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Legal Update: Architects Beware: It Is Now Settled That The Principal Architect Owes a Duty of Care to Third Party Purchasers for Negligent Design

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In *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP,* the California Supreme Court held that architects and engineers can be held liable to condominium owners for negligently prepared plans, specifications or design modifications. In doing so, the Court enlarged the scope of duty owed by design professionals to third party purchasers, holding that the principal architect on a project owes of duty of care to future homeowners – even when the design professional does not exercise the ultimate control over construction decisions.

In *Beacon* two architectural firms provided architectural and engineering services for the Beacon Residential Condominium Project, a 595-unit condominium development located near AT&T Park in San Francisco. Although the 595 units were initially rented out for two years, the two architectural firms knew from the beginning that ultimately the units would be sold to third party purchasers as condominiums.

The Association's complaint named as defendants the original owner and developer as well as the Architect and Engineer with whom the developer had contracted for design professional services. The professional services were in excess of $5,000,000 and included construction administration and construction contract management. As alleged, the design professionals had an active role throughout the construction, coordinating design and construction teams, providing weekly site visits and inspections, monitoring contractors for compliance with the design plans and making recommendations for design revisions, as needed.

The Association alleged that the Architects' negligent design resulted in several defects, with "solar heat gain" being the principal defect, which rendered the units uninhabitable and unsafe as a consequence of the high temperatures generated. The Association claimed that the solar heat gain was caused by the Architects' recommendation to reduce the amount of ventilation ducts coupled with the Architects' approval of less expensive, substandard and nonoperational windows.

Defendants' demurrer was sustained by the trial court which held that under *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co.* (2004) 125 Cal. App.4th 152, 158-162*,* the architect and engineer owed no duty of care to the Association or to the future condominium owners. Absent such a duty, liability for negligent design could not be imposed.

The Appellate Court reversed and held that the design professionals owed a duty of care to subsequent purchasers of residential projects under the six factor analysis set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 as well as under the Right to Repair Act (SB 800, codified in Civil Code § 895, et seq.), which expressed a Legislative intent to impose on design professionals a duty of care to future homeowners. *Beacon* (2012) 211 Cal. App. 4th 1301. The California Supreme Court granted review and affirmed the Appellate Court's decision.

Embracing the six factor balancing test established in *Biakanja,* the California Supreme Court determined that a duty of care exists despite the absence of contractual privity. Notably, the Court declined to rule on whether the Right to Repair Act was dispositive on the issue of duty. The Court relied upon several Appellate Court decisions where the foreseeability of harm to third persons (for personal injuries or property damage) was apparent and arose out of improper design (in plans, specifications or revisions), sufficient to impose a duty of care on the design professionals. Reviewing each prong on the six factor balancing test, the Court determined that:

1. The architect's work was intended to benefit the homeowners living in the residential units that defendants' designed;
2. It was foreseeable that the homeowners would be among the limited class of persons harmed by the negligently designed units;
3. The Association's members suffered injury; the design defects made their homes unsafe and uninhabitable during certain periods;
4. In light of the nature and extent of the Architects' role as the sole Architects on the Project, there is a close connection between the defendants' conduct and the injury suffered;
5. Because of the Architects' unique and well compensated role in the Project coupled with their awareness that future homeowners would rely on their specialized expertise in designing safe and habitable homes, significant moral blame attached to the defendants' conduct;
6. The policy of preventing future harm to homeowners relying on an Architects' specialized skill, supports imposition of the duty of care. *Id*. at 22-23.

