.<sup>14</sup> Certain jurisdictions, like Florida, explicitly prohibit lien waivers in anticipation of the awarding of a contract;<sup>15</sup> however, other jurisdictions allow general lien waivers.<sup>16</sup> Still other jurisdictions

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<sup>13</sup> See FL. STAT. ANN. § 713.20 (West 2002).

<sup>14</sup> See FL. STAT. ANN. § 713.20 (West 2002) ("Any waiver of a right to claim a lien that is made in advance is unenforceable.").

<sup>15</sup> See N.C. GEN. STAT. § 44A-12(f) (2002) ("An agreement to waive the right to file or claim a lien granted under this Article, which agreement is in anticipation of and in consideration for the awarding of any contract, either expressed or implied, for the making of an improvement upon real property under this article is against public policy and is unenforceable"); MICH. STAT. ANN. § 26.315(115) (Law. Co-op. 2002) ("A person shall not require, as part of any contract for an improvement, that the right to a construction lien be waived in advance of work performed. A waiver obtained as part of a contract for an improvement is contrary to public policy, and shall be invalid except to the extent that payment for labor or material furnished was actually made to the person giving the waiver."); N.Y. LIEN LAW § 34 (McKinney 2002) ("[a]ny contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable. This section shall not preclude a requirement for a written waiver of the right to file a mechanic's lien executed and delivered by a contractor, subcontractor, material supplier or laborer simultaneously with or after payment for the labor performed or the materials furnished has been made to such contractor, subcontractor, material man or laborer nor shall this section be applicable to a written agreement to subordinate, release or

may neither explicitly prohibit nor allow lien waivers, either general lien waivers or otherwise.<sup>17</sup>

### The Effect of Lien Waivers

The effect of a lien waiver is that a general contractor may not file liens against the owner's property; however, the general contractor retains its contract rights against the owner. Thus, although a general contractor may waive its right to lien the owner's property, the general contractor retains the right to sue for breach of contract and to seek payment for the materials supplied or work performed. In Louisiana, a general contractor may also have a cause of action for unjust enrichment. Although a general contractor may have recourse against the owner outside of the state's lien statutes, a subcontractor or materialman generally has no such rights as he is not in privity of contract with the owner. Thus, when a project deteriorates, the lower tier claimants may find themselves in the unenviable position of being unable to assert rights against the owner who, in all probability, has the deepest pockets. Not surprisingly, the lower tier claimant will seek to evade the general lien waiver and seek payment from the owner.<sup>18</sup> The argument made by the lower tier claimant will depend on the creativity of the claimant's attorney.

### Owner Breach and Enforcing Lien Waivers

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satisfy all or part of such a lien made after notice of lien has been filed."); DEL. CODE ANN. tit. 25 § 2706(b) (2002) ("Any Contract, any agreement or understanding whereby the right to file or enforce any lien ... is waived, shall be void as against public policy and wholly unenforceable."); GA. CODE ANN. § 44-14-366 (2002) ("A right to claim a lien or to claim upon a bond may not be waived in advance of furnishing labor, services, or materials. Any purported waiver or release of lien or bond claim or of this Code section exacted or made in advance of furnishing of labor, or services, or materials is null, void, and unenforceable.").

<sup>16</sup> See KY. REV. STAT. ANN. § 376.070(3) (Banks-Baldwin 2002) (articulating that the subsection is inapplicable "where persons ... have waived in writing their right to file mechanics' or materialmen's liens,"); 770 ILL. COMP. STAT. 60/21 (West 2002) ("If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by anyone, such provision shall be binding.."); N.D. CENT. CODE § 35-27-02 (2002) (lien may be waived); 49 PA. CONS. STAT. ANN. § 1402 (West 2002) (contractor or subcontractor may waive lien); TENN. CODE ANN. § 66-11-124 (2002) (all persons except laborers can waive mechanics' lien rights in their contract); WIS. STAT. ANN. § 779.05 (West 2002); IND. CODE ANN. § 32-8-3-1 (West 2002) (allowing a general contractor who complies with the requirements of the statute to effectively waive lien rights for himself and those who work under him on a contract or provide materials for the contract for certain types of property).

