



Rexel, Inc.

**Securing Unsecured Accounts,
Mechanic's Liens and Payment Bonds**

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COUNSELORS AND ATTORNEYS AT LAW

Building Relationships, Exceeding Expectations

Discussion Topics

Securing Unsecured Accounts

Personal Guaranty
Corporate Guaranty
Joint Check Agreements
Promissory Note
Virginia: 43-11 Notices
Credit Line Deed of Trust
Purchase Order
Security Interests

Mechanic's Liens and Payment Bonds

Mechanic's Liens
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Payment Bonds

Securing Unsecured Accounts

Personal Guaranty

Highlights:

- Binds an individual to the terms and conditions of the credit application
- Creates personal liability for the individual executing the guaranty
- Remains in full force and effect until revoked in writing and sent by certified mail
- Contains a provision for payment of costs of collection (attorney's fees/court costs)
- Waives all available homestead exemptions
- Binds the successors and assigns of the guarantor
- Allows for confessed judgment in the event of default
- Allows access to the guarantor's consumer credit report

Practical Tips:

- Guarantors should be affiliated with the company
- Most courts will not enforce a guaranty against an individual who has not been associated with the company for a number of years
- No titles under signature line
- Obtain driver's license to ensure proper signature
- Obtain Social Security number for credit reporting and collection purposes

Corporate Guaranty

Highlights:

- Binds a third party entity to the terms and conditions of the credit application
- Creates liability for the third party entity executing the guaranty
- Remains in full force and effect until revoked in writing and sent by certified mail
- Contains a provision for payment of costs of collection (attorney's fees/court costs)
- Waives all available corporate exemptions
- Binds the successors and assigns of the corporate guarantor
- Allows for confessed judgment in the event of default
- Allows access to the corporate guarantor's credit report

Practical Tips:

- Obtain Dun & Bradstreet or credit report to ensure credit worthiness of guarantor
- Obtain driver's license to ensure proper signature
- Obtain Federal EIN number for credit reporting and collection purposes

Joint Check Agreements

Highlights:

- Binds the general contractor to the terms and conditions of the credit application
- Creates liability for the general contractor to remit payment (creates guaranty)
- Ensures that any payments to the customer be made payable directly to the supplier
- Provides for payment without regard to set-off or back charge to customer
- Creates joint and several liability as to general contractor
- Customer and general contractor waive all available exemptions
- Allows for confessed judgment against customer in the event of default

Practical Tips:

- Joint Check creates liability and access to payment from a third party entity
- Ensures payment by general contractor in the event of customer default
- Material deliveries must be tracked to ensure the proper amount of material is shipped to a project
- Payments should be tracked to ensure payments are not made directly to the customer

Promissory Notes

Highlights:

- Binds an individuals or entity to the provisions of the Promissory Note
- Creates personal liability for the individual executing the Promissory Note
- Contains a provision for payment of costs of collection (attorney's fees/court costs)
- Waives all available Homestead Exemptions
- Allows for confessed judgment in the event of default

Practical Tips:

- Promissory Note reduces debt to writing avoiding disputes as to balance due
- Promissory Note creates payment plan to reduce and pay balance due
- No titles under signature line if signing individually
- Obtain driver's license to ensure proper signature
- Obtain Social Security number for collection purposes

Virginia §43-11 Notices

Highlights:

- Creates personal liability as to the general contractor and owner
- Ensures payment in the event your customer has not been paid
- Two notices must be sent to the owner and General contractor
- First notice must contain information outlining material to be shipped and approximate cost
- Second notice must be sent within 30 days of the completion of the project.
- Second notice must contain affidavit outlining material shipped and total cost

Practical Tips:

- Affidavit must be accurate (cannot recover amounts above affidavit amount)
- First notice may be sent after first 30 days but recovery may be an issue
- Notices should be sent certified mail, return receipt requested
- §43-11 personal liability is preferable to a mechanic's lien
- §43-11 rights only exist on Virginia projects

Purchase Orders

Highlights:

Issued by customer (or general contractor) for material order and will typically contain:

- Material or “package” required
- Delivery times and dates
- Adherence to plans and specifications
- Pricing
- Release and Indemnity requirements
- Warranty requirements

Practical Tips:

