

**THE CONSTRUCTION LENDER / GENERAL CONTRACTOR
RELATIONSHIP**

**WHEN A DEVELOPMENT PROJECT FAILS:
CONTRACTUAL AND COMMON LAW ANALYSIS**

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**Presentation for Construction Financial
Management Association Tampa**

LOANS



**“We’re offering you an assumable mortgage.
We assume you’ll make the payments and you can
assume we’ll make your life miserable if you don’t.”**



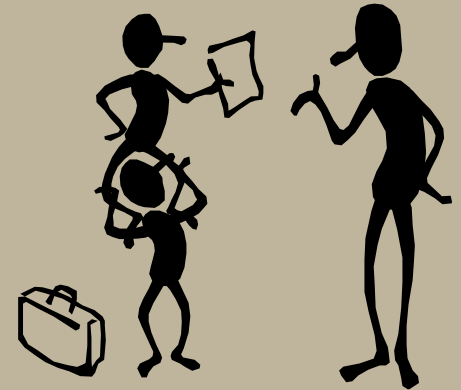
CONTRACTUAL TROUBLE AND HOW TO AVOID IT

- RELATIONSHIPS
- DOCUMENTATION
- ASSIGNMENTS
- STRATEGIES
- LEGAL THEORIES
- FIDUCIARY DUTY
- UNJUST ENRICHMENT
- THIRD PARTY BENEFICIARIES



Lender / General Contractor Relationship

- Often over-looked
- Not always viewed as a direct relationship
- Separate contracts with Lender and GC
- Relatively little, if any, documentation
- Serious gaps/conflicts when a project fails
- Proper documentation and a better understanding of the relevant law would avoid serious conflict, delay, and cost



The Lender

Construction lender, among other things, will consider:

- ✓ construction plans and specifications
- ✓ proposed construction budget and schedule
- ✓ credentials of the general contractor and major subcontractors
- ✓ Goal: on time and on budget



The General Contractor

General contractor is interested in:

- ✓ meeting its obligations
- ✓ owner who is creditworthy and will pay as and when due
- ✓ Inception – Lender and GC not in conflict



Initial Documentation

- Assignment of developer's rights / interest in general contract
- Able, in theory, to complete the project
- Complete project pursuant to the general contract with minimal delay or interruption
- General contractor wants to be paid what it is entitled to



Contractual Arrangement / Consent To Assignment

- General Contractor Letter or Consent (“consent”)
- Prepared by the construction lender or its counsel
 - Consent to assignment
 - GC to continue to perform
 - GC payment for performance after lender’s notice
 - Notice of default / opportunity to cure
 - No reliance on loan documents / not a third-party beneficiary
 - No modification / amendment without approval
 - No change orders without approval



Distressed Projects: Management & Strategies

- Warning signs
- Controls
- Goals of Interested Parties
- When to Work out
- When to Walk Away



Relevant Legal Theories

- As important as contractual relationship
- Entitled to loan proceeds or other payment
- Deemed relationship between lender and GC
- Possible fiduciary duty owed by lender to GC
- Promissory estoppel
- Unjust enrichment
- Intended third-party beneficiary of loan



Construction Lender's General Fiduciary Duty To A General Contactor

- Hesitant to find fiduciary duty owed by Lender to GC
- Absent misrepresentation / negligence
- Majority: Courts are generally not willing to find a duty owed
- Minority: Duty on the construction lender to supervise the uses of loan proceeds



Circumstances When Courts Impose A Duty On The Lender

- “Equitable Estoppel” / “Promissory Estoppel” = equitable remedy
- Owed to parties relying to their detriment on inducements by others
- Duty because the inducing party should have known
- Fairness is essential



Circumstances When Courts Impose A Duty On The Lender

Three elements:

- 1) party estopped acts inconsistent with position it later adopts**
- 2) reliance by the other party**
- 3) injury to latter due to former's repudiation of its prior conduct**

Pennsylvania - party seeking estoppel cannot have duty of inquiry



Unjust Enrichment

Recovery regardless of absence of an agreement

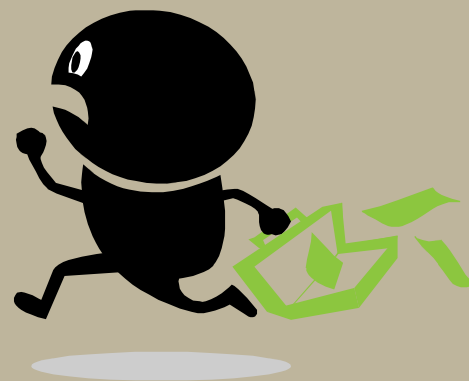
Three elements:

- 1) lack of an adequate remedy at law
- 2) benefit conferred upon the defendant
- 3) inequitable acceptance and retention of the benefit



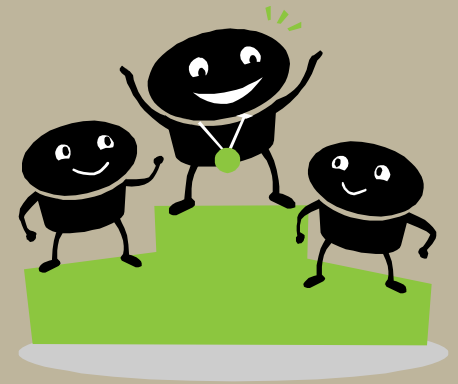
Unjust Enrichment, Cont.

- Most jurisdictions, no wrongdoing / wrongful intent required
- Primary focus is result of the unjust enrichment
- Most jurisdictions, contractor must complete project
- Multiple factors considered



Third Party Beneficiary

- Intended beneficiary though not party to agreement
- Intend to confer benefit on third party
- Not simply an incidental benefit
- Contemplated and affirmatively granted
- Courts typically find against third party beneficiary status



Conclusion

- Consider nature of relationship at inception
- Agreement setting forth scope and expectations
- Legal theories may, but not always, create unwanted duties or liabilities



Q & A



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