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# Construction Practice Group E-Alert:

## *A "Beacon" of Hope for Purchasers of Real Property, at the Expense of Design Professionals*

The California Court of Appeal on December 13, 2012 issued an opinion which is harmful to design professionals performing services in this state, broadening their exposure to claims brought by third party purchasers of properties which they design. Unless the case, *Beacon Residential Community Association v. Skidmore, Owings & Merrill, LLP, et al. ("Beacon"),* is overturned by the California Supreme Court, design professionals in California are wise to assume that regardless of their attempts to circumscribe their scope of duty by contract, they will be held to owe a duty of care to subsequent purchasers of the properties they design, particularly if those properties are residential. This, in turn, places additional importance on design professionals' other contractual protections, such as the rights of indemnification and defense.

The *Beacon* case arose from alleged construction defects in a 595-unit condominium development built in San Francisco. There were approximately 40 defendants ultimately named in the case. Skidmore, Owings & Merrill, LLP ("SOM") and HKS Architects, Inc. ("HKS") were the project designers, alleged to have performed architecture, landscape architecture, and engineering (civil, mechanical, structural, soils, electrical), in addition to construction administration and construction contract management. The plaintiff homeowners association sued them for violation of the building standards set forth by Civil Code sections 896 and 897 (aka "SB 800") and professional negligence.

The designers had successfully responded to the HOA's claims by demurrer, convincing the trial court to dismiss the claims against them since the HOA merely alleged that they had "the typical role of the architect." The trial court concluded that the designers' liability to the HOA, with which they had not contracted, could not be premised on negligent design and that the HOA instead had to show that the designers had "control" in the construction process.

The Court of Appeal reversed the trial court's order. What is perhaps most interesting about the court's decision is not that it concluded the HOA's allegations were sufficient to hold the designers in the case for purposes of discovery and trial, but <u>how</u> it reached that conclusion. The court acknowledged that SB 800 might not even apply to the development since the residential units, before they were sold as condominiums to the public, were first rented out as apartments, to which SB 800 is not applicable. Ultimately, however, the court held that SB 800, itself, regardless of its applicability in the case, is "dispositive of the scope of duty owed by a design professionals [sic] to a homeowner/buyer." The court looked to the language of SB 800 as well as its legislative history to recognize that "the Legislature assumed that *existing law* imposed third party liability upon the design professionals… The plain language of [SB 800] 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 section 896 for residential housing may be liable to the ultimate purchasers for damages."

The court also conducted a policy analysis, considering the factors previously articulated by the California Supreme Court in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650–651 (*Biakanja*) and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*) as relevant to determining a party's potential liability to third parties. It then concluded that the policy analysis also compelled reversal of the trial court's order, but ultimately also stated that the analysis did not "matter" since SB 800's enactment controlled. Nonetheless, the *Beacon* court's *Biakanja*/*Bily* analysis is quite troubling insofar as it essentially provides that design professionals will almost always owe a duty of care to a subsequent purchaser of residential property.

For example, even though HKS had a very strong disclaimer in its contract as to potential obligations to third parties, specifically including the eventual purchasers of the condominiums, the court held that that clause "only serve[d] to emphasize the fact that Respondents were more than well aware that future homeowners would necessarily be affected by the work that they performed. And, in any event, liability to foreseeable residential purchasers is determined by the scope of the duty of professional care, not whether those purchasers are, or are not, third party beneficiaries under contract. While a duty of care arising from contract may perhaps be contractually limited, a duty of care imposed by law cannot simply be disclaimed."

The *Beacon* court also rejected the designers' "conflict of loyalty" argument, for which they cited *Ratcliff Architects v. Vanir Const. Management* (2001) 88 Cal.App.4th 595, 606 (*Ratcliff*) and pointed out various "value engineering" decisions made by others in the selection of the project's windows. The court did not see how the public policy considerations presented in *Ratcliff*, "an action between a construction manager and the architect, would apply here, or how requiring a design consistent with architectural and statutory standards is in conflict with the duty already owed by an architect to the client."

Perhaps the only ways which design professionals, in hereafter arguing the *Biakanja*/*Bily* factors, will be able to distinguish themselves from the designers in *Beacon* are to show that they are allegedly liable only for defects not involving a risk to health or safety or to structural integrity (the *Beacon* court suggested that such defects are associated with "less moral blame") and/or that they did not earn a high fee for their services (the court found that SOM and HKS were paid over $5 million, "not an insignificant sum and presumably reflective of the extent their work product was incorporated into the Project"). However, again, the *Beacon* court held that now that SB 800 has been enacted, the *Biakanja*/*Bily* policy analysis does not "matter," suggesting that such analysis may now only be applicable in the context of commercial property. Moreover, although the HOA in *Beacon* had alleged that the designers had actually gone quite further than the "typical role" of an architect (for example, alleging that they were also responsible for "construction contract management"), the court's *Biakanja*/*Bily* analysis only focused on the defendants' design roles. Thus, the court's analysis can be applied to design professionals who have no role during construction, rendering it very difficult for them to hereafter argue a lack of duty toward third person purchasers, regardless of project type.

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