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The Expanding liability of A&E professionals and Risk Shifting in Design-Build Projects

I. Design Build and Engineer-Procure-Construct Contracts

A. Practical Considerations

1. The Design-build Contract.

The Design-Build Contract is a construction project delivery system where the design and construction aspects are contracted for with a single entity known as the design-builder or design-build contractor. *Thomas v. Buttress & McClellan, Inc*. (1956) 141 Cal. App. 2d 812, 815. In design-build ("DB") projects, the single entity responsible for project design and construction can be a general contractor, a design professional, architect, or engineer. It continues to grow as the most popular project delivery system in that it is seen as streamlining the design and construction phases and eliminates the direct privity between an Owner and a separately retained Construction Contractor.

A DB contract typically places design, construction, and material and equipment procurement responsibilities under a single contract thus maximizing the cooperative and early involvement of design and construction professionals working as part of a project team.

2. The EPC Contract

An EPC Contract places full responsibility on the design, procurement, construction, commissioning and handover of the project to the end-user or owner. In that it is "one-stop" shopping for the owner, an EPC contract is very similar to a DB contract. However, in the DB or Design-bid-build ("DBB") model the owner and construction manager or designer take a more active role in final completion or punchlist of the project.[1] EPC contracts usually included little more than performance requirements whereas in the DB project, some design build is typically included. As essentially "free reign" is given in an EPC contract, so too does the EPC contractor assume greater risks than in DB or DBB projects. Under this "turnkey" contract model, the entire risk and responsibility for land acquisition, design based on owner performance objectives,

[1] Jordan, Patrick T. "Differences between EPC and design-build delivery", Construction Law Blog, May 7, 2015, https://www.lexology.com/library/detail.aspx?g=7e8d69d7-b936-4891-aab8-d69690c3cc71

procurement, construction, and finance, remain with the contractor until the "key is turned over" and the completed project is conveyed to and paid for by the owner.[2]

B. Benefits of the Design-build and EPC contracts[3]

There are several widely regarded advantages to the DB and EPC models. The DB model offers owners the comfort of a single source accountability for all design and construction problems avoiding the need for the Owner to contract separately with the various involved professionals. Further, work can be "fast tracked" as a single entity can, for example, begin construction prior to the completion of all design documents. Further, early contractor involvement in estimating and material procurement can lead to substantial cost savings. With less "cooks in the kitchen," the likelihood for disputes is minimized with a "single source" of responsibility and early involvement of the entire design-build team. Significantly, time lags for project completion can be reduced through issuance of staged bid packages s. In addition, as the design-build method minimizes the owner's detailed involvement in management of the design and construction process, an Owner can dedicate his resources to other projects, confident in the knowledge that he has one point of accountability – the design-builder.

C. Problems and Potential Pitfalls with DB and EPC contracts

Consolidation of responsibility in one design construction professional/organization is not without its drawbacks. Utilizing a single entity to perform both design and construction requires all involved to be on the same page. Philosophical differences between design and construction teams can undermine "teamwork" needed for DB/EPC projects. Further, significant time and upfront costs are often incurred in preparing a detailed scope of work and requests for proposals. Design build also significantly reduces the role of the owner who may be used to having control over each step of the project. A project owner's interference or meddling can undermine some of the benefits of the DB delivery method. As mentioned above, DB projects often include performance warranties and concentrate the exposure in a single or limited number of entities. Concentration of that risk can be troubling for both the DB team and the owner if they are not adequately insured/protected. In addition, DB projects can be specifically undermined where the DB and any subcontractors are carefully vetted and where it is later determined that the DB team lacks a fulsome capacity to not only meet the design obligations but also meet construction phase(s) obligations and timelines.

Further, concentration of full responsibility with a design-build team can deprive an owner from the benefits of having the advice of multiple independent professionals in a typical design-bid-build project. Where a single entity or team is financially tied to the outcome of a given project, the owner runs the risk of investing in a single entity who can be self-motivated. While municipalities and local governments continue to pass statutes permitting design-build delivery, there continue to be hurdles with licensing, public procurement laws and competitive bidding. Lastly, Design-builders assume the responsibilities of a design professional (architect/engineer) and furnish all services – designing, engineering, constructing – necessary to deliver a completed

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[2] Bruner, Philip L. and O'Connor, Patrick J. (2018). Bruner & O'Connor Construction Law § 2:17. Project delivery methods— Design-build and turnkey.

