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# Construction Lending -- General Contractor v. Lender

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compelled to do so by the doctrine of stare decisis. It also appears that the court missed the opportunity to limit the *Cutts* opinion to its own facts as obiter dictum. Also present and missed was the opportunity to narrow its scope by assigning credibility as a matter of law in *Shearin* or at least recognizing the availability of that action on other facts.<sup>64</sup> Finally, available to and never mentioned by the majority were several possible distinctions between the two motions.<sup>65</sup>

In light of *Brooks* and *Bogle*, it is difficult to evaluate the significance of the *Shearin* holding. The danger in the court's blind application of *Cutts* is that *Shearin* will become the same rigid touchstone in summary judgment cases that *Cutts* has become in directed verdict cases. Unfortunately, it appears that this process has already begun.<sup>66</sup>

CARL N. PATTERSON, JR.

### Construction Lending—General Contractor v. Lender

Any number of complex legal relationships may be generated by a building construction project.<sup>1</sup> Even within the framework of an ordinary situation with standard contracts, small factual variations can produce very different legal consequences. The relationship between

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64. Since *Shearin* was basically a case of contract interpretation, granting summary judgment for plaintiff seems appropriate. See note 49 *supra*. However, in *Shearin* the option was certainly available to deny plaintiff's summary judgment motion since two of his affiants (the plaintiff and his friend) were interested parties. See text accompanying note 11 *supra*.

65. See text accompanying notes 44-58 *supra*. One final distinction is particularly troublesome. The impact of the *Cutts* opinion is somewhat ameliorated by the availability of a peremptory instruction to the movant. In this procedure the jury is instructed to find for the movant if it believes the movant's evidence. No such procedure is available in summary judgment proceedings.

66. *Shearin* was decided on October 1, 1975. Twice before the end of that year it was referred to in conjunction with *Cutts* concerning the propriety of summary judgment for the party having the burden of proof when the credibility of his witnesses is at issue. See *Equitable Leasing Corp. v. Kingsmen Prod.*, 27 N.C. App. 661, 663, 220 S.E.2d 95, 97 (1975); *Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp.*, 27 N.C. App. 403, 405, 219 S.E.2d 242, 243 (1975).

1. Unless otherwise indicated, the following situation is assumed: The owner of the property finances the project through a lender, for example, a savings and loan association. The owner contracts with a general contractor to build the building and agrees to pay him accordingly. The general contractor in turn employs various subcontractors and material suppliers. These subcontractors may similarly employ other subcontractors and material suppliers. The chain of subcontracts may become quite long on a major project.

the construction lender and the general contractor is one that has caused courts a great deal of difficulty. It is a relationship influenced by statutory law, common law, equity and contract. An especially difficult question, unresolved in North Carolina,<sup>2</sup> is what circumstances give rise to a claim for relief by a general contractor against a construction lender when the former has been unable to obtain payment from the party with whom he is in privity, namely, the owner.

The owner of property who wants to erect a building thereon normally obtains temporary financing to cover the costs of construction.<sup>3</sup> When the construction is complete, he obtains a long term loan secured by a new mortgage on the property and pays off the construction mortgage. The construction loan is normally disbursed in "progress payments" keyed to various stages of completion of the project.<sup>4</sup> The idea is that the borrower will be able to pay the general contractor and that the contractor will pay the various subcontractors and material suppliers in such a way that no one will go unpaid for completed work for very long.<sup>5</sup> Also, under this arrangement the various parties are supposedly motivated to complete the work soon so that they can be paid. A problem arises when the funds are somehow diverted from flowing smoothly to their proper destination. Work comes to a halt when payments are unreasonably delayed, and the scramble to get paid begins. If the lender forecloses and then seeks to complete the project without satisfying the unpaid parties, he may have difficulty getting people to do the work for various reasons.<sup>6</sup> Meanwhile, the partially completed building is exposed to weather and vandalism.

Statutory remedies are available to the unpaid parties to the project, but those remedies are often of no practical value. Generally speaking, the mechanics lien law in North Carolina<sup>7</sup> grants the claimants the right to assert liens against funds payable by the owner, but not

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2. *Urban Systems Dev. Corp. v. NCNB Mortgage Corp.*, 513 F.2d 1304, 1305 (4th Cir. 1975).

