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Notable Decisions 2014

By Michael B. Geibel, Esq.
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EXPANDED LIABILITY FOR DEVELOPERS, CONTRACTORS AND DESIGN PROFESSIONALS: The anticipated decision by the California Supreme Court *in Beacon Residential Community Assoc. v. Skidmore Owings and Merrill, LLP* (July 3, 7/3/2014) 157 Cal.Rptr. 222, portends increased liability and insurance costs for developers, contractors and design professionals involved in residential construction. The Court held that an architectural firm providing design services for a residential condominium project as the principal architect owed a duty of care to future homeowners and could be sued for construction defects under the common law theories of negligence and strict liability even if the architect did not exercise ultimate control over construction decisions. The Court acknowledged the reference in the Right to Repair Act to architects, but the Court's decision was based on case law and the common law considerations set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647 and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370.

In a related context, the appellate court in *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411 held that a general contractor owed a duty of care supporting negligence liability to future purchasers, and that a future purchaser could have standing as a third party beneficiary for purposes of finding liability for breach of implied warranty. The Court also affirmed that the Right to Repair Act is not the exclusive remedy for construction defects and may not provide procedural protections (notice, right to repair and non-adversarial dispute resolution) when developers or contractors are sued under common law theories such as negligence or strict liability.

The *Beacon* and *Burch* decisions represent a limitation on the significance of the requirement privity of contract, especially with respect to suits against architects, engineers and design professionals who are involved in residential housing. The *Weseloh* case, and older cases holding no tort duty of care to future owners based upon a lack privity of contract, are the growing exception and not the rule.

SUBROGATION ACTIONS UNDER THE RIGHT TO REPAIR ACT: There was "Bad News" for insurance companies repairing construction defects without providing the statutory notice under the Right to Repair Act. Allstate repaired water damage caused by defective plumbing but did not afford the developer an opportunity to repair, and then filed a subrogation action against the builder. The appellate court *in KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471 held

that if the subrogation action is brought under the Right to Repair Act, the statutory requirement of notice must be given to a builder ***before*** repairs are made even if repairs are funded by insurance.

CONTINUED VIABILTY OF THE "COMPLETED AND ACCEPTED" DEFENSE: Under the "completed and accepted doctrine," a contractor is not liable for injuries to third persons if the owner has inspected and accepted the work, provided the injury is caused by a patent defect (obvious upon reasonable inspection) and not a latent defect. An argument that only a "technical reading of the applicable building codes" could reveal a construction or design deficiency is insufficient to make an alleged defect latent, since the existence of Building Code provisions only underscores that the defects should have been discovered on reasonable inspection. *Delon Hampton & Associates, Chtd. v. Superior Court* (2014) 227 Cal.App.4th 250, 257.

For more information about these cases please contact:

Michael B. Geibel, Esq.

Gibbs Giden Locher Turner Senet & Wittbrodt LLP 1880 Century Park East, 12th Floor Los Angeles, California 90067 Phone: (310) 552-3400

email: mgeibel@ggltsw.com