

NEWSLETTERS

California Upholds Contractor's Professional Negligence Claim Against Geotechnical Engineer In The Absence Of Privity

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Within the past two years California courts have recognized negligence claims against professional engineers and architects in the absence of privity. First, in *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP*, 59 Cal.4th 563; 173 Cal.Rptr.3d 372; 327 P.3d 850 (2014), where the court found residential design professionals potentially liability for negligence claims brought by third party homeowners whom they had no contractual relationship. More recently, the court in *Apex Directional Drilling, LLC v. SHN Consulting Engineers & Geologists, Inc.*, --- F.Supp.3d --- N.D. Cal. 2015) recognized a contractor's claims for professional negligence and negligent misrepresentation against a geotechnical engineer where the contractor relied upon the engineer's geotechnical report in preparing its bid on a municipal wastewater pipeline. We wrote about the Beacon decision last fall and how the declining significance of privity has found its way into California construction law. That trend has continued and has now been applied in the commercial setting.

In *Apex*, the City of Eureka, California solicited bids for the installation of a new wastewater pipeline by use of a technique known as horizontal directional drilling. The lead engineer on the project contracted with the city to serve as project manager. Part of the engineer's job was to conduct a geological study of the construction site and based on its findings, prepare a bid package describing the project. Certain portions of the study were furnished to potential bidders and the project engineer intended that the contractors would rely on the reports and drawings to estimate the necessary inputs for completing the work and how much to bid on the project. However, the engineer's study was based on the results of a single test bore, which was drilled outside the path of the planned pipeline. Relying upon this study, the plaintiff contractor submitted the lowest bid and was awarded the project.

Immediately after commencing with the work, the contractor encountered severe adverse soil conditions. Instead of the competent soils described in the study, the plaintiff found itself drilling in mud and flowing sands causing the project costs to escalate significantly. Over the next several months, the plaintiff continued to experience adverse soil conditions and did not reach stable conditions until several months after the project started. As a result, the plaintiff struggled mightily on the project and brought claims against the project engineer for furnishing misleading information in the geotechnical study.

In most states, a contractor is precluded from bringing direct claims

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against the project engineer in the absence of privity of contract. Until recently, California, like other states, applied the economic loss rule and required privity to bring suits in the commercial construction setting. Beginning with *Beacon Residential*, however, California courts have begun to look closer at whether a legal duty is owed by an engineer and contractor in the absence of privity. This shift in analysis has resurrected claims against unwitting design professionals. *Apex* is a perfect example. After balancing a six factor test on whether a duty exists, the court ultimately held that the aggregate weight of the relevant factors (including the fact that the parties interacted closely for a period of months on the project) and authorities dictates that the engineer owed the contractor a duty.

Similarly, the *Apex* court also recognized the contractor's claim for negligent misrepresentation under Section 552(2) of the Restatement (Second) of Torts. Applying the test pronounced in the Restatement, the court found: (i) that the contractor was a member of a finite class of persons that (ii) the "defendant supplier of information intends the information to influence." *Id.* at *6. Because the design professional supplied the geotechnical study with the intent to influence the contractor's bid, and the information was provided to a close universe of third parties, the court recognized the contractor's claim for negligent misrepresentation.

In light of the recent trend in California, design professionals should consider being careful if providing information on a project without clearly defined legal duties spelled out in the bid packages. The *Beacon Residential* and *Apex* cases may have had a different result had the design professionals included exculpatory language that clearly disavowed any legal duty and placed the onus on the contractor to independently verify the information.

For more information about this topic and the issues raised in this article, please contact Scott R. Murphy in our Grand Rapids office at smurphy@btlaw.com or (616) 742-3930.

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