3. See G. NELSON & D. WHITMAN, *CASES AND MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT* 553-58 (1976).

4. *Id.* at 555; Lefcoe & Schaffer, *Construction Lending and the Equitable Lien*, 40 S. CAL. L. REV. 439 n.1 (1967) [hereinafter cited as Lefcoe].

5. The payments may not cover all of the costs of the in-place work for various reasons, including the possibility of a retainage provision. Lefcoe, *supra* note 4, at 439 n.1.

6. "When work stops, the suppliers and laborers who had participated are in a strong bargaining position. Union rules, camaraderie, and skepticism about the likely future of the project deter others from replacing them." *Id.* at 456.

7. N.C. GEN. STAT. § 44A (Cum. Supp. 1975).

against funds in the hands of the construction lender.<sup>8</sup> The claimants may also, through subrogation, enforce a lien against the land.<sup>9</sup> However, the liens on funds payable by the owner may well be worthless, as the owner probably was diverting funds already because of insolvency. Similarly, the lien on the property may be valueless as it only relates back to the beginning of construction and is probably subordinate to the construction loan mortgage.<sup>10</sup>

The North Carolina statute provides no remedy against the construction lender or the funds in his hands.<sup>11</sup> Those funds normally cannot be attached in a proceeding against the owner since the loan agreement and the owner's right to the funds have been terminated by his diversion of funds and the discontinuance of work. Lawyers for these claimants of undisbursed loan funds have advanced various theories, mostly without success.<sup>12</sup> In *Urban Systems Development Corp. v.*

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8. *Id.* §§ 44A-17(3),-18. First tier subcontractors have a direct right to liens on funds due to the contractor; second and third tier subcontractors may claim through subrogation to the rights of the party with whom they dealt. Although the language of section 44A-18(1) arguably reaches loan funds wherever they are if they are "owed to the contractor," *id.* § 44A-19, which deals with notice to the "obligor," a term which by definition (*id.* § 44A-17(3)) cannot mean the lender, when coupled with section 44A-18(6) requiring such notice, makes it clear that such a result was not intended. *See* text accompanying note 64 *infra*.

9. N.C. GEN. STAT. §§ 44A-8,-23 (Cum. Supp. 1975). The general contractor may enforce such a lien directly.

10. *Id.* § 44A-10; Lefcoe, *supra* note 4, at 440-41. The land may be subject to other prior encumbrances as well, for example, a purchase money mortgage. *Miller v. Mountain View Sav. & Loan Ass'n*, 238 Cal. App. 2d 644, 658, 48 Cal. Rptr. 278, 288 (1st Dist. 1965). For a discussion of priorities under the California statutes, see Comment, *California Mechanics' Liens*, 51 CALIF. L. REV. 331, 341-44 (1963). *See also* Kratovil & Werner, *Mortgages for Construction and the Lien Priorities Problem—The "Unobligatory" Advance*, 41 TENN. L. REV. 311 (1974).

11. N.C. GEN. STAT. § 44A-17(3) (Cum. Supp. 1975). The lender is not an "obligor." *See* note 8 *supra*.

12. The opinions reflect overlapping and ill-defined theories. One suspects that only a small fraction of the cases of this type have been appealed. The following are some of the theories advanced in cases relating to the instant fact situation: (1) Equitable assignment theory, *Pratt Lumber Co. v. T.H. Gill*, 278 F. 783, 789-90 (E.D.N.C. 1922); (2) reliance theory, *G.L. Wilson Bldg. Co. v. Leatherwood*, 268 F. Supp. 609 (W.D.N.C. 1967), *Wahl v. Southwest Sav. & Loan Ass'n*, 12 Ariz. App. 90, 102-03, 467 P.2d 930, 942-43 (1970), *Lampert Yards, Inc. v. Thompson-Wetterling Constr. & Realty, Inc.*, — Minn. —, 223 N.W.2d 418, 422 (1974), *First Nat'l State Bank v. Carlyle House, Inc.*, 102 N.J. Super. 300, 246 A.2d 22 (Ch. 1968), *Demharter v. First Fed. Sav. & Loan Ass'n*, 412 Pa. 142, 194 A.2d 214 (1963); (3) third party beneficiary claim, *Avco Delta Corp. Canada v. United States*, 484 F.2d 692 (7th Cir. 1973), *Demharter v. First Fed. Sav. & Loan Ass'n*, *supra*, *Clardy v. Barco Constr. Co.*, 205 Pa. Super. 218, 208 A.2d 793 (Super. Ct. 1965); (4) priority for liens over lenders' mortgages sought based on various principles of equity, *Ash v. Honig*, 62 F.2d 793 (2d Cir. 1933), *J.I. Kislak Mfg. Corp. v. William Matthews, Builder, Inc.*, — Del. —, 303 A.2d 648 (1973), *Bedford Lake Park Corp. v. Twelve Linden Corp.*, 8 App. Div. 2d 962,