[3] Cushman, Robert F. and Loulakis, Michael C. (2019). Design Build Contracting Handbook § 1.02. Evaluating Project Delivery Systems. New York, New York. Aspen Publishers.

project for an agreed price. Thus, with that concentration of responsibility, the DB team assumes all fiduciary duties owed (where applicable) of the design professional and construction professional. See, e.g. *Edward Barron Estate Co. v. The Woodruff Co.* (1912) 163 Cal. 561, 576 (Design or construction professional occupies a relationship of trust to his client and owes his client a fiduciary duty of loyalty and good faith.). The concentration of those duties with a single entity necessarily increases the potential exposure of that entity and is something that all operating in the DB space must be wary of.

D. Risk Transfer- Insurance, Surety bonds, Indemnity & Contribution

In DB projects, It can often be difficult to determine whether a problem is the result of a design or construction defect and the result can be costly litigation. The design-build method can circumvent some of these problems and avoid costly finger-pointing by concentrating responsibility with a single entity.

Often, in DB contracts, a design-build professional will warrant that the completed structure will meet or exceed the criteria of the request for proposal.[4]To that end, design build contracts will often include performance warranties and liquidated damages provisions for failure to achieve certain criteria. *Id*. Given same, all parties (including insurers) must be wary of potential exposures where members of the design build team are actively involved in performing various tasks in design-build contracts and lines are blurred with respect to each parties' respective responsibilities. Design build and EPC contracts afford owners an expansive opportunity to shift risk to the design-build team. Those professionals need to ensure that they are adequately protected for the various tasks and responsibilities they intend to undertake and assume in design-build contracts. This can be achieved by way of a myriad of different products including errors and omission coverage, comprehensive general liability coverage (modified to cover professional liability risks), supplemental contractor professional liability coverage, surety bonds and, of course, clear and precise indemnification and damages provisions in design build subcontracts. Carriers should carefully assess the risks of insuring design-build teams and where appropriate, ensure that their forms carefully define "professional services" distinguishing between traditional and design/build architectural services and where appropriate include language limiting coverage for design-team joint ventures.

1. Insurance

The first step in evaluating appropriate risk-transfer mechanisms is for the design-build team to identify what kinds of insurance are likely to be necessary or advisable for the project. This determination is likely to be made in concert with the owner. It may also involve use of an insurance broker, risk manager, or similar consultant.

The next step is to determine which party will be responsible for procuring and maintaining each type of insurance. General liability insurance is usually provided by the contractor, and professional liability is usually provided by the design professional. Property or builder's risk insurance may be provided by the owner, contractor or the design-build team – usually whoever can purchase it least expensively. Construction subcontractors usually

[4] Friedlander, Mark C. (2003 October), *Risk Allocation in Design-Build Construction Projects* URL: https://www.schiffhardin.com/Templates/media/files/publications/PDF/risk_allocation_design_build.pdf

purchase and maintain their own general liability and worker's compensation / employer's liability insurance, while design subconsultants often are required to carry their own professional liability coverage and worker's compensation / employer liability insurance. Contractors should require each subcontractor to secure additional insured coverage for the benefit of the contractor and owner on as broad as terms as possible.

One option is for the owner to purchase or to reimburse the design-build team for purchasing a project or wrap policy that insures all of the companies involved in the project. It is particularly useful in design-build projects because of the closer involvement of the members of the design-build team and the overlap between the design and construction functions. Of course, as to any coverage being purchased, there must be a determination as to the coverage limits, deductibles, procedures for demonstrating proof of insurance coverage and other terms.

An insurance concern relatively unique to design-build, particularly where the contractor is prime and the design professional sub, involves the contractor's potential liability for professional errors or omissions on the plans. It may not be possible for the contractor to obtain coverage through the design professional. Recently, other alternatives have been developed by the marketplace, such as a contractor's professional liability policy.

