



Pitfalls of Lender's Assignment and Consent Agreements

RLI[®]
DIFFERENT WORKS

THOMPSON BECKER, LLC

RLI Design Professionals
DPLE 311

RLI Design Professionals is a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members are available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.



Copyright Materials

This presentation is protected by US and International Copyright laws. Reproduction, distribution, display and use of the presentation without written permission of the speakers is prohibited.

Acknowledgement to George J. Vogler, “Certifications, The Owner is On the Phone and the Lender Wants These Papers Signed Now!”, The AIA Trust, “Lender Assignment and Certification Requirements”.

© RLI Design Professionals



DIFFERENT WORKS

THOMPSON BECKER, LLC

Disclaimer

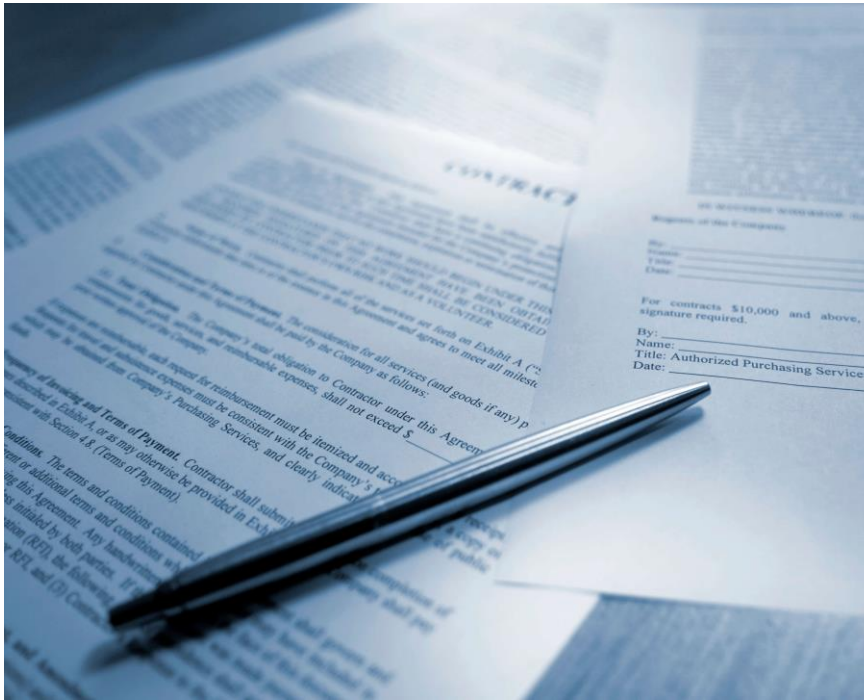
The material is intended for informational purposes on the subject and should not be taken as legal advice. Please consult appropriate advisors for guidance applicable to your individual circumstances and/or state requirements.



DIFFERENT WORKS

THOMPSON BECKER, LLC

Course Description



In today's climate, more and more design professionals are being asked to address client issues relative to financing, such as a lender's request for an assignment or certification. This presentation will focus on the often overlooked and misunderstood agreements issued by lenders, and explain how certain provisions, or even a single word, can potentially jeopardize a design firm's professional liability coverage and/or expose a design firm to unanticipated liability.

Learning Objectives

Participants will learn:

- 1** Discuss some of the implications and pitfalls for design professionals providing a lender requested consent to an agreement or certification;
- 2** Consider contract language that can help design professionals manage and mitigate some of the associated risks;
- 3** Identify “red flag” words and other contract language design professionals may wish to avoid; and
- 4** Review strategies for negotiating for fair consents and certificates.

Providing Lender Requested Documents



Contractual obligations

Are you required by the contract to provide a consent to an assignment, a certification, or to furnish services to the lender? If not, leverage that to negotiate for acceptable terms.

Practical considerations

Do not be pressured to accept unreasonable terms or waive contractual protections just to accommodate the client.

Assignment

The Owner and [Design Professional], respectively bind themselves, their agents, successors, assigns, and legal representatives to this Agreement.

Neither the Owner nor the [Design Professional] shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement, including any payments due to the [Design Professional] by the Owner prior to the assignment.