*NCNB Mortgage Corp.*,<sup>13</sup> which originated in North Carolina,<sup>14</sup> the Fourth Circuit Court of Appeals rejected the general contractor's claims against the construction lender which were based on detrimental reliance,<sup>15</sup> third party beneficiary status,<sup>16</sup> and a trust fund theory.<sup>17</sup> In similar cases, unpaid claimants have asserted claims based on negligence.<sup>18</sup> They have also sought to have the lenders estopped on equitable grounds from asserting the priority of their mortgages to the claimants' mechanics liens.<sup>19</sup>

If diversion of construction loan proceeds is to give rise to a claim for relief against the lender, the theory the courts select is of minor consequence since several theories could be adapted to the situation. The equitable lien theory used by the California courts, before the legislature intervened and eliminated it, is probably the most flexible and appropriate. The California equitable lien doctrine is also the only theory that has generated a substantial number of judicial opinions and reached a

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190 N.Y.S.2d 834 (1959); (5) negligence theory, *Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp.*, 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (4th Dist. 1975), *Lampert Yards, Inc. v. Thompson-Wetterling Constr. & Realty, Inc.*, *supra* at 422-23, *First Nat'l State Bank v. Carlyle House, Inc.*, *supra*. (The writer has found no cases in which this last theory has been successful, seemingly because the courts have not found the duty of the lender to the plaintiffs that a negligence claim requires.) *See also* the California cases discussed in text accompanying notes 22-39 *infra*.

13. 513 F.2d 1304 (4th Cir. 1975).

14. Other North Carolina cases have been settled, avoiding appeals on similar claims. Letter from Edward C. Winslow III, an attorney in Greensboro, N.C., to Elizabeth Gibson, June 3, 1975, on file with the *North Carolina Law Review*.

15. 513 F.2d at 1306-07. Special circumstances, namely the allegation of an express promise, gave rise to this claim. Reliance on the fund is generally treated as an element of an equitable lien claim, rather than an independent ground of recovery. *See* note 17 and text accompanying notes 23-34 *infra*.

16. 513 F.2d at 1306.

17. *Id.* at 1305-06. *Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp.*, 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (4th Dist. 1975), was apparently not yet available to Judge Haynsworth when he wrote this opinion. *See* text accompanying notes 56-62 *infra*. It is not clear what he meant by the California "trust fund" theory. *See* 513 F.2d at 1305. He cited two cases; one, *Ralph C. Sutro Co. v. Paramount Plastering, Inc.*, 216 Cal. App. 2d 433, 31 Cal. Rptr. 174 (2d Dist. 1963), predicated its holding on certain contractual provisions and third party beneficiary principles and found that the loan funds constituted a trust for the benefit of the lender and the claimants. The project having been completed, the lender had received his benefit, and liens were granted to the claimants. The second case, *Miller v. Mountain View Sav. & Loan Ass'n*, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1st Dist. 1965), insofar as it relates to this type of claim, is really an equitable lien theory case, which is discussed beginning with note 22 *infra*. If Judge Haynsworth intended to state the requirements for recovery under the equitable lien theory in *Urban Systems*, he made an overstatement. *See* text accompanying notes 22-39 *infra*.

18. *See* cases cited note 12 *supra*.

19. *Id.*

significant level of development.<sup>20</sup> In *Urban Systems*, Judge Haynsworth alluded to the California "trust fund theory"<sup>21</sup> without determining its applicability in North Carolina. Because of the degree of development of the California theory, North Carolina can benefit from an analysis of the California experience.