2. Surety Bonds

The roles of performance, payment and bid bonds are essentially the same in design-build as in traditional projects. In a design-build project, they may be provided by the design-builder rather than the contractor alone, but they are typically secured by the contractor's financial capitalization, rather than by the design professional's, because of the usual disparity between them. The design professional and contractor need to discuss and incorporate into the teaming agreement whatever bonding arrangements, if any, they agree to for the project. The teaming agreement should include an explanation of how the bond premium, which is usually reimbursed directly by the owner, will be treated, as well as any other risk, notice or proof issues pertaining to the bond. Input from the owner may be required to determine these agreements.

The unique issue of concern for bonding companies with regard to design-build projects is the extent to which the bond will be responsible for the A/E's professional errors and omissions. Although traditional construction bonds did not include coverage for such issues, it is now relatively easy to find sureties who are willing to bond the entire project, including professional liability. Such coverage is usually contingent on the maintenance of appropriate professional liability insurance coverage against which the bonding company may subrogate. It may be necessary for the design-build team to consult with the surety before reaching final agreement on these issues.

3. Indemnity & Contribution

The concepts of Indemnity and Contribution are generally no different in the design and construction space then they are in any other arena. Contribution shifts a portion of the risk or loss to the other party, usually proportional to the relative culpability or fault of the two parties.

Indemnity is an "all or nothing at all" concept. With the indemnitor defends and/or reimburses the indemnitee for 100% of the indemnitee's risk or loss.

Indemnity and contribution clauses can be and frequently are written into the contract at each level of the construction project and are ordinarily included in the design-build team's agreement with the owner. Indemnity or contribution clauses are likely to be and should be included in each subcontract between the design-build team and subcontractors or subconsultants of every tier.

Design and risk professionals must remain cognizant of the fact that many states have "anti-indemnity statutes" which would render certain kinds of indemnity provisions in certain kinds of contracts void and unenforceable. In particular, the courts of some states refuse to enforce certain clauses whereby one party agrees to indemnify the other against the consequences of the indemnified party's own negligence.

4. Contract Language, Joint Defense Agreements

In the design-build setting, where the design-build responsibilities do not rest with a single monolithic entity, all efforts should be made to reach agreement regarding how specific losses and risks should be allocated and shared. Where a design-build team subcontracts specific design services, clear delineation should be made as to the specific scope of work for the design professional. Even though you are the "design" part of the Design-Build team, carefully crafted subcontracts will ensure that the design professional does not share in the liability for those issues that fall within the "build" part of the team. Joint defense agreements and tolling agreements should be executed so as not to air out the parties "dirty laundry" in any litigation. Other issues should be sorted out in teaming agreements as to who has responsibility for making key decisions regarding defense and resolution of claims where there may be shared responsibility for a given loss/suit. Joint defense agreements can be carefully tailored so all parties have skin in the game (i.e., shared obligations for expert fees, required participation in ADR).

II. Fiduciary Duty Claims and Expanding Areas of Liability for Design Professionals and their Carriers

A. Professional Standard of Care

In traditional construction, the architect or engineer is not held to a standard of perfection or guarantee of adequacy in the performance of its services. As a professional, the architect or engineer only promises to perform its services with the degrees of skill, care and diligence that the average typical design professional, similarly situated, would employ. In undertaking the representation, the design professional commits that he/she has the degree of learning and skill ordinarily possessed by architects of good standing, practicing in the same locality and must use reasonable diligence, skill and the care ordinarily exercised by reputable members of his profession. *Paxton v. Alameda County* (1953) 119 Cal. App. 2d 393, 259 P. 2d 934, 938.