AIA A201-2017 § 10.3

Certifications

If the Owner requests the [Design Professional] to execute certificates, the proposed language of such certificates shall be submitted to the [Design Professional] for review at least 14 days prior to the requested dates of execution. If the Owner requests the [Design Professional] to execute consents reasonably required to facilitate assignment to a lender, the [Design Professional] shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the [Design Professional] for review at least 14 days prior to execution. The [Design Professional] shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement.

AIA A201-2017 § 10.4

Negotiating the Consent and Certificate



Avoid:

- signing an onerous consent,
- providing an unfair certification to the assignee, or
- otherwise extending rights to the lender that are not envisioned by the contract with the client.

Issues and Concerns

Things to Consider...

Unknown client: Are you comfortable providing services to an unknown client – both before and after the assignment?

Compensation: Will you be properly compensated for services after a loan default?

Instruments of service: Could your instruments of services be used in an unmanaged situation, increasing the risk of claims against you?

Certifications: Are you extending your liability through any certifications or statements to the lender?

Warranty or guarantee: Does the assignment contain express warranty or guarantee language?

Assumption of Rights and Obligations

Revise any provision that seeks to assign the benefits but avoid the obligations of the agreement.

Sample Revision

The undersigned Engineer acknowledges the assignment by Owner to Lender, as additional security under a Construction Loan Agreement, of all of the rights ~~but not obligations~~ and obligations of Owner in the Agreement between the Owner and Engineer pertaining to the construction of the improvements described in the Plans (the “Improvements”). Engineer hereby consents to and agrees to be bound by such assignment.

Protecting Your Fee and Plans

Place appropriate conditions on the license to use your instruments of services upon termination.

Sample Revision

Irrespective of Engineer being further actively employed, Lender and Lender's Successors shall be entitled to use for the completion of the Improvements the Plans prepared by Engineer for the project, ~~without further cost to Lender or Lender's Successors~~ provided Engineer has been fully paid past sums for services rendered on the project and Lender releases Engineer from future liability and defends and indemnifies Engineer from all claims arising out of Lender's use of the Plans.

Protecting Your Fee and Plans

Condition the continuation of your services upon the receipt of payment due for services rendered prior to the assumption of rights by Lender.

Sample Revision

Lender shall have the rights of Owner under the Architect Agreement, including the right to use the Plans and the ideas, designs and concepts contained therein in connection with the completion of the Improvements provided Architect continues performance under the Architect Agreement and is paid all amounts due and owing for architectural fees, costs and expenses for services performed, as provided for in the Architect Agreement, and any overdue fees, costs and expenses at the time Borrower requests the continued performance of Architect.

Avoid Assuming Additional Obligations

Delete references to services, obligations, or waivers not included in the Client Agreement.

Sample Revision

Architect agrees to give Lender written notice of any material defaults by Borrower under the Contract, and to give Lender, at the sole option of Lender, the right to cure any material defaults by Borrower under the Contract within ~~60~~ 14 days (or such longer period of time, if any, as permitted in the Contract for the curing of any such defaults) after receipt by Lender of written notice of such material defaults, ~~during which time Architect will not exercise any remedy available under the Contract, at law, or in equity, arising from such default by Borrower until Lender shall have had the opportunity to cure such default.~~

Avoid Assuming Additional Obligations

Delete references to services, obligations, or waivers not included in the Client Agreement.

Examples

“Engineer shall provide Lender promptly in each case with (a) any information regarding defects in workmanship or materials which come to Engineer's attention, (b) any deviations or variations in construction of the project from the Plans, (c) any information Engineer may have regarding any defaults by Owner or any contractor or subcontractor under any construction contracts, and (d) any claims of non-payment by any person furnishing labor or material in connection with construction of the project.”

“The undersigned shall not make any changes in the Plans without the prior written consent of Lender and shall immediately notify Lender of any changes of which undersigned may become aware.”

Certifications

Certifications can increase your exposure and present insurance coverage issues.

Certification

A document attesting the truth or a fact or statement.

*Please note: To “certify” means to establish a thing as fact and may create a warranty or guarantee of truth; as such, it may also present coverage concerns that further increase your risks.



