

Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP, et al. (issued December 13, 2012; First Appellate District No. A134542)

A California Court of Appeal has unequivocally held that a design professional may be held liable for its negligence in causing or contributing to construction defects in a residential project – even if the design professional was not in direct contract with third party purchasers. Prior to this decision, California law was unclear as to whether design professionals owe a duty to purchasers of residential construction based on theories of negligent design. Unless the case is subsequently overturned by the California Supreme Court, the existence of that duty is certain, although the scope of the duty remains to be applied on a case-by-case basis.

In *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP, et al.*, plaintiff homeowners' association filed suit against the architects alleging "Civil Code Title 7 – Violation of Statutory Building Standards for Original Construction," "Negligence Per Se in Violation of Statute," and "Negligence of Design Professionals and Contractors." The architects demurred asserting that they did not owe plaintiff a duty of care since they had no contractual relationship with the homeowners' association. The trial court ruled in favor of the architects and sustained the defendants' demurrer. The trial court concluded that the architects' liability could not be premised on negligent design. Instead, the trial court ruled that plaintiff was required to show that the architects had "control" over the construction process and assumed a role beyond that of providing design recommendations to the owner. The trial court found the plaintiff's allegations did not show that the architects went beyond the typical role of the architect, which is to make recommendations to the owner. The First Appellate District reversed based on its analysis of both case precedent and statutory law.

Overview Of Case Law

The court's analysis of the common law started with consideration of certain factors derived from *Biakanja v. Irving* (1958) 49 Cal.2d 647. These considerations include: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Id.* at 650-651. In *Biakanja*, the court permitted the intended beneficiary under a will prepared for the decedent to recover damages from the defendant notary public who failed to have the will properly attested. In concluding

the notary owed a duty to an intended beneficiary not to mishandle the will's drafting and solemnization, the court held that a defendant's negligent performance of a contractual obligation resulting in damage to the property or economic interests of a person – even one who is not in privity – could support recovery if the defendant was under a duty to protect those interests.

The *Beacon* court next considered the court's holding in *Bily v. Arthur Young & Co., Inc.* (1992) 3 Cal.4th 370. In contrast to *Biakanja*, in *Bily*, the Supreme Court held that an accounting professional's duty of care in preparing an independent audit of a client's financial statements for the client's public stock offering did not extend to persons other than the client. In limiting general negligence liability to the direct clients of the auditor, the Supreme Court considered the following policy considerations: whether the imposition of liability is out of proportion to fault, the ability of third parties to contract around liability, and which party is best suited to bear losses. *Id.* at 405. The *Bily* court observed that "judicial endorsement of third party negligence suits against auditors limited only by the concept of foreseeability raises the spectre of multibillion-dollar professional liability that is distinctly out of proportion to: (1) the fault of the auditor (which is necessarily secondary and may be based on complex differences of professional opinion); and (2) the connection between the auditor's conduct and the third party's injury (which will often be attenuated by unrelated business factors that underlie investment and credit decisions)." *Id.* at 401-402.

In its ruling in the architects' favor, the *Beacon* trial court had relied on *Weseloh Family Ltd. Partnership v. K.L. Wessell Construction Co., Inc.* (2004) 125 Cal.App.4th 152. In that case, defendant engineers designed a retaining wall for a commercial property on behalf of a subcontractor. They were sued by the property owner and by the general contractor when the wall failed. The trial court granted motions for summary judgment on the ground that the design engineers did not owe a duty of care to the property owner or to the general contractor. The appellate court affirmed. The *Beacon* appellate court, however, distinguished application of *Weseloh*, stating "[i]t is important to note that the holding in *Weseloh* was premised on the evidentiary record before the court and plaintiffs' failure to satisfy their burden in opposing the defendants' motion for summary judgment. The court limited its holding to the facts before it, stating that '[o]ur holding should not be interpreted to create a rule that a subcontractor who provides only professional services can never be liable for general negligence to a property owner or general contractor with whom no contractual privity exists. There might be a set of circumstances that would support such a duty, but it is not presented here.'" *Id.* at 173.

The *Beacon* court then proceeded to analyze a number of other cases that considered whether a design professional may be sued for negligence in the preparation of plans and specifications either by the client or by third persons. *See, e.g., Mallow v. Tucker, Sadler & Bennett Architects etc., Inc.* (1966) 245 Cal.App.2d 700, 703; *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 299. The court found that all of these cases supported a ruling against the design professional. In the one case where the Supreme Court did adopt a rule precluding

damage recovery for purely economic losses for alleged deviations from applicable building codes or industry standards, such rule, the *Beacon* court noted, was abrogated by the enactment of Senate Bill No. 800 (discussed below). See, *Aas v. Superior Court* (2000) 24 Cal.4th 627,635. Moreover, the *Beacon* court observed, the *Aas* decision nonetheless reiterated that builders of homes had a duty independent of contractual obligations arising from principals of tort law supporting negligence for construction defects causing property damage. *Id.* at 643.