B. Design Build Standard of Care

Inherent in every design-build contract is the non-delegable duty to properly design and construct. See, e.g. *Maloney v. Rath* (1968) 69 Cal. 2d 442, 446-447, 71 Cal. Rptr. 897. The key focus is the owner's complete reliance on the design-builder's skill and judgment, together with the inevitable expectation that the design-builder will provide a "turnkey" project. When design-builders don "two hats," they are fully responsible for all of the legal duties and traditionally imposed on designers and builders.[5]

With regard to the owner, the standard of care for design problems in design-build projects is different. Courts have tended to view the design professional's role as subsumed within the objective of the design-build project to produce a completed structure that functions adequately.[4] Thus, a design-builder's obligations to the owner are deemed to be subject to the implied warranty of adequacy of services in the design-build contract.[4] Generally, a design-builder will remain liable to the owner for the failure of the completed structure to function adequately as a consequence of a design problem, even where it cannot be established that the design problem resulted from the design-builder's negligent error or omission.[4]

For insurers, policy language should be carefully crafted to ensure that professional liability policies are limited to coverage for design errors/omissions and do not extend coverage for a design professional's involvement in more amorphous tasks in the design-build enterprise.

C. Fiduciary Duty Claims Against Design Professionals

Exposure for breach of fiduciary duty claims continues to present problems for design professionals. In certain jurisdictions there is a well-developed body of law addressing whether a fiduciary duty exists as a matter of law between a design professional and his client. In design build contracts, given an owner's delegation of autonomy and the trust and confidence vested in the design builder, a fiduciary duty owed to the owner will often be found to exist. In the more traditional design-bid-build setting, a factual determination is often necessary to determine whether or not a design professional owes a fiduciary duty to his client. In general, the more autonomy and authority given to the design professional to monitor the contractor and produce the end-result project, the more likely a fiduciary duty will be found.

1. Defining Fiduciary Duty Claims

A "fiduciary duty" is, in legal terms, the highest duty of trust and confidence that one person may owe to another. The fiduciary owes to its beneficiary the utmost good faith and loyalty. Where a fiduciary duty is found, the fiduciary must act "solely for the benefit of the principal in all matters connected with the agency, even at the expense of its own interests." *French v. Wachovia Bank*, N.A., 722 F.3d 1079 (7th Cir. 2013). It goes without saying that this represents a higher duty then, for example, a design professional's typical standard of care.

2. States where a design professional has a fiduciary duty by law[6]

[5] Castro, Joel B. *Evolving Liability for Design-Build Contracts: The Perfect Storm of Conflicting Interests*. URL: https://www.defectlaw.com/Publications/Understanding-Design-Build-Contracts-JBC1-239.pdf

[6] Not intended to be an exhaustive list.

A handful of jurisdictions have concluded that the relationship between a client and construction or design professional is fiduciary as a matter of law[7,8] (e.g. California, North Carolina, South Dakota). The leading case in California continues to be *Palmer v. Brown*. In *Palmer*, the Court stated that an architect owes a fiduciary duty of loyalty and good faith. Notably, in Palmer, the architect, the owner's agent, was "conflicted" because he was also receiving payment from the project contractor without the owner's knowledge or consent.

3. States where no fiduciary duty exists at law[6]

Other states have rejected the idea that the design professional-client relationship creates a *per se* fiduciary relationship (e.g. Indiana, Minnesota, Nebraska, Alaska).[9]

4. Fact Based Approach

Other jurisdictions have taken a fact-based approach to assessing whether a fiduciary duty exists and have not made definitive statements whether such a fiduciary duty exists *per se*. New York, Connecticut, Texas, Ohio and Florida present interesting case scenarios where the Courts have found that a fiduciary duty depends on the particular facts and circumstances of the design professional-client relationship at issue.

In New York, it is fundamental that a fiduciary duty "is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." *Kern v. Robert Currie Assocs*. 220 A.D. 2d 255 (1995) (citing *Northeast Ge. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 172 (1993). In *Cinque v. Schieferstein*, 292 A.D. 2d 197, 738 N.Y.S. 2d (2002), summary judgment was granted to the architect in a breach of fiduciary duty case as the Court found there was a "lack of proof of a fiduciary duty" separate from and extraneous to the party's contractually defined relationship...or even that there was a fiduciary relationship...". The Court stopped short of opining that there could never be a fiduciary relationship and instead held that there was insufficient proofs in this instance to suggest that there was a fiduciary relationship. Similarly in *Liberman v. Cayre Synergy 73rd LLC*., 2011 NY Slip Op 33975(U), the Court found that Third Party Plaintiffs' claims for breach of fiduciary duty against an architectural design firm could not be sustained as third party plaintiffs had not alleged sufficient facts to demonstrate that the third party defendants had "breached a duty of care independent of their contracts."