RLI Policy Exclusion

Express Warranties or Guarantees

This Policy does not apply to any Claim(s):

Based upon or arising out of any express warranties or guarantees. However, this Exclusion does not apply to a warranty or guarantee by the Insured that the Insured's Professional Services are in conformity with the standard of care applicable to that Professional Service.

Avoid the Word “Certify”

Things to Consider...

Strike “certify”

Strike the word “certify”. Instead use “in the Design Professional’s opinion...”, “We hereby opine...”, “it is our opinion that...” or similar language.

Define “certify”

In the event the word “certify” cannot be expunged, asterisk (*) the words “certificate” and “certify” and insert the following footnote:

*The word “certify”, as used in any of its forms herein, is an expression of a professional opinion only and shall not be construed or understood to be a statement of fact, a warranty, or a guarantee of any kind, expressed or implied.

Avoid the Word “Certify”

Sample Revision

~~We certify that~~ In our professional opinion, and based upon information provided by Owner, the permits identified on Exhibit A, attached hereto and incorporated herein by this reference are the only federal, state or local permits or approvals required for the construction of the Improvements that are applicable to and within the architect’s scope of service and have been obtained by or on behalf of the Owner, and except as otherwise noted, each has been validly issued by the appropriate authorities. However Architect does not represent that Exhibit A is a complete list of every permit and approval obtained by or on behalf of the Owner for the project or still required for the project.

Avoid the Word “Certify”

Sample Revision

~~We certify that~~ It is our professional opinion that upon completion of the Improvements substantially in accordance with the Plans, the Improvements will substantially comply with the Plans and ~~all applicable~~ those building codes and regulations, including, without limitation, federal, state and local laws, statutes, regulations, and ordinances applicable to and within the scope of the Architect’s services provided under the Contract.

Avoid the Word “Certify”

Sample Revision

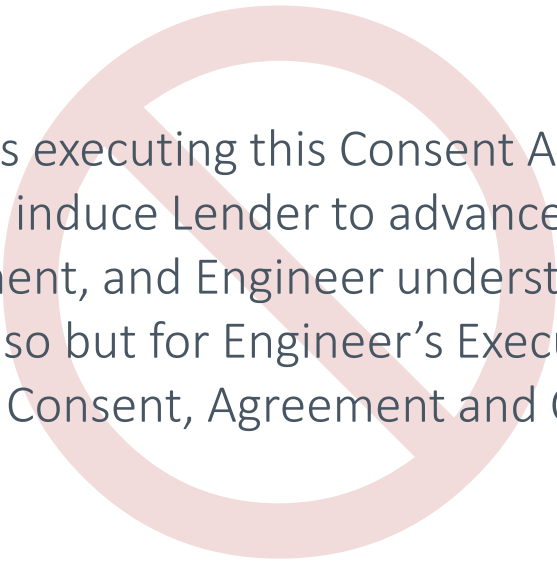
~~We certify that~~ the Plans have been prepared and will continue to be prepared in accordance with customary professional standards of architectural practice for projects similar to the Improvements, such that when finalized, the Plans will be complete and adequate, in the Architect’s professional opinions, for the construction of the Improvements.

Inducement or Reliance Provisions

Strike provisions that claim the Lender being induced or relying upon your consent and/or certification.

Sample Revision

Engineer is executing this Consent Agreement and Certificate to induce Lender to advance funds under the Loan Agreement, and Engineer understands that Lender would not do so but for Engineer's Execution and delivery of this Consent, Agreement and Certificate.



Time and Pressure

Don't be pressured into signing the lender's form(s)!

Standard industry forms provide for:

Review period

AIA B101-2017 gives the design professional at least 2 weeks to review the proposed language.

Limitations

AIA B101-2017 clarifies the design professional shall not be required to execute anything requiring knowledge, services or responsibilities beyond the scope of the Agreement.



Your contract should contain similar protections!

Closing

Remember...

- ✓ Include appropriate language in your client agreement.
- ✓ Negotiate a fair consent/certificate with Lender.
- ✓ Do not certify!
- ✓ Do not be pressured!
- ✓ Seek advice.

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program

John M. Becker
Ten Melrose Avenue, Suite 400
Cherry Hill, NJ 08002

THOMPSON BECKER, LLC

RLI[®] DIFFERENT WORKS