So Is There Anything GOOD to be Taken from *Beacon?*

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Another blow by the California Supreme Court on the design industry hit the wires with a vengeance when the Court issued its July 3 ruling. For those of you that may not have already heard, the Court in *Beacon Residential Community Association v. Skidmore, Owings & Merrill, LLP, et.al.,* (Supr. Ct. No. S208173), affirmed a finding by the Court of Appeal that imposed a duty on the principal architects of a condominium project to the homeowners' association, thereby allowing the association to sue the architects directly in tort.

Certainly, the impact on its face appears to be that the Court has managed to erode any contractual protections that prime consultants work so hard to negotiate into their contracts. The Court seems to make a concerted effort to take excerpts from history and weave them into a suffocating tarp that leaves consultants with little room to breathe. But we should not necessarily accept the decision as a complete wash of any defenses design professionals may have when confronted with a claim by a project owner in the absence of a contract. Here are some notable points made by the Court:

- The decision is an appeal to a ruling on demurrer, an initial attack to a complaint that is confined to the allegations made in the opening pleading; the Court left open the possibility that it may have reached a different conclusion had this been a motion for summary judgment, which would have allowed the architects to bring in controverting evidence to dispute the alleged facts in the complaint;

- The decision relied heavily on the defendant architects being "principal architects" of the project, and focused on the broad scope of services provided, from conceptual design through construction administration (including weekly inspections at the construction site, monitoring contractor compliance with design plans, altering design requirements as issues arose, advising owner of noncomforming work that should be rejected), as well as their large fee of over $5 million;

- The Court declined to rule as to whether a duty is automatically imposed by the Right to Repair Act (Civ. Code Section 896 et seq.);

- The Court specifically distinguished the facts in *Beacon* with those in *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Col., Inc.* (2004) 125 Cal.App.4th 152 *(Weseloh)*, wherein the California Court of Appeal determined that there was no duty owed by second tier engineers to the project owner. Specifically, the Court noted that the engineers were retained by the prime consultant, and their services were for the intended benefit of the prime. Further, the Court took note that the engineers were not involved in the construction of the project, but simply provided an opinion for the intended use of the prime.

For most design professionals, this ruling may not have a significant impact at all. Those of you who typically provide services as a subconsultant, for example, can use the *Beacon* ruling to your advantage. The Court was very specific as to the facts directing this lawsuit. As we continue our crusade for the rights of architects and engineers, we will use *Beacon* to bolster arguments of lack of duty in certain situations. We should keep our focus on good contracts that offer significant protections because those provisions will still play an important role if your project becomes the subject of litigation.

Throughout the decision, the Court points to the very broad scope of services provided by the "principal architects", and the high fees charged. Most design professionals do not fit into this category. Indeed, most consultants would agree that the trend is for clients to limit services and skimp on fees, even to the project's detriment.

As to the Right to Repair Act, we have seen that the statute has gained momentum in the past year. While the statute creates a certain standard of construction and allows claims against design professionals, the Court left room for design professionals to assert defenses, contractual or otherwise, and did not take advantage of an opportunity to determine that a duty is automatically owed regardless of the consultant's role on a project. That defense is still alive and well under most conditions.

As to those of you who often find yourselves in the role of "principal architects" similarly situated as those in *Beacon*, well, the battlefield just became a little more dangerous. We like to believe that prime consultants who are entrusted with a vast scope of responsibilities and a healthy fee are also in a better position to negotiate their contracts at the start of the project, and have the ability to effectively document the project file throughout the course of design and construction. Some thoughts:

- An iron-clad scope of services, clearly designating the roles of owner, contractor and consultants, may prove helpful in educating a court on how broad a prime consultant's services really are. We are all very aware that lead consultants on a project can only do so much. Your contract becomes the first line of defense in articulating how much control you really have.

- An indemnity and/or limitation of liability provision that includes third party claims is generally enforceable. You can negotiate reasonable language with your client that will protect both parties fairly, and require your client to protect you from third party claims, or provide insurance to cover such claims. Even if that protection has its limits, it is worth fighting for. Better yet, insist that the indemnity obligations are with the parent company developer as opposed to the subsidiary/LLC that only owns the one development property.

- As lead consultant, you are generally the scrivener of meeting minutes, responses to inquiries and change order requests, etc. Use these opportunities to include notations as to the parties involved in certain discussions and decision-making. These documents may become key in a summary judgment motion, as they will likely shed light on how much power a "principal architect" really has throughout the course of a project.

- Propose contract provisions to your client requiring language in the Purchase and Sales Agreements and CC&Rs that force the HOA and homeowners, if they are to be considered legitimate third party beneficiaries, to be subject to any and all contract defenses that you have within your agreement with your client.

- Insist upon additional, protective contract language that has your client agree to write into the Declaration, the Bylaws and Purchase & Sales Agreements a requirement that the recommended maintenance be the responsibility of the HOA, and that homeowners undertake additional maintenance measures for their own residences.

Surely, the Supreme Court did not do us any favors in its most recent ruling impacting the design industry. We are left with the perhaps unwieldy task of using the ruling to improve the way we do business. While the initial analyses hitting the wire in the hours after the ruling was published generally took a dim view of our revered Court, we suggest that perhaps some deeper consideration will help us refocus and strengthen our stance.

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