In Connecticut, the Superior Court for the Judicial District of Hartford held that a fiduciary duty exists where the architect as a professional…stands in a position of justifiable trust resulting in superiority and influence over the client. *Thier v. Kenyon*, et al. No.

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[7] Gurney, Brent, Curtis, Doug and Murphy, Rachel. (January 2014). Fiduciary Duty Claims Against Construction and Design Professionals. *New York Law Journal*.

[8] *Palmer v. Brown*, 127 Cal. App. 2d 44, 59 (Cal. Ct. App. 1954); *RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors*, P.A., 2001 WL 1013241, at *5 (W.D.N.C. Jan. 25, 2001); *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck*, 507 F. Supp. 873, 878.

[9] *Munn v. Thornton*, 956 P.2d 1213, 1220 (Ala. 1998); *Strauss Veal Feeds v. Mead and Hunt*, 538 N.E.2d 299, 303); *Carlson v. Sala Architects*, 732 N.W.2d 324, 331 (Minn. Ct. App. 2007), *Getzschman v. Miller Chem*., 443 N.W.2d 260, 270 (Neb. 1989)

CV054007354. 2006 WL 2605301. (2006). The Court in *Their* acknowledged that the complaint included specific contentions alleging that the defendants were hired "because of their superior knowledge, skill and experience which the Defendants had in construction projects." As Plaintiffs did not possess those qualities, the Court found that same was evidence that the firm was in a dominant position creating a relationship of dependency. In *Thier*, the court cited to an earlier Connecticut decision, *Lavy v. W&M Construction*, 34. Conn. L. Rptr. 721 (2003) where the Court permitted a count alleging a breach of fiduciary duty against an architectural firm where there was a similar allegation in the pleading that there was a unique degree of trust and confidence between the parties. Though, contrast the holding in *Thier*, to the decision in *Routh v. Preusch*, 2004 WL 2165906, at 2 (Conn. Super. Ct. Sept. 1, 2004), where the Court found that because there was no allegation of fraud, self-dealing or conflict of interest, and because there was no proof of a special relationship of loyalty and trust, no fiduciary duty existed.

In Texas, whether a fiduciary duty exists between parties depends on the circumstances. *Lindley v. McKnight,* 349 S.W.3d 113, 124 (Tex. App.-Fort Worth 2011, no pet.); *Cotten v. Weatherford Bancshares, Inc.,* 187 S.W.3d 687, 698 (Tex. App.-Fort Worth 2006, pet. Denied. For a fiduciary relationship to be found, a "special relationship" must exist between the contracting parties, *Arnold v. Nat'l County Mut. Fire Ins. Co.,* 725 S.W.2d 165, 167 (Tex. 1987). Similar to other jurisdictions, Texas Courts have found that a "special relationship" exists where "there is unequal bargaining power between the parties and a risk exists that one of the parties may take advantage of the other based upon the imbalance of power." *Laredo Med. Group v. Lightner,* 153 S.W.3d 70, 72-73 (Tex. App.-San Antonio 2004, pet. denied) (op. on reh'g). In *Sheffield Dev. V. Carter & Burgess*, 2012 WL 6632500 (Tex. Ct. App. Dec. 21, 2012), the Texas Court of Appeals found that, because Plaintiff could not offer evidence of a relationship of trust and confidence in the engineering firm beyond simply a trust in the firm satisfying its contractual obligations, the breach of fiduciary duty claim could not be sustained.

