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The Duty of Care of Design Professionals after *Beacon Residential*

FOR YEARS, DESIGN PROFESSIONALS HAVE avoided negligence liability to third-party property purchasers by arguing that their role makes them too remote from the purchasers. Instead, design professionals usually became involved in a construction lawsuit when they were sued by the builders or developers with whom they had contracts. This paradigm is changing as a result of the California Supreme Court's holding in *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP*.[1]

In *Beacon Residential*, the court ruled that in the context of residential development, design professionals owe a duty of care to third-party property purchasers. The court distinguished earlier case law that had restricted liability in cases in which design professionals only prepared plans or made design recommendations and held that design professionals can be liable to a purchaser for negligence even when they do not actually build the project and do not exercise control over construction decisions. The supreme court declined to follow the court of appeal's finding of a statutory duty of care, relying instead on a common law multifactor test. The holding still allows design professionals to argue that the rule is not absolute but makes it more difficult for them to avoid litigation at an early stage and increases their exposure to liability.

The plaintiff in *Beacon Residential* was a condominium homeowners association that, on behalf of individual homeowners, sued the developer and the project architects for construction defects that the plaintiffs argued were caused by negligent architectural design work. The architects filed demurrers, which the trial court sustained, finding that the claims did not show that the architects did anything beyond the typical role of an architect in making recommendations to an owner and that there is no duty owed by architects to future condominium purchasers when the architects act in that capacity.[2] The court of appeal reversed, finding both a common-law duty and a statutory duty under the Right to Repair Act.[3] The architects appealed the issue to the California Supreme Court, which affirmed the court of appeal's ruling on more narrow grounds.

Building on a long history of negligence case law, the supreme court held that in circumstances in which the design professional is not subordinate to any other design professional, a duty of care is owed to future purchasers. The court found a duty even though the developer made final decisions on the architect's recommendations and the contractors had control over the construction process and implementation of plans and recommendations.[4] The court noted that in hiring the architect, the developer relied upon the architect's specialized training, technical expertise, and professional judgment. Moreover, the court found that the architect applied this expertise throughout the construction of the project, conducting inspections, monitoring contractors' compliance with plans, and altering design requirements as issues arose.[5]

The court based its holding on an evaluation of factors developed in two earlier California Supreme Court decisions, one holding that a duty was owed to third parties and another holding that it was not. In the first case, *Biakanja v. Irving*,[6] the court had held that a notary public who negligently drafted a will could be liable to the third-party intended beneficiary of the will. Applying the factors set forth in *Biankanja,* The court in *Beacon* considered 1) the extent to which the transaction was intended to affect the future homeowner, 2) the foreseeability of harm to the homeowner, 3) the degree of certainty that the homeowner suffered injury, 4) the closeness of the connection between the design professional's conduct and the injury suffered, 5) the moral blame attached to the design professional's conduct, and 6) the policy of preventing future harm.[7] The *Biakanja* court, in the context of a notary's faulty preparation of a will, had held that the preparation of the will was intended to affect the beneficiary, it was foreseeable that faults in the preparation of the will would cause the intended beneficiary loss, the loss of benefits that the will was intended to provide was clearly suffered by the intended beneficiary, and, but for the negligent preparation of the will, that loss would not have been suffered. Therefore, the loss was closely connected to the notary's conduct, and the moral blame attributed to the conduct was high—it amounted to the unauthorized practice of law—which the court held should be discouraged as a matter of policy.[8]

The *Beacon Residential* court arrived at a similar outcome when it considered the *Biakanja* factors in the context of an architect's role

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in residential construction. The supreme court held that 1) the architects' work was intended to benefit the homeowners living in the residential units that the architects designed and helped to construct, 2) it was foreseeable that these homeowners would be among the limited class of persons harmed by the negligently designed units, 3) the homeowner association's members had suffered injury because 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 was a close connection between their conduct and the injury suffered, 5) because of the architects' unique and well-compensated role in the project as well as their awareness that future homeowners would rely on their specialized expertise in designing safe and habitable homes, significant moral blame attached to their conduct, and 6) the policy of preventing future harm to homeowners reliant on architects' specialized skills supported recognition of a duty of care, all of which favored imposing a duty of care on architects.[9]