A basic statement of the California equitable lien theory is found in the 1965 case of *McBain v. Santa Clara Savings & Loan Association*.<sup>22</sup> In *McBain* an equitable lien on undisbursed construction loan funds held by the lender was granted to subcontractors who had dealt directly with the owner-borrower.<sup>23</sup> Relying on older California equitable lien cases,<sup>24</sup> the court stressed that the claimants were entitled to senior liens on the fund because they had justifiably relied on the fund for payment,<sup>25</sup> even though the complaining subcontractors made no showing of enrichment of the lender as was made in those older California decisions.<sup>26</sup> The facts that the land was heavily encumbered prior to construction and that the owner lacked personal resources made reliance on the fund obvious.<sup>27</sup> The court quoted from the case of *Miller v.*

20. The cases are collected in Annot., 54 A.L.R.3d 848 (1974). See text accompanying notes 22-39 *infra*.

21. 513 F.2d at 1305; see note 17 *supra*.

22. 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (1st Dist. 1966).

23. *Id.* at 832, 841, 51 Cal. Rptr. at 80, 86. The owner apparently acted as his own general contractor.

24. *Id.* at 836, 51 Cal. Rptr. at 83. The older decisions were *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898 (1928) and *Pacific Ready Cut Homes v. Title Ins. & Trust Co.*, 216 Cal. 447, 14 P.2d 510 (1932). Another important precedent cited was *Miller v. Mountain View Sav. & Loan Ass'n*, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1st Dist. 1965).

25. The rule required that the borrower or the lender have induced the reliance, 241 Cal. App. 2d at 836, 51 Cal. Rptr. at 83, but the court also said: "Basically it is the fund itself and the arrangement for progress payments therefrom, created by the mutual agreement of the borrower and the lender, that constitutes the material inducement . . ." *Id.* at 841, 51 Cal. Rptr. at 86.

26. See *Boyd & Lovesee Lumber Co. v. Western Pac. Fin. Corp.*, 44 Cal. App. 3d 460, 464, 118 Cal. Rptr. 699, 701 (4th Dist. 1975).

In the older decisions granting recovery, *supra* note 24, the projects were completed with loan funds remaining and the owner in default. Assuming the value of the completed project to be at least the amount of the loan taken out initially, the lender had been "unjustly" enriched to at least the extent of remaining loan funds. See *McBain v. Santa Clara Sav. & Loan Ass'n*, 241 Cal. App. 2d 829, 845-46, 51 Cal. Rptr. 78, 89 (1st Dist. 1966); Lefcoe, *supra* note 4, at 444 n.11. See also note 41 *infra*.

None of the cases discarding the requirement of a surplus after completion or even a showing of any enrichment of the lender, see text accompanying notes 32 & 35 *infra*, reached the California Supreme Court, where *Smith* and *Pacific Ready Cut* were decided.

27. 241 Cal. App. 2d at 844, 51 Cal. Rptr. at 88. The system of progress payments and inspections constituted further inducement to rely. *Id.* at 843-44, 51 Cal. Rptr. at 87-88. The lack of personal finances was inferred from the inability to

*Mountain View Savings & Loan Association*,<sup>28</sup> cited also in *Urban Systems*.<sup>29</sup>

"Where the lender has received the benefit of the claimant's performance, and therefore a more valuable security for its note, it is not justified in withholding or appropriating to any other use money originally intended to be used to pay for such performance and relied upon by the claimant in rendering its performance."<sup>30</sup>

The *McBain* court assumed that lenders are capable of preventing loan misappropriations: "Respondent was therefore in a commanding position to employ well known and commonly accepted . . . methods to prevent the diversion . . . of the progress payments by the owners . . . ." <sup>31</sup> The court did not require the claimants to prove that the lender had been unjustly enriched; indeed, there was no indication that the incomplete project was worth more than the amounts already disbursed from the fund.<sup>32</sup> Thus *McBain* gave an equitable lien on remaining funds to any unpaid contributor to the project able to show reliance on the loan fund.

Two subsequent cases sharpened three significant aspects of the equitable lien theory. First, in *Doud Lumber Co. v. Guaranty Savings & Loan Association*<sup>33</sup> the court pointed out that reliance on the fund may be circumstantially proved with ease.<sup>34</sup> Second, *Doud* specifically rejected completion of the project as a prerequisite to recovery.<sup>35</sup> Third, in *Swinerton & Walberg Co. v. Union Bank*<sup>36</sup> California granted recovery under the equitable lien theory to a general contractor for the first

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purchase the land or build the building without extensive credit. See text accompanying note 34 *infra*.