In Ohio a fiduciary relationship is one in which "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis,* 66 Ohio St.2d 74, 78 (1981), quoting *In re Termination of Employment,* 40 Ohio St.2d 107, 115 (1974). The role can arise by either contract or de facto from a special trust or confidence in a relationship. *Id.* In *Constr. Sys., Inc. v. Garlikov & Assoc.*, Inc. 2012 Ohio Ct. App. 2947 (10th Appellate Dist. 2012), the Court found that there was no evidence of a formal fiduciary relationship where an architectural firm had been retained as the architect, owner's representative and construction manager for the design and construction of its relocated office space. There, the magistrate relied on the fact that the firm did not have decision-making authority on behalf of the client.

Similarly, in Florida, the Florida Supreme Court has found that a fiduciary duty extends "to every possible case ... in which there is confidence reposed on one side and the resulting superiority and influence on the other. .... The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another." Mastzal v. City of Miami, 971 So. 2d 803 (2008) (citing *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 421 (1927)

5. The Aftermath – Dealing with Suits for Breach of Fiduciary Duty

There are a variety of damages that can be available to a plaintiff where a breach of fiduciary duty is found including lost profits, mental damages separate from economic loss, punitive damages, equitable relief, etc. Thus, all involved are best to be prepared to avoid and handle fiduciary duty claims when they are pled. Where a suit against a design professional pleads a breach of fiduciary duty claim, same raises a host of considerations including questions regarding the potential availability of coverage. As a breach of duty will arise out of intentional wrongful conduct, coverage is likely to be unavailable to the design professional under a given professional liability policy. Further, many jurisdictions have statutes precluding insurers from extending coverage for intentional acts. The pleading of an intentional wrongful act may give rise to situations where certain claims are covered while others will never be covered.

Where a given case against a design professional involves "mixed claims", there will likely be a duty to defend. Further, where coverage is unavailable under an errors and omissions policy, carriers should be mindful to prepare appropriate reservation of rights correspondence which specifically makes clear that coverage is unavailable for those claims for breach of a fiduciary duty and other claims sounding in intentional wrongful acts.

Both the design professional and their carriers face separate challenges where suits involve, for example, breaches of fiduciary based on wrongful intentional conduct, and run of the mill negligence claims. In pleading a breach of fiduciary claim or other intentional wrongful act, Plaintiffs may be looking to simply drive up the settlement value of the case. The question remains whether the settlement value of the case is being driven by the intentional wrongful conduct, gross negligence or other wrongful conduct or true negligent errors and omissions on the part of the design professional.

Settlement demands made in the face of both covered and uncovered claims can create a disconnect between an insurer and its insured. Carriers must also be cognizant that reticence to settle a suit involving covered claims and an uncovered breach of fiduciary claim could have implications to the carrier and the insured for excess exposure in addition to depletion of available limits by continued payment of defense costs. Early challenges to eliminate claims for breach of fiduciary duty may be prudent to leverage a favorable settlement and to harmonize the defense of the claim with the scope of available coverage.

D. Design Professionals Duties Owed to Non-Contracting Parties

1. The Economic Loss Rule and its demise in Florida

Design professionals' duties are not limited to those parties where there is direct privity of contract. Design Professionals can be liable under tort law to anyone to whom they owed a duty to act with reasonable professional skill and care. This includes innocent third parties for the design professional's negligence where it is the proximate cause of harm. See, e.g., *Columbia Engineering International, Ltd. v. Dorman*, 602 S.W.2d 7 (Tex.Civ.App.—Beaumont 1980), overruled on other grounds, 640 S.W.2d 860 (Tex. 1982). In short, courts will evaluate, based upon a host of factors, whether the design professional should have been able to foresee that specific persons or classes of persons would be harmed if there was substandard performance.

Under the traditional "economic loss rule" recovery for purely economic losses is barred from architects and other design professionals absent contractual privity. Jurisdictions are split

with respect to the adoption of the economic loss rule.[10] While we will not get into a full discussion of those states that do and do not get adopt the Economic Loss rule here, it bears noting that in jurisdictions where the Economic Loss Rule has been rejected, design professionals face exposure for economic loss in the absence of privity of contract.