<sup>17</sup> LA. REV. STAT. ANN. §§ 9:4801-9:4961. In such instances, jurisprudence must supply the rule. In Louisiana, jurisprudence recognizes the validity of lien waivers. See, e.g., *Wardlow Bros. Garage, Inc. v. Thomas*, 140 So. 108 (La. 1932); *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1042 (5th Cir.), cert. denied, 498 U.S. 848 (1990).

<sup>18</sup> If lower tier subcontractors ignore the lien waiver provision in their contract and record a lien against the owner's property, the owner or other interested party, like a higher tier contractor, will seek to have the lien erased. In Louisiana, LA. REV. STAT. ANN. § 9:4833 provides a vehicle to erase liens that are improperly filed. Pursuant to LA. REV. STAT. ANN. § 9:4833, an owner or other interested party "may require the person who has filed a statement of the claim or privilege to give a written authorization directing the recorder of mortgages to cancel the statement of claim or privilege from his records." LA. REV. STAT. ANN. § 9:4833. If the lien claimant does not direct the cancellation of the lien, the owner or other interested party is granted an action against the person required to deliver the cancellation and there may be a claim for attorney's fees and damages. See LA. REV. STAT. ANN. § 9:4833(B) & (C).

One of the most basic arguments to avoid lien waivers is that owners should not receive the benefit of the contractual provision waiving lien rights if the owner breaches the contract by failing to pay the contract price. At first, the argument that the owner should not be able to enforce the general lien waiver should he breach the contract seems tenable under general contract principles. The argument fails, however, if the basic mechanics of a lien waiver are examined: “[A] mechanic’s lien can be obtained only if there is a breach of contract and if... a breach of contract nullifies a written waiver of lien, then there would be no way to effectively waive the right to a mechanic’s lien.”<sup>19</sup> Courts generally hold that a general lien waiver provision may be enforced despite the owner’s failure to pay the contract price. In *Dux v. Ramsey*, 190 Ill. App. 234, the court noted:

When the parties insert into a carefully prepared contract between them provisions like [the lien waiver provision] of this sub-contract, a reasonable interpretation of the contract requires the courts to presume that some purpose was intended to be accomplished by such provision. If the construction contended for by the subcontractor here is sustained, it makes the subcontract mean that the subcontractor waives his lien in case he is paid in full. The law gives him no lien if he is paid in full. Therefore the proposed construction deprives [the lien waiver provision] of said contract of all meaning and leaves the contract as it would be if that section had never been written.<sup>20</sup>

### **Contractor’s Waiver Affecting Subcontractor’s Rights**

Some states allow the contract between the owner and the prime contractor to have a provision that the project be “lien free” meaning neither the prime contractor nor anyone on a lower tier may assert a lien.<sup>21</sup> Other states have a provision in the statute that allows the owner to record the contractor’s waiver and thereby affect the subcontractors rights.<sup>22</sup>

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<sup>19</sup> *Jankoviak v. Butcher*, 159 N.E.2d 377, 378.

<sup>20</sup> The *Jankoviak* Court noted that there were various Illinois decisions holding that breach by the owner does not prevent the owner the benefit of the lien waiver provision. *Jankoviak*, 159 N.E.2d at 129. Additionally, the court noted that the Illinois rule is the rule followed generally. *Id.* at 130 (citing 57 C.J.S. *Mechanics’ Liens* § 224, pp. 795-96; 36 AM. JUR. *Mechanics’ Liens* §§ 230, 231; 102 A.L.R 356).

<sup>21</sup> See IND. CODE ANN § 32-8-3-1.