28. 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1st Dist. 1965).

29. 513 F.2d at 1305 n.1.

30. 241 Cal. App. 2d at 836, 51 Cal. Rptr. at 83, quoting 238 Cal. App. 2d at 661, 48 Cal. Rptr. at 290.

31. 241 Cal. App. 2d at 842, 51 Cal. Rptr. at 86-87. See *Miller v. Mountain View Sav. & Loan Ass'n*, 238 Cal. App. 2d 644, 659, 48 Cal. Rptr. 278, 288 (1st Dist. 1965).

32. Lefcoe, *supra* note 4, at 444 n.11.

33. 254 Cal. App. 2d 585, 60 Cal. Rptr. 94 (1st Dist. 1967).

34. *Id.* at 589, 60 Cal. Rptr. at 96. "Both Smith and Ready Cut indicated that the necessary elements of inducement and reliance could be inferred from the circumstances of the transaction without great difficulty and suggested that an improver's knowledge that a construction loan had been negotiated would be sufficient." *Id.*

35. *Id.* at 592, 60 Cal. Rptr. at 98, quoting *Miller v. Mountain View Sav. & Loan Ass'n*, 238 Cal. App. 2d 644, 664, 48 Cal. Rptr. 278, 292 (1st Dist. 1965). "The reasoning behind Smith and Pacific Ready Cut Homes is as applicable to the claimant putting in the foundation, or the rough plumbing, as it is to the carpenter driving the last spike. All other factors being equal the rights of one contributing to the construction should not depend on the stage thereof at which his contribution was made." *Id.*

36. 25 Cal. App. 3d 259, 101 Cal. Rptr. 665 (2d Dist. 1972).

time.<sup>37</sup> The *Swinerton* court held that, in the equitable lien context,<sup>38</sup> general contractors who were independent from the borrower were indistinguishable from subcontractors in relation to the lender and to the policies behind the equitable lien.<sup>39</sup>

An article analyzing the California equitable lien in construction lending cases was published after *McBain*.<sup>40</sup> The authors, Lefcoe and Schaffer, point out that although the lenders in cases in which the owners divert loan funds have gotten a more valuable security because of the claimants' work, they have already disbursed funds once. Therefore they have not been unjustly enriched,<sup>41</sup> and there must be some reason to force them to pay twice instead of applying any remaining funds against the borrowers' loan liabilities.<sup>42</sup> Lefcoe and Schaffer discredit fault and the prevention of loan diversions as supportable rationales for granting equitable liens.<sup>43</sup> These commentators dismiss the court's assumption in *McBain* that lenders are more able to prevent borrowers from diverting the loan funds than are contractors and sub-

37. The appellant bank claimed that such a recovery had not been allowed before, and the court did not disagree. *Id.* at 264, 101 Cal. Rptr. at 668.

38. *Swinerton* distinguished *Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Ass'n*, 247 Cal. App. 2d 1, 55 Cal. Rptr. 884 (2d Dist. 1966). 25 Cal. App. 3d at 263-64, 101 Cal. Rptr. at 667-68. *Gordon* denied the general contractor an "equitable lien" based on a third party beneficiary claim, a contract theory, not an equitable lien theory as discussed herein. In addition, there was no proof of reliance in *Gordon*. *Swinerton* held that, "Since recovery in the present case is not grounded on contract but rather on equitable considerations arising out of estoppel and unjust enrichment, its disposition is not controlled by . . . *Gordon*." *Id.* at 264, 101 Cal. Rptr. at 668. *But see* text accompanying notes 26 & 32 *supra*, note 41 *infra*. The loan agreement in *Swinerton* contained a provision denying the creation of an interest in the fund in the contractor. 25 Cal. App. 3d at 266, 101 Cal. Rptr. at 670.

39. 25 Cal. App. 3d at 264, 101 Cal. Rptr. at 668. The only possible basis of distinction is that there are simply more parties between the lender and the subcontractors, and, hence, more possibilities for diversion of funds and a greater need for protection of the subcontractors' rights. On the other hand, it is arguable that simply because of the number of intervening parties, a general contractor may be more justified in relying on a construction loan fund. Certainly it should not matter that the general contractor's contribution may be largely of entrepreneurial and managerial effort rather than of materials or physical labor.

