PROUT LEVANGIE

2021 N Street
Sacramento, California 95811
Telephone: (916) 443-4849 Fax: (916) 443-4855
www.proutlaw.com

Nevada Office
612 South Tenth Street
Las Vegas, NV 89101
t. (702) 562-4044
f. (702) 554-3272

Michael J. LeVangie
Michael.levangie@proutlaw.com

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WHITE PAPER ALERT
Construction Defect

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A Duty of Care Is Owed By Design Professionals To Third Party Purchasers Of Residential Buildings

(Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP)
(No. A134542.)

In *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP*, a homeowners' association sued two firms that provided architecture and engineering services during construction of their condominium complex. The association alleged negligent design resulting in water infiltration, structural cracks, solar heat gain, and safety hazards.

Skidmore, Owings & Merrill LLP (SOM) and HKS Architects (HKS) provided architectural and engineering services for the Beacon Residential Condominiums, a 595 unit development in San Francisco. Alleged construction defects caused problems with water infiltration, inadequate fire separations, structural cracks, and other life safety hazards.

The trial court granted demurrers filed by SOM and HLS finding that design professionals did not owe a duty of care to the condominium association or residents where the owner/contractor retains final decision-making power over the design.

The Court of Appeal reversed, holding design professionals, under some circumstances, owe a duty of care to third party purchasers and residents even when they do not have control. The Court viewed the issue as "not whether a design professional owes a duty of care to purchasers but the scope of that duty." The Court of Appeal rested its decision primarily on an analysis of *Biakanja v. Irving* (1958) 49 Cal.2d 647, *Bily v. Arthur Young § Co*. (1992) 3 Cal.4th 370, and a discussion of Senate Bill 800. The court's analysis has important implications for architectural/engineering and other firms providing construction design services.

First, firms may be liable to a residential association despite contract language with the developer designed to protect the firms from just such liability to purchasers. The Court of Appeal concluded design firms are well aware future homeowners may be affected by their work. Therefore, the firms have a duty to those future homeowners and may be liable for negligent design.

Second, public policy favors protecting purchasers against negligent design. The court reasoned purchasers are usually ill-equipped to discover structural defects and do not have the opportunity to negotiate or enter into contracts related to liability with design firms. These principles, underscored by the court's finding that SB 800 evinced the legislature's assumption that liability could reach to design professionals, supported the court's decision to extend the design firms' liability to third-party purchasers.

The court also applied six policy factors from *Biakanja* to assess the scope of that duty: 1) extent to which the transaction was intended to affect the plaintiff, 2) foreseeability of harm to the plaintiff, 3) degree of certainty that the plaintiff suffered injury, 4) closeness of connection between defendant's conduct and the injury suffered, 5) the moral blame attached to defendant's conduct, and 6) the policy of preventing future harm.

The contract between HKS and the developer contained a clause intended to limit HKS's liability. Ironically, the court used this clause as evidence the design firms were "more than well aware that future homeowners would necessarily be affected by the work that they performed."

The court noted other facts as important in their analysis:

- The alleged defects posed a serious risk of harm to people or property.
- The plaintiffs were purchasers/owners and not merely investors.
- Numerous cross-complaints filed among 40 defendants made it unlikely the design professionals would bear liability out of proportion to their fault.
- SOM and HKS were paid over $5,000,000 for their work on the project, a factor speaking to proportional liability.

The court further reasoned that the Legislature sets public policy and that the legislative intent of SB 800 was clear in that design professionals are liable to third parties for negligence. This reasoning served to show that the sixth factor of *Biakanja* was met, for a common law analysis. However, the court noted further that "To the extent that a *Biakanja/Bily* policy analysis is not otherwise dispositive of the scope of duty owed by a design professional to a homeowner/buyer, Senate Bill No. 800 is." This sentence implies that even if a design professional is not liable under the common law, they may well be liable under the statute.

The court's analysis suggests it may now be difficult for firms providing design/engineering services to contractually insulate against liability to third-party purchasers and purchasers now have a greater public policy argument when pursuing legal action against design and engineering firms.

Petition for review was filed on January 23, 2012, but the Supreme Court has not yet granted review.

Please contact us with any questions.

Michael J. LeVangie

Prout • LeVangie
2021 N Street
Sacramento, California 95811
t. 916.443.4849
f. 916.443.4855
e. michael.levangie@proutlaw.com
Las Vegas ● Sacramento ● Truckee