<sup>22</sup> See PA. STAT. ANN. tit. 49 § 1402 (providing “A written contract between the owner and contractor or a separate written instrument signed by the contractor, which provides that no claim shall be filed by anyone, shall be binding; but the only admissible evidence thereof, as against a subcontractor, shall be proof of actual notice thereof to him before any labor or materials were furnished by him; or proof that such contract or separate written instrument was filed in the office of the prothonotary prior to the commencement of the work upon the ground or within ten (10) days after the execution of the principal contract or not less than ten (10) days prior to the contract with the claimant subcontractor, indexed in the name of the contractor as defendant and the owner as plaintiff and also in the name of the contractor as plaintiff and the owner as defendant. The only admissible evidence that such a provision has, notwithstanding its filing, been waived in favor of any subcontractor shall be a written agreement to that effect signed by all those who, under the contract, have an adverse interest to the subcontractor’s allegation.).

Although the statutes may prohibit the general contractor from waiving rights of lower tier workers, general contractors may require those subcontractors, materialmen, and laborers with whom it has a contractual relationship to execute some type of lien waiver. The general contractor should and typically does seek to extract the same promises from subcontractors that the general contractor promised to the owner, like a promise to refrain from filing any liens against the owner's property.<sup>23</sup>

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<sup>23</sup> For more information on the ability of a general contractor's ability to waiver rights of the lower tier subcontractors, materialmen, suppliers and laborers, see *Validity and Effect of Provision in Contract Against Mechanics Liens*, 76 A.L.R. 2d 1087, 1097 (1961).

## Owner's Ability to Enforce a Waiver in a Subcontract to Which the Owner is Not a Party

Although an owner may have a lien waiver provision in the prime contract, the issue of its application to subcontractors, as stated *supra*, is varied. The general contractor, to protect itself, may include general lien waivers in its subcontracts. The enforcement of lien waivers in subcontracts by owners can be problematic as the owner is not a party to the subcontract. As a stranger to the contract, the owner may, depending on the jurisdiction, attempt to assert rights to enforce lien waivers as a third-party beneficiary.<sup>24</sup> Some jurisdictions do not recognize that "a person who is neither a party to, nor in privity with, a contract, or the consideration for the contract" has a right to maintain an action on the contract.<sup>25</sup> The Restatement (Second) of Contracts provides for third-party beneficiaries: "A promise in a contract creates a duty in the promisor to an intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."<sup>26</sup> The Idaho Supreme Court summarized the law relative to third-party beneficiaries as follows:

'This court ... considered the right of a third party beneficiary to recover, and after an analysis of the Illinois cases ... stated: 'One may be a direct beneficiary under a contract of guaranty, or he may be a mere incidental beneficiary. If he belongs to the former class he may recover, but if to the latter he may not. From these decisions we think it is clear that one claiming as a beneficiary may not recover under such a contract unless it may be concluded from the instrument that the parties thereto regarded him as a person primarily interested and that they desired and intended to secure to him personally the benefits of its provisions.' 'It has been held in numerous other cases that incidental benefits to third persons resulting from a contract to which they are not parties are insufficient to permit such third parties to sue on the contract. 'Thus, before recovery can be had by a third party beneficiary, it must be shown that the contract was made for his direct benefit, or as sometimes stated primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary. Furthermore, such a contract must be strictly construed in favor of the person against whom such liability is asserted.'<sup>27</sup>

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<sup>24</sup> "A third-party beneficiary is one to whom the promisee owes, or is believed to owe, a duty which is discharged by the promisor's performance. Such a beneficiary is one who, though not a party to the contract, will nevertheless receive direct benefits from it. The third-party is not the promisee rather, such beneficiary is one for whose benefit a promise is made in the contract but who is not a party to the contract." 17B C.J.S. *Contracts* § 612 at p. 319 (1999).

<sup>25</sup> 17B C.J.S. *Contracts* § 614 at p. 321 (1999).

<sup>26</sup> RESTATEMENT (SECOND) CONTRACTS § 304 (1981). "Where performance will benefit a person other than the promisee, that person is a beneficiary." RESTATEMENT (SECOND) CONTRACTS § 2. "Where specific performance is otherwise an appropriate remedy, either the promisee or the beneficiary may maintain a suit for specific enforcement of a duty owed to an intended beneficiary." RESTATEMENT (SECOND) CONTRACTS § 307.