40. Lefcoe, *supra* note 4.

41. "Unjustly enriched" is used in the traditional sense. Disbursing to the owner according to contract can hardly be regarded as tortious behavior. RESTATEMENT OF RESTITUTION § 128 (1937). The lender may not have been enriched in any sense. The term "unjust enrichment" is used liberally in the equitable lien context to indicate the situation in which one party, the lender, has realized a gain, but another, the lien claimant, has suffered a loss.

42. *See* Lefcoe, *supra* note 4, at 444.

43. Lefcoe, *supra* note 4, at 442-43. Actually, prevention is only one objective of what Lefcoe and Schaffer termed an "allocation of resources" rationale. However, if this was the courts' rationale, prevention was certainly the ultimate objective.

contractors.<sup>44</sup> They also point out a number of problems with lenders' use of bonding or the voucher system as preventive measures.<sup>45</sup> In fact, a survey of California lenders taken after *McBain* showed insignificant movement to more sophisticated methods of supervising loans.<sup>46</sup> The mere threat of equitable lien liability was apparently insufficient to induce the drastic alterations in lending practices necessary to avoid liability under *McBain*.<sup>47</sup>

Lefcoe and Schaffer suggest a different basis for decision: the desire to mitigate losses due to delay in resuming construction after work has stopped.<sup>48</sup> Neither the allowance nor disallowance of equitable liens in all cases is likely to affect lenders' decisions to take over and complete disrupted projects.<sup>49</sup> The remedy should be limited so as not to put the various claimants in a position to be unreasonable about completing the work because of their possession of a claim against the lender.<sup>50</sup> As *McBain* imposes no such limitations, its rule is too broad.<sup>51</sup> Lefcoe and Schaffer assert that, under this rationale, equitable liens are justified in two situations:

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44. *Id.* at 447-48. See text accompanying note 31 *supra*. The *Miller v. Mountain View Sav. & Loan Ass'n* court mentions this proposition. 238 Cal. App. 2d 644, 658-59, 48 Cal. Rptr. 278, 288 (1st Dist. 1965).

45. Lefcoe, *supra* note 4, at 449-52. "Performance bonds" guarantee performance of the contract; "payment bonds" guarantee payment of the subcontractors and materialmen. See G. NELSON & D. WHITMAN, *supra* note 3, at 664-65. "[Bonding companies] do not seek to prevent losses by supervising the distribution of construction loan funds; rather, they rely on the credit of the borrower as a source of indemnity. This much lenders could do themselves. Bonding is efficient only for a lender less capable than a bonding company of checking borrower credit." Lefcoe, *supra* note 4, at 449. Mandatory bonding would inhibit certain small scale construction contrary to the public interest. *Id.* at 450.

The voucher system calls for disbursements only upon receipt of bills for completed work. The bookkeeping expense of paying each subcontractor is generally prohibitive, and paying the borrower directly facilitates the presentation of forged bills. *Id.* at 451.

46. Lefcoe, *supra* note 4, at 454. Greater selectivity of borrowers was attributed to the then tight money situation. *Id.* n.48.

47. "As a determinant of lending policy, the threat of equitable liens seems insignificant in relation to trends in the money market and demand for construction loans." *Id.* at 455. One reason for the scarcity of appellate opinions may be that the cost of litigation and appeal is simply too high compared to the amounts involved, which tend to be small. Large projects with large costs are usually bonded, eliminating the need for recourse to equitable liens for subcontractors and materialmen. *Id.* at 458 n.62. But see notes 69-70 *infra* concerning general contractors.

48. Lefcoe, *supra* note 4, at 456-58.

49. *Id.* at 456.

