

## Fiduciary Duty in Construction

Occasionally, the issue of whether an architect or contractor owes a fiduciary duty comes up in a construction case. A “fiduciary” is a person having the duty to act primarily for another person’s benefit connected with a particular matter. An example of this is an executor of an estate or a trustee who possesses a fiduciary responsibility to the beneficiaries of the trust to follow the terms of the trust and the requirements of applicable state law.

If a contractor or architect has a fiduciary duty to the owner, that contractor or architect must place the owner’s welfare above his own. This is generally a higher standard than is found in normal construction contracts. This also would result in greater liability for the architect or contractor.

A recent North Carolina case<sup>1</sup> applied this to a contractor. In that case, the following language was included in the general conditions: “The Contractor accepts the relationship of trust and confidence established by Agreement and covenants with the Owner to cooperate with the Architect and utilize the Contractor’s best skill, efforts and judgment in furthering the interests of the Owner . . . .” The owner filed suit against the contractor, alleging unfair and deceptive business practices because the contractor breached its fiduciary duty to the owner resulting in constructive fraud. According to the owner, the contractor did not properly perform all of its contractual duties. The court held that because the architect was hired to perform construction administration and was to keep an eye on the contractor, there was no fiduciary relationship between the owner and this contractor, despite the language quoted above.

The 1997 version of AIA Document A201, includes the following language:

**9.6.7 . . .** Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the

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Contractor for breach of the requirements of this provision.

Although this paragraph is found in the section entitled “Progress Payments,” this language also makes it clear that no fiduciary duty is created by this document. This makes sense, because a contractor is normally not in a position of trust in relation to the owner. Usually, the opposite is the case. Nevertheless, contractors should be on the lookout for language in contracts that might be construed to create a fiduciary duty.

Architects are a more difficult case. Although the standard AIA documents do not make mention of any fiduciary duty, both the American Institute of Architects Code of Ethics as well as many state licensing acts<sup>2</sup> for architects have some reference to a fiduciary duty owed by the architect. As far as the licensing acts are concerned, this duty relates to the duty of an architect to protect the health, safety and welfare of the public. In that sense, it is not really a fiduciary duty because the protection of the public might actually require the architect to go against its clients own best interests. For instance, if the client insists that the architect violate the local building codes in order to reduce the cost of the building, the architect cannot comply with the owner’s wishes. The architect may actually have to inform the building authorities if the owner goes ahead and instructs the contractor to violate the code. This would probably constitute a violation of an architect’s fiduciary duty if one existed, but the architect’s duty to the public under state law overrides this in any case.

A fiduciary is often an agent. The standard AIA documents make it clear that the architect is not the agent of the owner. The architect has no authority to bind the owner in dealings with the contractors. The architect is a “representative” of the owner during construction (see ¶ 4.2.2 of A201) and has some limited authority, such as rejection of non-conforming work (¶ 12.2.1.1 of A201), but only the owner may accept non-conforming work (¶ 12.3.1). Changes in the Work require the signature of the owner to be effective (See Article 7 of A201).

While AIA documents are the most widely used and are considered the standard in the industry, what if non-standard documents are used? On many projects, there is only an oral agreement between the owner and architect. In these situations, what is the duty of the architect? Arguably, one could say that the AIA documents represent the custom and practice in the industry, at least with reference to the standard non-project-specific language contained in those

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documents. This is probably a correct approach, especially in light of the way that AIA documents are drafted – with participation by the various professional and trade groups that make up the construction industry. On any particular project, of course, the parties are free to deviate from the norm, and this is where one will find room for disagreement.

An unhappy owner may seek to impose a fiduciary obligation on an architect where the contractor did not properly perform, went bankrupt, or where there were other problems on the project that are not within the contractual obligations of the architect. As the *Eastover* case, cited above, demonstrates, owners will try to escalate minor contractual breaches to “unfair and deceptive trade practices” and try to recover more money than they could under ordinary contract law. Architects, as well as contractors, need to be careful about using non-standard language in their contracts, particularly when it comes to establishing standards of care and duties. They also need to avoid saying anything in any document that would indicate that they are undertaking any higher level of duty than is actually set forth in the contract.

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1. *Eastover Ridge, LLC v. Metric Constructors, Inc.*, 2000 N.C. App. LEXIS 900 (August 1, 2000).

2. For instance, the Illinois Architecture Practice Act, at Par. 305/13, includes this language: “Good moral character means such character as will enable a person to discharge the fiduciary duties of an architect to that person's client and to the public in a manner which protects health, safety and welfare.”

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