MEMORANDUM

TO: Tony Darkangelo
FROM: Michael McNally
DATE: December 21, 2018
RE: LMCI

Our File No: 12788.001

You have asked that we provide you with answers to a couple questions regarding the obligation of contractors to contribute to the LMCI following termination and if, or how, the arbitration between the Employer and Union Trustees bears upon the obligations of contractors with respect to the Finishing Industries Labor Management Partnership Trust.

Q. I have been told that the LMCI terminated, and that as a result there is no longer an obligation to continue remitting contributions to the LMCI. My local BMST, however, has insisted that because my collective bargaining agreement requires me to contribute to LMCI I am bound to do so, despite the fact that the LMCI is terminated. Which is it?

A. It is important to briefly clarify 2 points, before turning to the question:
   - As of December 14, 2018, the LMCI Agreement and Declaration of Trust was terminated. The Trust, specifically the corpus of the Trust, continues to exist after the Trust Agreement terminates.
   - The LMCI Trustees have a continuing obligation as Trustees to windup the affairs of the Trust following termination of the Trust Agreement, and to protect, preserve and maintain the Trust’s assets.
   - The Arbitrator will decide the deadlocked motions concerning the ultimate disposition of the Trust’s assets.
To the question, the LMCI is an intended third-party beneficiary of collective bargaining agreements between District Councils, or local unions, and contractor associations, or individual contractors. The obligations contained within those CBAs to contribute to LMCI were premised on the basic assumption that LMCI would engage in programs and initiatives that would advance the signatory finishing industry, and that LMCI would continue to exist to fulfill those purposes.

It is a well-settled principle of contract law that when an intended third-party beneficiary of a contract will not provide the benefit a promisor and promisee relied upon in making their agreement, because the third-party beneficiary will no longer exist or otherwise, the promisor and promisee are relieved of their obligations under their agreement. See Restatement (Second) of Contracts § 265 (nothing that when an event eliminates “a basic assumption on which the contract was made” a party’s performance obligations are discharged unless there exists contrary language in the underlying agreement); § 263, cmt. a (stating that if the continued existence of a “specific thing is necessary for the performance of a duty” is a “basic assumption on which the contract was made,” then the deterioration or elimination of such entity discharges any corresponding performance duties which are now impracticable.)

Moreover, where the third-party beneficiary will fail to perform its essential purpose through no fault of a promisor, but rather the fault of another, including the promisee or its agents, the promisor has no obligation under the terms of the agreement. See, e.g., W. L.A. Inst. For Cancer Research v. Mayer, 366 F.2d 220, 223 (9th Cir. 1966) (holding that a supervening factor not attributable to the promisor that makes it impossible for one party to receive “the result which the parties intended him to receive” absolves performance under a contract); Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 A.D. 484 (N.Y. Ct. App. 1915) (noting that the removal of an implied provision of a contact through no fault of either party “abrogates the contract”); 20th Century Lites v. Goodman, 149 P.2d 88 (Cal. App. Dep’t Super. Ct. 1944) (affirming the ability of a promisor to cease on-going payments when the underlying purpose of a contract becomes frustrated).

The agreements to contribute to the LMCI under local area CBAs were predicated on the basic assumptions of the LMCI’s continued existence and its promotion of programs to support labor-management cooperation and advancement of the signatory finishing industry. With the termination of LMCI, it will be wound down and fail to perform its essential purpose. The LMCI’s failure is attributable solely to the IUPAT. Because of that failure, the obligation of contractors to continue contributing to LMCI following termination of the Trust Agreement also terminates.
Any grievance threatened by a District Council or local union against contractors for failing and refusing to contribute to LMCI following its termination is without merit.

Q. My local BMST has suggested that we should wait to hear what the arbitrator rules because that will tell us whether we need to contribute to the Finishing Industries Labor Management Partnership, or not. Is that accurate?

A. No.

To recap, on November 13, 2018, the IUPAT provided notice that it was unilaterally terminating the LMCI Trust Agreement. That meant that 30 days following the IUPAT’s notice the Trust Agreement would terminate.

The next day at the Board of Trustees meeting the Trustees deadlocked on motions concerning the disposition of the Trust’s assets upon termination. Both the Employer and Union Trustees demanded arbitration to decide their respective deadlocked motions.

On January 23 and 24, 2019, the Employer and Union Trustees will present their cases before the Impartial Arbitrator. He will decide the deadlocked motions and the disposition of the Trust’s assets.

The Arbitrator has no authority to decide the terms of your CBA. Whether, or not, you will contribute to the Finishing Industries Labor Management Partnership Trust is between you and your District Council or local union. The Arbitrator’s ruling will not answer or address that issue. All he will decide is the disposition of the Trust’s assets.