50. That is, if the remedy is allowed in all cases, the claimants are likely to get the same compensation for what they have already done regardless of whether they resume work. *Id.*

51. See text accompanying notes 23-32 *supra*.

First, when the lender forecloses and sells the incomplete project to a purchaser who finishes and resells for a substantial profit, this provides some evidence that the lender failed to act reasonably to mitigate loss. In such a case the tender [*sic*] without a coherent defense of its conduct (e.g., that materialmen and laborers capriciously refused to stay with the job) might properly be held accountable to unpaid materialmen on an equitable lien theory. Second, an equitable lien might be imposed in order to avoid unjust enrichment. Suppose the lender finishes after foreclosing mechanics' liens and realizes a profit above normal entrepreneurial gains. This surplus profit may be attributable to the earlier, uncompensated contribution of materialmen.<sup>52</sup>

Having identified two situations in which it is clearly unfair to deny the remedy to the claimants, the commentators also suggest that a reasonable profit should be preserved for the lender.<sup>53</sup>

The liberal allowance of recovery against lenders under the rule of *McBain* produced sufficient backlash to have the remedy legislated out of existence, possibly completely. In 1967 the California legislature enacted the following statute:

[N]o person may assert any legal or equitable right with respect to such [construction] fund, other than a right created by direct written contract between such person and the person holding the fund, except pursuant to the provisions of [the California stop notice<sup>54</sup>] chapters.<sup>55</sup>

In *Boyd & Lovesee Lumber Co. v. Western Pacific Financial Corp.*<sup>56</sup> the California Court of Appeals rejected the argument that the statute was intended only to abrogate the extension of the equitable lien theory that occurred in *McBain* and similar cases.<sup>57</sup> Instead, the court construed the new statute to abolish the equitable lien altogether<sup>58</sup> and expressed the

52. Lefcoe, *supra* note 4, at 457.

53. *Id.*

54. The stop notice is a device whereby the unpaid materialmen may enjoin the lender from making further disbursements. CAL. CIV. CODE § 3162 (West 1974). See Ilyin, *Stop Notice!—Construction Loan Officer's Nightmare*, 16 HASTINGS L.J. 187 (1964); Comment, *California's Private Stop Notice Law: Due Process Requirements*, 25 HASTINGS L.J. 1043 (1974). In *Connolly Dev., Inc. v. Superior Court*, 41 Cal. App. 3d 543, 116 Cal. Rptr. 191, 200 (5th Dist. 1974), the court held the bonded stop notice statute to violate procedural due process.

55. CAL. CIV. CODE § 3264 (West 1974). In *Swinerton*, a 1974 decision, the statute was held to be prospective only and, therefore, inapplicable to the events of 1965. See text accompanying notes 36-39 *supra*.

56. 44 Cal. App. 3d 460, 118 Cal. Rptr. 699 (4th Dist. 1975).

57. *Id.* at 464-65, 118 Cal. Rptr. at 701. See text accompanying notes 24-26 *supra*.

58. *Id.* at 465, 118 Cal. Rptr. at 701-02.

opinion that the mechanics liens and stop-notice statutes adequately provided for contractors, subcontractors and materialmen.<sup>59</sup> Concerning lenders, the court said, "[Lenders] are relieved of the expense and risk of policing the ultimate distribution of construction funds and can concentrate on their primary duty of providing construction loans at lesser expense to the borrower and ultimately to the consuming public."<sup>60</sup> The facts of the case did not compel the court to decide expressly whether a claim for relief would be stated if there were an allegation of unconscionable enrichment of the lender.<sup>61</sup> Thus the possibility of stating a claim under the circumstances that Lefcoe and Schaffer suggest as justifying the equitable lien remedy has not been properly foreclosed by *stare decisis*.<sup>62</sup>

North Carolina's courts have the opportunity to discard the worst of the California judicial theory and to retain and improve on the best. Development of this area of the law in North Carolina should not be impeded by her statutory scheme because it does not treat the construction lender's relationships with other parties,<sup>63</sup> and because there was no legislative intent to foreclose such development.<sup>64</sup> It is noteworthy that at the time California legislated the equitable lien out of existence,<sup>65</sup> that state still provided a statutory remedy against the lender.<sup>66</sup> North Carolina's statute is different.<sup>67</sup> Her courts should apply the equitable lien theory as Lefcoe and Schaffer recommend: (1) to prevent lenders from taking unfair advantage of an unpaid contractor's, subcontractor's, or materialman's contribution by granting recovery in such cases and (2) to assist in minimizing economic waste by not granting the remedy in all cases in which mere reliance is shown.<sup>68</sup>

Beyond that application, however, the North Carolina courts should consider applying the theory to another situation based on a prevention rationale, but should avoid the shortcomings of a *McBain*

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59. *Id.*

60. *Id.* at 465, 118 Cal. Rptr. at 702.

61. *Id.* at 466, 118 Cal. Rptr. at 702.