Application Of The *Biakanja* And *Bily* Factors

Turning, then, to the scope of that duty, the *Beacon* court considered each of the *Biakanja* and *Bily* policy factors, providing a model for analyzing different sets of facts in this context. Focusing on the architects' design roles, the *Beacon* court analyzed each factor as follows:

1. **Extent To Which The Transaction Was Intended To Affect Plaintiff.** The court cited the parties' "no third party beneficiary" language in the contract and stated the parties could not by contract not limit their statutory duty to third parties. The court found this language only served to emphasize the fact that the architects were well aware that future homeowners would necessarily be affected by the work they performed.
2. **Foreseeability Of Harm.** The court reasoned that since professional skill is required to prepare an architect's design documents, a failure to exercise reasonable professional care in the design of residential construction presents readily apparent risks to the health and safety of the ultimate occupants.
3. **Degree Of Certainty That The Plaintiff Suffered Injury.** Plaintiff alleged a number of building defects resulting from the architects' defective work. In light of the procedural background under which this issue was being presented to the appellate court, the court accepted as true the plaintiff's allegations for purposes of its analysis.
4. **Closeness Of Connection Between Defendant's Conduct And The Injury Suffered.** The court noted plaintiff had alleged that significant defects resulted from the architects' deviation from the applicable standard of care. The court stated that the fact that others, including the owners, were alleged to have contributed to the defects should not serve to limit the responsibility of the architects given their unique qualifications to make design decisions and their expertise upon which the builder presumptively relied. In fact, in response to the architects' argument that their duty to the owner would conflict with their duty to third parties, the court stated "[w]e do not see . . . how requiring a design consistent with architectural and statutory standards is in conflict with the duty already owed by an architect to the client." (The architects had argued that their duty to their client, which allowed for the owner's value engineering decisions, ultimately resulted in the selection of the non-performing windows.)

5. **The Moral Blame Attached To Defendants' Conduct.** The court found the plaintiff alleged significant failures in the project components specified in the design, as well as deficiencies in design, that resulted in actual property damage and health safety risks. Less moral blame, the court noted, would attach to defects that do not present a risk to health or safety to structural integrity.

6. **The Policy Of Preventing Future Harm.** In analyzing the appropriate policy, the court considered these factors: (1) potential imposition of liability out of proportion to fault, (2) the possibility of private ordering of risk, and (3) the effect on the defendants of third party liability. As to the first factor (1), the court noted that there were approximately 40 defendants involved in the case and multiple cross-claims for contribution and indemnity. Hence, the court reasoned, the architects' comparative fault, including their right to be indemnified and obligation to indemnify others, would necessarily be litigated whether or not there is direct liability to the plaintiff. Moreover, the universe of potential plaintiffs here is limited to 595 condominium unit owners. In *Bily*, the court was concerned with liability to an unknown universe of potential investor plaintiffs. Finally, in its assessment of the first factor, the court gave significant weight to the fact that the architects were paid over \$5 million for their services.

As to the second factor (2), the court observed that the average home buyer does not have the ability to privately order allocation of liability among themselves by contract or through insurance coverage. In contrast, the parties participating in the development process do have such ability.

As to the third factor (3), the court stated the goal was to establish a policy balance between efficient loss spreading, on the one hand, and the potential for dislocation of resources, on the other. The court recognized that the imposition of liability against the architects could negatively impact the cost of housing and limit the willingness of design professionals to undertake large residential construction projects.

Despite its assessment, the court proceeded to rely completely on Senate Bill No. 800 as a legislative expression of the social policy choices relevant to a *Biakanja/Bily* analysis. The court stated "ultimately, it is not our assessment of the *Biakanja/Bily* policy analysis that matters" since the Legislature has "clearly expressed its view of those policy choices" in enacting Senate Bill No. 800, also known as the "Right to Repair Act." While the court acknowledged that an analysis was required of whether Senate Bill No. 800 applied in this case, where the units were initially rented as apartments before they were renovated and sold as condominiums, the court ultimately determined that Senate Bill No. 800 was dispositive of the scope of the architects' duty.

Senate Bill No. 800

The court cited the plain language of Senate Bill No. 800 which provides “that a design professional who ‘as the 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 may be liable to the ultimate purchasers for damages.” Moreover, the court noted, section 897 provides that “[t]o the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage.” In construing any statute, the court noted, “our general goal must always be to effectuate the legislative intent.” Since the legislative history revealed the Legislature assumed that existing case law imposed third party liability on design professionals prior to enacting the Right to Repair Act, the court reasoned that the Legislature’s intent must have been to extend third party liability to design professionals.

Accordingly, the *Beacon* court held that the plaintiff homeowners’ association must be afforded the opportunity to bring its claims for violation of statutory building standards, negligence per se in violation of statute, and simple negligence against the design professional defendants.

Conclusion

Design professionals in California should be aware that they may be accountable to purchasers of residential property for negligent design pursuant to both statute and common law. Since this duty to third parties may not be circumscribed by contract, design professionals should carefully consider this risk exposure when setting their fee, evaluating the appropriate insurance coverage to procure, and negotiating for indemnity in their favor from clients.

Practice Area: Design Professionals Defense & Counseling

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