<sup>27</sup> *Dawson v. Eldredge*, 372 P.2d 414, 417-18 (Idaho 1962) (quoting *Sachs v. Ohio Nat'l Life Ins. Co.*, 148 F.2d 128 (7th Cir. 1945)). The requirements needed to establish rights as a third-party beneficiary vary depending on the jurisdiction. Some jurisdictions hold that "[i]t is not necessary, to enable the third party to sue the promisor,

Courts have recognized owners as third-party beneficiaries of lien waivers found in subcontracts to which the owner is not a party. For example, in *Richardson Engineering Co. v. International Business Machines Corp.*, IBM contracted with a general contractor for the construction of a manufacturing building.<sup>28</sup> The general contractor, in turn, subcontracted the piping work.<sup>29</sup> The subcontract contained a lien waiver provision.<sup>30</sup> The court held that IBM, the owner, was entitled to enforce the lien waiver in the subcontract “[s]ince IBM was clearly the intended beneficiary of the waiver....”<sup>31</sup>

In *AAA Plastering Co. v. TPM Constructors, Inc.*, the Georgia Supreme Court held that an owner could enforce a lien waiver clause as an intended beneficiary of the lien waiver.<sup>32</sup>

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that the obligation shall have been undertaken ... directly or primarily for the benefit of the third person. The liability of the promisor to the third party ... depends merely upon the question of whether the third party has a beneficial interest in the enforcement of the contract.” 13 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 37:14 (4th ed. 2000) (citing *Merchants Loan & Trust Co. v. Ummach*, 228 Ill. App. 67, 1923 WL 3153 (1st Dist. 1923)).

In Louisiana, a third-party beneficiary designation is called a *stipulation pour autrui* or stipulation for others. “A contracting party may stipulate a benefit for a third person called a third party beneficiary. Once the third party has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by mutual consent without the beneficiary’s agreement.” LA. CIV. CODE ANN. art. 1978. “Although not a party to the contract, the third party beneficiary acquires rights with respect to the benefit conferred, including right to demand performance from the promisor. Our jurisprudence recognizes several factors which must be considered in determining whether a contract provides for a stipulation *pour autrui*. These factors are enumerated in *Andrepoint v. Acadia Drilling Co.*, 231 So.2d 347, 351, 255 La. 347 (1969)....” *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 790 So.2d 93, 100 (La. App. 3d Cir. 2001). The factors enumerated in *Andrepoint* are as follows:

- (1) The existence of a legal relationship between the promisee and the third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge;
- (2) the existence of a factual relationship between the promisee and the third person, where (a) there is a possibility of future liability either personal or real on the part of the promisee to the beneficiary against which performance of the promisee (sic) will protect the former; (b) securing an advantage for the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit by way of gratuity was intended.

*Andrepoint*, 231 So.2d at 251 (citing *Smith, Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 TUL. L.REV. 18, 58 (1936)).

<sup>28</sup> *Richardson Engineering Co. v. International Business Machines Corp.*, 554 F.Supp. 467, 468 (D. Vt. 1981).

<sup>29</sup> *Id.* at 468.

<sup>30</sup> *Id.* at 471 n. 6 (“Subcontractor, for itself and for all persons furnishing labor, materials or services in connection with the Work, waives and releases all mechanic’s liens or right of liens or claims, not existing or hereafter arising for labor or materials furnished under this Subcontract, upon the Project or Project premises or upon any monies due or to become due the Contractor.”)

<sup>31</sup> *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 133).

<sup>32</sup> 277 S.E.2d 910, 912 (Ga. 1981). The issue in the case was whether, given the language of GA. CODE ANN. § 67-201(2) (specifying that the true owner of the real-estate, rather than the general contractor, must show that a lien has been waived in writing), the general contractor could not enforce a lien waiver. The Georgia Supreme Court held that the “General Assembly did not intent the ... language of the Code section to change the general principles that allow the promisee as well as the intended beneficiary of the subcontract lien waiver clause to bring suit to enforce the waiver and to resist the validity of the claim of lien.” *Id.* at 911-912.