One particular jurisdiction where caselaw continues to develop is in Florida. For years, Florida adopted the economic loss doctrine in connection with matters in the construction industry. S*pancrete v Ronald E. Frazier & Assoc., P.A.*, 630 S2d 1197 (Fla App 1994). See also*, A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973) (prohibiting a claim for economic damages against an architect where there was no privity of contract). However, in *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999), the Florida Supreme Court held that the economic loss rule does not bar a cause of action against a professional despite the lack of a direct contract between the professional and the aggrieved party. In 2013, the Florida Supreme Court specifically amended the economic loss rule. n *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc*., 110 So.3d 299 (2013), the Court held that the economic loss rule only applied to products liability cases. It also bears noting that in Florida, a breach of the Florida Building Code is available "notwithstanding any other civil remedies available.[11]

2. Rejected Recommendations / Subsequent Owners

In California, the courts have made clear that there need not be direct privity of contract in order for an architect, engineer or other design professional to be found liable in tort. *Biakanja v. Irving,* 49 Cal.2d 647, 320 P.2d 16 (1958). Architects, engineers, and other design professionals owe duties of care not only to current owners but also to future owners and other parties who would foreseeably be harmed by negligence in construction. *Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP,* 59 Cal.4th 568, 173 Cal.Rptr.3d 752, 327 P.3d 850, 857 (2014). A 2015 case recently reinforced these principles*. Philadelphia Indem. Ins. Co. v. Simplex Grinnell, L.P.*, 616 Fed.Appx. 870 (2015).

In *Simplex*, the District Court was asked to review claims against a design-builder of a complex sprinkler system for a high-end athletic field. After the property had been sold, and subsequent to catastrophic flooding of the field, the new owners and the tenant filed suit against Simplex Grinnell. The district Court held that Simplex was not a design-builder and did not owe a duty of care under the *Biakanja* standards. Further the District Court found that Simplex had no duty to install stronger guards or recommend protective netting for the sprinklers. On appeal, the Ninth Circuit found that the parties in *Simplex* stipulated that Simplex acted as the "design-builder of the sprinkler system" at issue and the fact that it was a subcontractor was of no moment. Further, the 9th Circuit found that a claim in tort for property damage could be pursued by the subsequent owner given clear California law that a subcontractor may be liable in tort for defective design or construction work. The case was remanded to the District for further findings consistent with the finding that Simplex had a duty.

III. Strategies for Minimizing Exposure to Design Professionals (10 Minutes)

[10] For a full discussion of caselaw addressing those jurisdictions that do and do not adopt the Economic Loss Rule, See, Bergeron, Keith J. *Architect and Professional Liability*. Modul Jury Instructions, Construction Litigation, Chapter 13. https://www.americanbar.org/content/dam/aba/publications/books/Ch_13_Model_Jury_Instructions_Construction_Litigation.authcheckdam.pdf

[11] §553.84 Fla. Stat. (2012)

There are numerous strategies to be utilized to minimize the exposure to design professionals both pre-project and in any post-project litigation:

- A design team should only take on projects, appropriate for the size and scale of the business. Overreaching can only lead to problems.
- Avoid any engagements where there could be even a perceived conflict of interest;
- Ensure that the design-build specifications are clear and sufficiently detailed;
- Ensure that contract does not establish a fiduciary duty or otherwise suggests that the design professional will be held to a heightened standard.
- Avoid contract language that could be construed as guarantees or warranties;
- Carefully vet and determine whether limitation of liability provisions, disclaimer language, and indemnification/risk-shifting provisions are enforceable under applicable law.
- Fully evaluate all subcontractors ensuring that they are fully licensed.
- Ensure adequacy of all potentially available insurance coverage – E&O, Builders' Risk, commercial general liability - and sureties
- When dealing with fiduciary duty claims – gather all evidence which demonstrates an equal bargaining position and/or that the design professional met any such fiduciary obligation.
- Consider litigation tactics – i.e. motion practice to eliminate fiduciary duty claims, removing any leverage they may create in settlement negotiations
- Pursue cost-share and joint defense arrangements to minimize exposure
- Evaluate all potential legal defenses (i.e. viability of the economic loss doctrine)