In determining that a principal architect owes a duty of due care to third party purchasers, the Court compared the facts and public policy considerations in *Beacon* to those in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 where the Court held that an auditor generally owes no duty of care to its client's investors, with negligence liability being limited solely to the party that contracted for the auditor services. In comparison to the secondary role played by the auditor in the financial reporting process, an architect has a *primary* role in the design of a project and in *Beacon* the design deficiencies bore a "close connection" to the injuries alleged by the Association. The Court rejected the architects' argument that liability should not be extended to third party purchasers because the developer, contractor and subcontractors retained primary control over the construction process and had the "final say on how the plans were implemented"; the Court observed that lawyers do not escape liability for negligence to clearly intended third party beneficiaries "on the ground that the client has the ultimate authority to follow or reject" the lawyer's advice, and held that "so too an architect cannot escape such liability on the ground that the client (developer) makes the final decisions." *Id.* at 18. Second, unlike an auditor's potential liability to investors which would likely be "in an indeterminate amount for an indeterminate time to an indeterminate class," in *Beacon* there was no question that the Architects' work on the Project "was intended to affect the Association" and that the "end or aim of the transaction was to provide safe and habitable residences for future homeowners, as a specific foreseeable and well defined class." *Id.* at 20. Finally, the California Supreme Court found uncompelling the prospect of private ordering as an alternative to negligence liability. The Court observed that the average homebuyer is similar to the presumptively powerless consumer in product liability cases because a typical homeowner relies on the skill of the developer and the implied representation that the house was built in an workmanlike manner fit for habitation. The Court flatly rejected the notion that pursuit of the developer for a design defect claim or an assignment of the developer's rights against the Architects was in any manner equivalent or adequate.

The Court also distinguished *Weseloh,* where the Appellate Court had determined that an engineer had no tort duty of care to the third party owner because the engineer had been retained by a subcontractor and neither the engineer nor design firm had a role in the construction of the defective retaining walls. The Court stated that the *Weseloh* defendants held a materially different role in the construction project than the role of the defendant Architects in *Beacon*:

The circumstances in this case are plainly different . . . defendants here were the sole entities providing architectural services to the Project. They did not provide their specialized services to a client or other entity that in turn applied its own architectural expertise to the plans and specifications supplied by the defendants. Moreover, defendants not only applied their expertise to designing the Project but further applied their expertise to ensure the construction would conform to the approved designs. *Weseloh*, which expressly limited its holdings to its facts, does not stand for the broad proposition that a design professional cannot be held liable in negligence to third parties so long as it renders professional advice and opinion without having ultimate decision making authority. Instead, *Weseloh* merely suggests that an architect's role in a project can be so minor and so subordinate to the role or judgment of other design professionals as to foreclose the architect's liability and negligence to third parties. *Id.* at 24-25.

In summary, *Beacon* establishes a new bright line rule imposing liability on architects that function as the principal architect on a project, even where the architect does not exercise ultimate control over construction decisions. *Beacon* is another example of the Court's continued reliance on the six *Biakanja* factors to find a duty of care where that duty is a logical extension of existing case law.[1]

While architects have never been immune from liability exposure in construction defect actions, typically they are joined as cross-defendants by the developer for contractual or equitable indemnity, in response to a homeowner's association or single family home buyer's direct action against the developer. Joinder as a cross-defendant creates a buffer between the homeowner and the architect, frequently resulting in a reduction of the architect's financial contribution to a global settlement, despite the architect's defective design which caused the defective condition. Direct actions, as authorized under *Beacon,* will enhance the plaintiff homeowner's leverage over the architect.

Beacon, arguably, leaves open potential arguments for the principal architect attempting to shield itself from owing a duty of care to third party homeowners based upon the scope of the architect's services (the cost of the professional services delivered was negligible, the architect had no active role throughout construction etc.). That said, such factors will be subject to the *Biakanja* balancing test, inappropriate under most circumstances to challenge by demurrer, and ensuring the principal architect's participation in the action, at least until the architect has the ability to file a motion for summary judgment on the issue of duty.

[1] It remains open whether the Right to Repair Act -- which provides that a design professional who "as a result of a negligent act or omission" causes in whole or in part a violation of the standards set forth in Civil Code section 896 for residential housing -- will be interpreted to impose liability for damages on architects to the ultimate purchasers of residential housing.

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