- Purchase Orders can modify the terms and conditions of the credit application
- Purchase Orders can modify price, warranty, payment and delivery terms
- Purchase Orders must be reviewed prior to execution to prevent modification of existing terms and conditions
- Purchase Orders must be approved to avoid situations where performance is not possible

Security Interests

Highlights:

- UCC filing allows a creditor to become a secured creditor
- Security Agreements grant a creditor a security interest in collateral
- UCC filing must be signed by the customer and owner of the property
- UCC filing must contain a description of the collateral
- UCC filing must be filed and recorded

Practical Tips:

- Allows supplier to secure ongoing line of credit by keeping security interest in materials purchased
- Converts an unsecured creditor into a secured creditor
- Creates a security in collateral that may be sold to pay balance due
- Ensures payment before unsecured creditors
- Useful only to the extent there is value in the collateral
- Must put potential third parties on notice that a security interest exists by filing it in public records

Mechanic's Liens and Payment Bonds

Mechanic's Liens

Highlights:

- A Mechanic's lien is a legal claim placed on a specific piece of real estate by someone who provided labor or materials to a project or property
- Mechanic's liens attach to property without the necessity of a final judgment
- Mechanic's liens are expedited
- Mechanic's liens are actions against the owner not the customer
- Most States require at least one notice to the general contractor and owner
- Some States require a "pre-notice" to file a mechanic's lien

Practical Tips:

- Most States have strict timing deadlines
- Need to track dates and refer mechanic's lien claims after 80 days from the last date materials were supplied
- Must accurately identify the owner of the property
- Track job accounts independently from main account
- Need to identify mechanic's lien agent, if any, at the outset of supplying to a job

Lien Releases

Highlights:

- A full and final release of mechanic's lien is provided at the end of the project when all material is billed, paid for, and accepted
- A partial release of lien is provided at any time while material is still being supplied, as required by the contractor or owner
- Lien releases serve to extinguish or waive rights a creditor may have with regards to collecting amounts due.
- Lien releases need to be specific to a project and to an amount

Practical Tips:

- Review each release carefully
- A partial release of mechanic's lien should indicate:
 - That it is a *partial* release
 - That payment is for "material furnished, invoiced and billed through to and including the date of this release" or "this release specifically does not apply to material shipped but not yet billed by the supplier"
 - State a date certain as to the dates covered, or not covered by the release
 - List dollar amount contemplated through the Release date ... "payment of \$_____ through _____ date"
 - Contain the project name and project address for which the release applies

Federal Bond Claims (Miller Act)

Highlights:

- Lien rights never exist on public projects
- Public projects over \$100,000 will be secured by a Payment Bond
- A Payment Bond is a security posted under a contract to assure the payment of persons supplying labor and material to the project
- Only a supplier who supplies the prime contractor or the prime's subcontractor may make a claim against a Payment Bond on a Federal project
- A notice of claim must be mailed within 90 days of the last date materials were supplied to the project unless privity exists with Contractor purchasing Payment Bond
- Suit must be filed within one year from the last date materials were supplied

Practical Tips:

- Obtain a copy of the bond before supplying a project
- Verify your "place in line" when determining coverage pursuant to the bond
- Confirm the terms of the Payment Bond before supplying materials
- Track job accounts independently from main account
- Track dates and refer bond claims after 80 days from the last date materials were supplied
- Track materials shipped to project

State (Little Miller Act) and Private Bond Claims

Highlights:

State Bonds:

- Lien rights never exist on public projects
- In almost all cases, public projects will be secured by a Payment Bond
- The surety (insurance company) provides security that all persons supplying labor and material to the project will be paid
- There is no "tier limitation" on a supplier's ability to make a claim against a Payment Bond
- A notice of claim must be provided within 90 days of the last date materials were supplied to the project unless privity exists with the contractor purchasing the Payment Bond
- Suit must be filed within one year from last date materials were supplied to the project

Private Bonds:

- Private (non government) projects
- Terms of the bond strictly apply

Practical Tips:

- Obtain a copy of the bond before supplying a project
- Confirm the terms of the Payment Bond before supplying materials - review private bonds extremely carefully with regards to notice of claim, ability to file a claim and time frame for initiating suit
- Track job accounts independently from main account
- Track dates depending on the terms of the bond and material shipped

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