Similarly, in *G.R. Sponaugle & Sons, Inc. v. McKnight Construction Co.*, a Delaware case, the plaintiff subcontractor filed an action for lien against the shopping center that was the subject of a construction contract, owned by Betty Gay of Delaware.<sup>33</sup> The subcontractor also sued the general contractor that was in receivership.<sup>34</sup> The owner asserted that the subcontractor waived lien rights pursuant to the subcontract.<sup>35</sup> The court addressed the issue of whether the owner was entitled to assert the waiver of lien clause that was in the subcontract between the general contractor and the subcontractor.<sup>36</sup> The court noted that a third-party beneficiary may recover on a contract made for its benefit and held that “[t]he waiver provision of the subcontract refers to liens against the premises to which the subcontract related. The clear inference from this language is that it is intended for the benefit not only of the contractor but of those having property interest in the premises.”<sup>37</sup>

The ability of owners to enforce waiver of lien provisions in subcontracts as a third-party beneficiary was also addressed in *Orlando Central Park, Inc. v. Master Door Co. of Orlando*.<sup>38</sup> In *Orlando*, the owner, Orlando Central Park, Inc., entered a contract with a general contractor, Brody, who in turn entered into a subcontract with Master Door. The subcontract had a waiver of liens provision.<sup>39</sup> The court cited the Florida Statute allowing any person other than a laborer to waive lien rights at anytime before performing work.<sup>40</sup> The court held that the subcontractor agreed to waive all liens or claims of liens and unequivocally surrendered its

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<sup>33</sup> *G.R. Sponaugle & Sons, Inc. v. McKnight Construction Co.*, 304 A.2d 339, 342 (Del. Super. Ct. 1973)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 343.

<sup>36</sup> *Id.* at 344.

<sup>37</sup> *Id.* The court, apparently addressing an argument raised by the plaintiff quoted intent language at the end of the waiver clause: “...it being the intent of the parties hereto that the Subcontractor shall only possess those rights and remedies against the Contractor which are created by the terms and provisions of this Subcontract and are based upon the contractual relationship between the Contractor and the Subcontractor as defined and limited by this Subcontract.” *Id.* The court held that this language did not limit the right of the owner to claim the benefit of the waiver clause as a third party beneficiary. *Id.*

<sup>38</sup> *Orlando Central Park, Inc. v. Master Door Co. of Orlando*, 303 So. 2d 685, 686 (Fl. App. 4th Dist. 1974).

<sup>39</sup> *Id.* at 686 (the lien waiver provision provided, “The subcontractor, upon acceptance of this order, waives all liens [sic] or claims of lien and all rights under any bond or bonds executed by Brody and its surety, if any, to which the subcontractor might otherwise be entitled, or to which he might become entitled pursuant to law. The subcontractor agrees upon presentation to him of the same to execute such number and form of waivers and affidavits in connection therewith in advance of performance of the subcontract as maybe required by Brody. The subcontractor further agrees to secure from his subcontractors and materialmen, if any, similar waivers and affidavits and to furnish Brody with written notice of all such subcontractors and materialmen.”).

<sup>40</sup> *Id.* at 686. (citing FL. STAT. ANN. § 713.20(2) (West 1971) (“Any person other than a laborer may waive his lien under this Chapter at any time wither before or after furnishing services or materials.”). FL. STAT. ANN. § 713.20 has been amended to provide that “[a]ny waiver of a right to claim a lien that is made in advance is unenforceable. See FL. STAT. ANN. § 713.20(2) (West 2002).

potential claim at the time the subcontract was executed.<sup>41</sup> With regard to the owner's ability to enforce the lien waiver, the court held: "[A]lthough the named parties to the subcontract are Master Door and Brody, Orlando Central is a third party beneficiary thereof. In our opinion the language used is clear and unambiguous. Master Door agreed to waive all liens and claims of lien. 'All liens' includes the lien here involved. Finally, the only party subject to a lien or claim of lien in this project was the property owner...."<sup>42</sup>