The second case that the *Beacon Residential* court considered in its review of common law factors was *Bily v. Arthur Young & Company*, in which the court had held that an accounting firm that audited a company did not owe a duty to third-party investors in the company.[10] In *Bily*, the court based its decision of no liability on three central concerns. The court first explained that auditors exposed to negligence claims from all foreseeable third parties faced potential liability far out of proportion to their fault, including because the company being audited retained primary control over the financial reporting process, which resulted in a mismatch between an auditor's "secondary" role in the financial reporting process and the "primary" role attributed to an auditor in a negligence suit by a third party. Second, the class of potential plaintiffs in auditor liability cases was generally more sophisticated than the ordinary consumer, and so could rely on their own audits or direct communications with a company's auditor to protect themselves and could pursue claims based on contract rather than tort liability to control and adjust the pertinent risks. Third, the *Bily* court expressed skepticism that holding auditors liable to third-party investors would increase the quality of audits.[11] Limiting its decision to the facts of the case before it, the *Bily* court explained that in other circumstances auditors could owe a duty to third persons to whom or for whom misrepresentations were made when those third persons actually and justifiably relied on auditors' mistaken reporting.[12]

Contrasting the role of architects with that of auditors, the *Beacon Residential* court reasoned that a duty should be imposed on architects because 1) the architects' primary role in the design of the project bears a "close connection" to the injury suffered by the homeowners, 2) the imposition would not render the architects liable for an indeterminate amount of time to an indeterminate number of persons as the construction of the project was intended to affect the limited number of people who would own and ultimately occupy the completed residences, and 3) the typical homebuyer relies on the expertise of the design professionals involved in the design and construction and does not have the expertise or independent ability to discern defects in the professionals' work.[13] In short, the court determined that the alleged negligent design bore a close connection to the injury suffered, that it was foreseeable that the home purchasers would be the ones to suffer that injury, and that holding design professionals liable would more efficiently protect homeowners from design defects and their resulting harms.[14]

Limitation of *Weseloh*

In finding a duty of care to future condominium owners, the supreme court distinguished *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Company, Inc.*,[15] often relied upon for the proposition that a design professional does not owe a duty of care to a third-party property owner that did not hire the design professional. In *Weseloh*, a property owner hired a general contractor to construct an automobile dealership. The general contractor then hired a subcontractor to build retaining walls, and the retaining wall subcontractor in turn hired design engineers to perform consulting work concerning the walls and to supervise the wall design work of the project design engineers. The retaining wall design engineers did not have a contract with the property owner for construction or design work and did not have a role in the construction, although they did inspect the walls after they were constructed. When the retaining walls failed, the property owner sued the general contractor, the subcontractor, and the design engineers.[16] The trial court considered the *Biakanja* and *Bily* factors and awarded judgment for the wall design engineers, holding that they did not owe a duty of care to the property owner.[17] The court of appeal affirmed.

In evaluating the *Biakanja* factors, the court of appeal in *Weseloh* held that 1) the wall subcontractor rather than the property owner was intended to be the beneficiary of the wall engineers' work, 2) though the resulting damage was foreseeable, this factor alone was not enough to impose liability, 3) the injury was not closely connected to the work of the wall engineers, which was limited to providing professional advice and opinion but did not extend to participation or supervision of construction, 4) moral blame should not be assigned to the wall engineers, and 5) expanded liability would not result in greater care in design engineering.[18] In evaluating the *Bily* factors, the court of appeal held 1) that liability would be out of proportion to the wall engineers' fault (the alleged damages were $6 million, while the engineers were paid only $2,200 for their services), 2) because they were not involved in the construction of the walls, the engineers did not have control over the creation of the walls, and 3) there was no evidence to support a policy reason for allocating loss to the engineers as compared with the property owner.[19] As a result, the court of appeal in *Weseloh* held that the engineers did not owe a duty of care to the property owner with which they had no contract.[20]

The architects in *Beacon Residential* relied on *Weseloh* in arguing that they did not owe a duty to future property purchasers. The court rejected this argument and expressly limited the applicability of *Weseloh*. The court explained that *Weseloh* did not broadly hold that a design professional who provides only professional advice and opinions, without having ultimate decision making authority, cannot be liable to third parties for negligence. Rather, *Weseloh* held only that a design professional's role can be so minor or subordinate to another professional in the same discipline as to foreclose liability to third persons.[21] Though in the years since the *Weseloh* decision was issued, design professionals have argued for broad application of *Weseloh*'s reasoning, the decision itself states that it is limited to the facts before it and should not be interpreted to create a rule that a design professional can never be liable to a third party with which it does not have a contract.[22]

