

# ProNetwork News

## Risk Management Tools for the Design Professional



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Samuel Muir practices primarily in the area of construction litigation with an emphasis on the representation of design professionals. As lead trial counsel and appellate attorney for the design professional in the landmark decision of *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, Sam argued successfully to uphold the law authorizing limitation of liability clauses in construction contracts.

Sam earned a Bachelor of Arts degree in Business Administration from Azusa Pacific University, and the Juris Doctor degree from Loyola Law School. He is a frequent speaker to architectural associations such as the Los Angeles Chapter of the American Institute of Architects (AIA) and the Pasadena/Foothill Chapter of AIA. Sam is past president of the Pasadena Bar Association, and is an affiliate member of the Pasadena/Foothill Chapter of the AIA, as well as a member of ACEC California.



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### California Supreme Court Rules Against California's Architects in the *Beacon v. Skidmore Owings Case*

by Samuel J. Muir, Esq.

The closely watched California Supreme Court case of *Beacon Residential Community Association v. Skidmore Owings and Merrill et. al.* has been decided, and the opinion is bad news for California Architects. The Court held that architects owe a duty of care to future homeowners in the design of residential buildings where the architect is a principal architect on the project, meaning that the architect is not a subordinate to other design professionals.

#### Case background and procedural history

As a refresher, this case involved the design and construction of residential units in the Bay Area of California. Originally held as apartments, the units were converted by one of the developers into condominium units. After completion, the condominium association filed a lawsuit against the original developers, contractors, and designers alleging a long list of construction and design defects. Among the issues was a complaint that the individual units did not include air conditioning and that the quality of the windows used was so deficient that the individual units experienced excessive heat gain, making them unlivable.

Skidmore Owings and Merrill ("SOM") and HKS, Inc. ("HKS") were the architects for the project. In reliance on past case law in California, SOM and HKS filed a motion in the trial court arguing that they did not owe any duty of care to the condominium association because neither SOM nor HKS had contracted with that entity. The trial court granted that motion. The intermediate appellate court reversed that ruling, holding that under other California law, SOM and HKS in fact did owe a duty to subsequent owners who were foreseeable even though SOM or HKS did not contract



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with them. This created an arguable conflict between cases, and thus the California Supreme Court accepted the case for resolution.

Our firm was privileged to file an amicus brief on behalf of the American Institute of Architects and the American Institute of Architects, California Council, arguing that architects should not be held to owe a duty to downstream owners with whom the architect did not contract.

This issue, the scope of an architect's duties and to whom those duties are owed, was the central issue before the Supreme Court. In addition to the amicus brief filed by our office, amicus briefs were filed by the California Building Industry Association, the Civil Justice Association, the Consumer Attorneys of California, and the Executive Council of Homeowners. The case was argued to the Supreme Court on May 7, 2014 and on July 3, 2014, the Court issued its opinion.

### **The court held that the architect did owe a duty of care to future homeowners based on common law interpretation of duty**

The Court held that architects owe a duty of care to future homeowners in the design of residential buildings where the architect is a principal architect on the project, meaning that the architect is not a subordinate to other design professionals. The Court based its ruling on a common law (historical case precedent) understanding of the scope of a professional's duty. In doing so, the Court traced through a history of cases where professionals were held to owe a duty to third parties with whom the Architect did not contract, where certain tests were met; these tests are known as the *Biakanja* factors, originating from the 1958 Supreme Court case of *Biakanja v. Irving*. Those factors are: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, 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. While there are procedural considerations specific to the *Beacon* case that informed the ultimate decision, the end result was a finding of duty.

### **Prior case law distinguished by the court**

Prior to the *Beacon* case, there were two decisions that were frequently looked to by architects to address the scope of professional duties: *Bily v. Arthur Young & Co.* and *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* In each of those cases, the professional was held to not owe a duty to the individuals that filed suit against them. *Bily* involved financial auditors and *Weseloh* involved engineers. The *Beacon* Court spent time distinguishing the facts between those in the *Beacon* case and the circumstances in both *Bily* and *Weseloh*.