### Choice of Law Provisions

Many construction contracts have choice of law provisions. These provisions are of added import when dealing with lien waivers because of the degree to which state statutes vary relative to lien waivers. Even with a choice of law provision that specifies a state in which waivers are permitted, the forum court may refuse to apply the law. For example, in *Clifton Steel Corp. v. General Electric Co.*, a dispute arose between a subcontractor and a sub-subcontractor regarding payment to the sub-subcontractor.<sup>43</sup> The sub-subcontractor filed a lien against the owner's property despite its agreement not to file mechanic liens under its contract.<sup>44</sup> The subcontractor sought to foreclose the lien by availing itself of the waiver of lien provision in the sub-subcontract.<sup>45</sup> In addressing the lien waiver provision, the court held "This issue as to whether or not the contract was governed by Connecticut law is academic as it related to the filing of a mechanic's lien. New York law specifically prohibits any waiver of the right to file or enforce such liens as against public policy. It is axiomatic that "even if [a] contract is valid where made, it will not be enforced in another State if it is repugnant to positive statutory enactment and the public Policy of the State."<sup>46</sup> The opposite result was reached in *Kippin Industries, Inc. v. Van Deilen International, Inc.*<sup>47</sup> In *Kippin*, the construction contract had a choice of law provision selecting Michigan as the state law by which the contract should be construed.<sup>48</sup> The contract contained a lien waiver.<sup>49</sup> The lien waiver was prohibited by Michigan law.<sup>50</sup> In absence of the choice of law provision, Kentucky law would have been applied. Kentucky law did not prohibit lien waivers.<sup>51</sup> The court held that "under

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Clifton Steel Corp. v. General Electric Co.*, 80 A.2d 714 (NY. App. 3d 1981).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 715.

<sup>47</sup> *Kippin Indus., Inc. v. Van Deilen Int'l, Inc.*, 182 F.3d 490, 494 (6th Cir. 1999).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

the Restatement, the parties' choice of law is to be considered a mistake if the chosen law would invalidate an express provision of the contract.<sup>52</sup> If, in such situation, the express provision would be valid under the law of the state that would govern in the absence of an express choice-of-law provision, the mistaken choice-of-law provision should be ignored and the express contractual provision enforced."<sup>53</sup>

## Conclusion

The general lien waiver and individual lien waivers can serve as effective weapons for owners who seek to limit their exposure under lien statutes. As general lien waivers can have devastating effects on contractors, subcontractors, materialmen and laborers who seek to assert lien rights, those entities effected will vigorously seek to avoid such waivers. Owners who seek to enforce lien waivers may seem to have an upper-hand as the contractor or subcontractor has expressly waived a right. Courts, however, may attempt to seek to void contractual provisions waiving liens because of the public policy principles supporting lien statutes. The battle over lien waivers has reached the legislatures and some state legislatures have prohibited general lien waivers in contracts as against public policy.

Even if a state allows lien waivers, owners may have a difficult time enforcing them. When the owner has a direct contractual relationship with the promisor of a lien waiver, the owner typically will be able to enforce the provision even if the owner has breached the contract by failing to pay the contract price. The owner's ability to enforce lien waivers in the general contractor's contracts with subcontractors and others becomes more tenuous. Generally, it appears that owners are succeeding in enforcing lien waivers as third-party beneficiaries. Asserting rights as a third-party beneficiary requires close attention to the jurisdiction's rules regarding the requirements to assert rights as a third-party beneficiary. The public policy problem with lien waivers is that the promisor of a lien waiver is relinquishing rights that were granted by the Legislature to support and protect the small and relatively weak vis-a-vis bargaining power in the construction business. In litigation, owners may be painted as Goliaths demanding small contractors, materialmen, laborers and suppliers give up valuable rights and the more complex the argument an owner is required to make to support a lien waiver, the more likely it becomes owners may find an unsympathetic bench.

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<sup>52</sup> *Kippen Industries*, 182 F.3d at 494.

<sup>53</sup> *Id.*