Impact of *Beacon Residential*

Beacon Residential is a logical extension, and in some respects an affirmation, of longstanding tort law. However, even after *Beacon Residential*, there may still be some limitations on a design professional's liability to third parties. Where the line will be drawn is not entirely clear. A design professional who inspects, supervises, or monitors construction almost certainly owes a duty to third-party residential property purchasers, and even a professional who does nothing more than provide plans may owe a duty—and face liability—if that professional is the principal professional for a project in a certain discipline. As noted by the California Supreme Court, the application of the common-law factors it considered "necessarily depends on the circumstances of each case."[23]

The supreme court could have eliminated any uncertainty, at least in connection with residential construction, but it chose not to do so. California's Right to Repair Act (formerly SB 800) provides construction standards applic-

able to new residential construction with purchase agreements signed on or after January 1, 2003.[24] The statutory scheme is intended to address every component of residential construction,[25] and it expressly applies to design professionals.[26] In holding that design professionals were subject to liability to third-party residential property purchasers, the court of appeal in *Beacon Residential* held the plain language of the statutory scheme to be dispositive of the issue.[27] The supreme court, however, expressly chose not to decide whether the Right to Repair Act disposes of the issue,[28] allowing room for the argument that whether a particular design professional's involvement in a project rises to a level at which liability should be imposed must be decided on a case-by-case basis.

In the limited circumstances in which a design professional is not involved in advising, conducting inspections, supervising, or revising plans during construction, it may be possible after *Beacon Residential* to argue at trial that the design professional's involvement with a project was too attenuated for liability to attach. However, because very few construction defect actions are currently proceeding to trial, the practical effect of *Beacon Residential* is much more pronounced. The ruling provides another source of direct recovery for homeowners by solidifying the right of property owners to bring claims directly against design professionals for construction deficiencies. When the design professional's indemnity obligations are not controlled by contract, the ruling strengthens the ability of builders, developers, and contractors to bring claims for equitable indemnity by pointing the finger at design professionals. No longer will architects or engineers be able to quickly remove themselves from litigation in which design defects may be an issue. Instead, their risk management programs and insurance providers will need to adapt to the reality of protracted litigation and the likely need to contribute settlement funds to resolve claims in advance of trial.

Although *Beacon Residential* concerned residential construction, the decision and its reasoning could be extended to other types of construction in which the property owner does not have a direct contract with the design professional. Examples include commercial properties that are built for sale and distressed properties that are purchased after construction is substantially or fully completed. Design professionals involved in the construction of apartment projects could also find themselves facing liability to an expanded group of persons, if the project is converted to condominiums and defects are later discovered.

The full implications of the *Beacon Residential* decision will play out over time, and design professionals should be prepared for greater involvement in construction litigation that they may previously have been able to sidestep. ■

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[1] Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP, 59 Cal. 4th 568 (2014).
[2] *Id.* at 572-73.
[3] Civ. Code §§895 *et seq.*
[4] Beacon Residential, 59 Cal. 4th at 581-82.
[5] *Id.* at 583.
[6] Biakanja v. Irving, 49 Cal. 2d 647 (1958).
[7] Beacon Residential, 59 Cal. 4th at 574.
[8] Biakanja, 49 Cal. 2d at 650-51.
[9] Beacon Residential, 49 Cal. 4th at 586.
[10] Bily v. Arthur Young & Co., 3 Cal. 4th 370 (1992).
[11] Beacon Residential, 59 Cal. 4th at 579-80
[12] *Id.* at 580.
[13] *Id.* at 581-85.
[14] *Id.* at 581.
[15] Weseloh Family Ltd. P'ship v. K.L. Wessel Constr. Co., Inc., 125 Cal. App. 4th 152 (2004).
[16] *Id.* at 159-60.
[17] *Id.* at 161.
[18] *Id.* at 167-70.
[19] *Id.* at 170-72.
[20] *Id.* at 172-73.
[21] Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP, 59 Cal. 4th 568, 578 (2014).
[22] Weseloh Family Ltd. P'ship, 125 Cal. App. 4th at 173.
[23] Beacon Residential, 59 Cal. 4th at 578.
[24] Civ. Code §§895 *et seq.*
[25] Civ. Code §897.
[26] Civ. Code §936.
[27] Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP, 211 Cal. App. 4th 1301, 1321 (2012).
[28] Beacon Residential, 59 Cal. 4th at 578.