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As to *Bily*, the Court focused “on three considerations that drive the analysis and distinguish this case from *Bily*: (1) the closeness of the connection between defendants’ conduct and plaintiff’s injury; (2) the limited and wholly evident class of persons and transactions that defendant’s conduct was intended to affect; and (3) the absence of private ordering options that would more efficiently protect homeowners from design defects and their resulting harms.” Applying those considerations, the Court held that as the only architects on the project SOM and HKS were closely connected to the alleged design defects. SOM and HKS had been involved in the original design, as well as the considerations to modify the HVAC for the units and the decisions to substitute the windows originally specified. The Court stated, “Among all the entities involved in the Project, defendants [SOM and HKS] uniquely possessed architectural expertise.” As such, the Court reasoned “an architect cannot escape such liability on the ground that the client makes the final decisions.”

As to the second consideration, the Court disagreed that a finding of a duty would create “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” Rather, the Court found that at the time of providing their professional services, SOM and HKS knew that the residential units would ultimately be sold as condominiums. The Court went on to state that by undertaking the design of these units, SOM and HKS intended to influence the transaction of the sale of those units and could therefore determine the scope of their liability and make rational decisions regarding their involvement. By this the Court was saying that the architects knew that they would affect the sale of these units and that the foreseeable buyers of the units were the population of people that could be harmed by the architect’s negligence and who might seek redress against the architects.

Third, on the issue of “private ordering” the Court held that purchasers of residential units are not positioned to take precautions against design defects. Homebuyers rely on the expertise of the builders and designers that the homes will be designed and built in a fashion that makes them habitable. The Court stated, “A liability rule that places the onus on homebuyers to employ their own architects to fully investigate the structure and design of each home they might be interested in purchasing does not seem more efficient than a rule that makes the architects who designed the homes directly responsible to homebuyers for exercising due care in the first place.”

The Court went through a similar process to distinguish the *Beacon* case from the *Weseloh* case. Again, the Court focused on the fact that SOM and HKS were the sole entities providing architectural services. Moreover, the Court noted, SOM and HKS not only provided their services in the form of design documents, but also “applied their expertise to ensure that construction would conform to approved designs.” The Court also indicated that *Weseloh* has limited application in that it is not so broad as to state that architects *never* have a duty to third parties. Rather, *Weseloh* only says

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that an architect's role *can* be so limited and subordinate to other design professionals that the architect will not, in those limited circumstances, have liability to third parties.

### **What does this mean for practicing architects?**

*Weseloh* and *Bily* remain good law in that they were not overturned by the Supreme Court. But, they have been reined in to more specific or limited circumstances. Under the *Beacon* case, it is clear that architects on residential projects who serve as the primary designer can be sued by downstream homebuyers with whom the architect did not contract.

In practical terms, this raises the bar not so much for the actual designs, but in your design process and your relationships with your clients. When designing a project, you need to be sure to consider the implications of each facet of the design. Like an author critical of each word they write, you need to see the whole building and how all of your elements will work together and what impact that can have on not just your client, but the ultimate end user of the project. From there, you need to communicate these items. When a builder or developer requests a change for cost savings reasons, you need to inform them of the implications of those changes. Changing windows may impact the heat gain; changing insulation may impact the energy costs; changing mechanical systems may impact the acoustical considerations.

Like a stone dropped into water, you need to consider not only where the stone will end up, but also the effect of the concentric ripples moving outward. What's more, those considerations should be documented and communicated to your client. Will this stop a lawsuit? Perhaps not. But it may provide the evidence you need to distance yourself from the ultimately alleged defects and their impact on the end user.

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### Guest Essays

#### Stirring the Pot: Workplace Drug Policy Implementation in the Era of Legalized Medicinal and Recreational Marijuana



In a wave of change that children of the 1960s only dreamed, debated and theorized about, almost half of the states in the United States have now passed laws legalizing the controlled distribution of medicinal marijuana, and two states have even legalized the sale of recreational marijuana... These new laws raise a variety of questions for employers who have drug screening programs or any type of drug-free workplace policy.

### The ProNet Blog

#### Announcing our 2014 a/e ProNet Scholarship Winners



We're proud to announce that the American Institute of Architects (AIA) panel—which includes a/e ProNet member Tom Coghlan of Design Insurance Agency, Inc.—has selected Kevin Fletcher and Nathan Blair to receive the 2014 a/e ProNet AIA David W. Lakamp Scholarship. [Continue reading...](#)

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