62. See generally Lefcoe, *supra* note 4, at 459, in which the authors described in their Postscript how the statute can be read to allow still the equitable lien in those cases in which they recommended its use. See text accompanying note 52 *supra*.

63. See N.C. GEN. STAT. § 44A (Cum. Supp. 1975), especially *id.* § 44A-17.

64. At least, such was the opinion of Professor Smith, a member of the committee that drafted section 44A. Interview with Richard M. Smith, Professor of Law at the University of North Carolina, February 11, 1976.

65. See text accompanying notes 54-62 *supra*.

66. The stop notice remedy was still available. See note 54 *supra*.

67. See text accompanying note 63 *supra*.

68. See text accompanying notes 48-52 *supra*.

type of rule. That situation occurs when the claim to the fund is made by an unpaid *general* contractor (rather than by subcontractors or materialmen) who simply proves that he relied on the fund for payment. This rule would encourage the lender to see to it that the proceeds of the loan make it at least past the owner to the next party in the chain of payment.<sup>69</sup> It may be that general contractors are just as likely as owners to misuse funds, but if the lender does his job, at least one party would be prevented from misusing the proceeds. Furthermore, by obligating the lender to supervise the distribution of funds to the general contractor, the first tier subcontractors are better able to protect themselves. The funds would at least make it to the party with whom the first tier subcontractors are in privity, or else the general contractor would have a claim against the lender that they could attach. Lenders should not be overburdened by this type of obligation, though they would be by an obligation to all possible claimants to the fund. Hopefully, unlike the *McBain* rule,<sup>70</sup> this approach, limiting recovery based on mere reliance to general contractors, would make it economically advantageous for lenders to verify that the requisite progress has been made prior to a disbursement and to obtain the owner's agreement to disburse funds directly to the contractor. Although it does not inhibit diversion further down the chain of payment, this rule would provide a reasonable measure of prevention.

Construction lending cases are difficult because of their differing fact situations and the problem of resolving disputes between two innocent parties. The California lien theory in the limited form advocated by Lefcoe and Schaffer, as opposed to the liberal view of *McBain*, would

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69. Any deterrence of mitigation (*see* text accompanying note 50 *supra*) caused by liberal allowance of the equitable lien to the general contractor should be outweighed by the prevention accomplished. Besides, it is not so difficult to find a new general contractor if the old one is unreasonable about finishing the job.

As for the fear that deterrence of mitigation of economic waste will result (as under the *McBain* rule) if subcontractors are able to obtain subrogation to the general contractor's claim by contract or otherwise, once the duty of the lender to get the payments to the general contractor is clear, fault becomes the controlling consideration if the lender fails in his simple duty.

Furthermore, when there is a payment bond guaranteeing payment to all subcontractors, the general contractor is an indemnitor of the surety and is the only party who really stands to lose if he has no recourse against the lender. He has no practical means of protecting himself from diversion by the owner. When he is granted the equitable lien remedy against the lender, and when there is a payment bond every innocent party is protected. The lender protects himself by getting the payments to the general contractor.

70. *See* text accompanying note 47 *supra*. The lender's cost of compliance with this rule is lower and the threat of lien liability is larger when the general contractor is the claimant.

not deter mitigation of loss and would prevent the lender from making a supernormal profit while others go unpaid. North Carolina can go one step further and reduce the number of loan misappropriation cases without unduly burdening lenders by granting equitable liens to general contractors who relied on construction loan funds but were not paid for completed work.

WILLIAM H. HIGGINS

### Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?

Shortly after the enactment of the North Carolina unfair trade practices legislation in 1969,<sup>1</sup> the hope was expressed that the state had taken a "unique approach" to consumer protection that might well succeed in curbing deceptive trade practices: a consumer protection statute to be enforced in large part by consumers themselves.<sup>2</sup> For almost six years, however, the potential of these sections had remained

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1. The main provisions of the legislation are to be found in the newly created section 75-1.1 which provides as follows:

**Methods of competition, acts and practices regulated; legislative policy.**—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C. GEN. STAT. § 75-1.1 (1975). In addition, the following sections were amended to make them applicable to all potential defendants in a deceptive trade practice action: *id.* §§ 75-9, -10, -11, -12, -16 (1975).

2. See Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 911 (1970) [hereinafter cited as Comment].