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Ridiculous or Creative:
Trends in Attempts to Expand the Liability of Architects and Engineers

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Architects and engineers know very well that they may be subject to professional liability claims for breach of contract and negligence arising from errors or omissions in their work. However, creative claimants' counsel continue to explore new causes of action against design professionals that reach beyond these more common theories of liability. This program explores some of these recent trends.

I. Why Are Design Professionals Attractive Targets?

Since the long ago days when architects and engineers assumed the role of master builder and well into the present, design professionals are often the most responsible and durable players on construction projects. Their role as advisors to the owner puts them in a special position in relation to the other parties. As major project delivery methods have changed and continue to develop, designers may report to an owner's representative or construction manager or even become a subcontractor on a contractor-led design/build project. However the contractual roles change and evolve, ultimately, if there is a problem on a project, someone will be looking to the design professional for advice and then contribution to the resolution of the claim. As developer LLCs come and go and contractors struggle to survive in tough economic times, the design professional is often the most stable party with a solid insurance program which, unfortunately, often makes the designer an attractive target as a defendant.

II. Fiduciary Duty Claims Against Architects and Engineers

Many design professionals may be surprised to learn that in certain jurisdictions they may be exposed to liability even in the absence of any purported negligent act, error or omission. Fiduciary duties generally entail an obligation on the part of the fiduciary to his or her beneficiary to exercise the utmost good faith and loyalty which is commonly described as requiring the fiduciary to "act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interests." *French v. Wachovia Bank, N.A.*, 722 F.3d 1079 (7th Cir. 2013). This is a higher level of duty than simply the professional duty of care.

Although rules vary by jurisdiction, many jurisdictions have long rejected the notion that fiduciary obligations arise between design professionals and their clients. *See, e.g., Strauss Veal Feeds, Inc. v. Mead and Hunt, Inc.*, 538 N.E.2d 299 (Ind. Ct. App. 1989) (architect does not owe

fiduciary duties to employer/client); *Todd County v. Barlow Projects, Inc*., 2005 WL 1115479 (D. Minn. May 11, 2005) (no fiduciary obligations as matter of law between engineer/design professionals and their clients). However, the specific terms of a party's contract or the actions or other assurances taken in the course of performance could alter these baseline rules.
Other jurisdictions have determined that design professionals may indeed owe fiduciary duties to their clients, depending on the particular circumstances. *See, e.g., Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck*, 507 F. Supp. 873 (architect-client relationship is fiduciary under South Dakota law) (D.S.D. 1981); *Blue Cross & Blue Shield v. W.R. Grace & Co*., 781 F. Supp. 420 (D.S.C. 1991) (architect is independent contractor of building owner for matters concerning preparation of plans and specifications, but is agent for all matters regarding supervision over construction).

The recent case of *City of Victorville v. Carter & Burgess* highlights the risks for architects and engineers when fiduciary duty claims are pursued. The City of Victorville hired Carter & Burgess to perform a feasibility study and design a power plant.[1] After a series of delays and cost overruns, the City terminated the project. *Id*. When Carter & Burgess sued for final payment due, the City filed a hefty counterclaim for the costs of the unfinished project, alleging in part that Carter & Burgess owed fiduciary duties to the City and breached those duties by failing to properly supervise the project's development. *Id*. The case resulted in a $52 million settlement in favor of the City after a California jury awarded the City the full costs of the unfinished project. *Id*.

Of course courts (and savvy plaintiffs' counsel) will scour the specific terms of any engagement or agreement for evidence that could be used to establish such a fiduciary relationship. In the *City of Victorville* case, the City's attorneys relied on provisions in the retention agreements that supported the notion that the relationship was more than simply an arms-length business relationship. *Id*. Provisions in such agreements that speak of a relationship of "trust and confidence" may be used as evidence of the existence of a fiduciary relationship. *Id*. Design professionals can minimize the risk of being found to be a fiduciary by eliminating such contractual language (or related language such as "agent" or the design professional having the "duty to act in client's interest at all times," and all such similar language). If possible, one should also try to expressly disclaim any fiduciary duties to the client in the contract documents.
Although the cases are fact specific and fact dependent, jurisdictions which have recognized a *per se* fiduciary/agency relationship between design professionals and clients in some setting are:

> **California** *Palmer v. Brown*, 127 Cal. App. 2d 44 (Cal. Ct. App. 1954) ("An architect owes to his client a fiduciary duty of loyalty and good faith.")
> **Nebraska** *Fuchs v. Parsons Constr. Co*., 111 N.W.2d 727 (Neb. 1961) (architect employed by owner is the agent of such owner in supervising construction work and in the interpretation of plans and specifications relating thereto); *Gering v. Patricia G. Smith Co*., 337 N.W.2d 747 (Neb. 1983) (engineering firm hired by city is agent of city and thus engineer has duty to communicate to his principal all facts concerning the service in which he is engaged.)

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[1] Brent Gurney, Doug Curtis, and Rachel Murphy, "Fiduciary Duty Claims Against Construction and Design Professionals," New York Law Journal, January 13, 2014. Available at: http://www.wilmerhale.com/uploadedFiles/Shared_Content/PDFs/fiduciary-duty-claims-against-construction-and-design-professionals.pdf

North Carolina *RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A.*, 2001 WL 1013241 (W.D.N.C. Jan. 25, 2001) (under North Carolina statutory law an architect owes fiduciary duties to his client.)

South Carolina *Blue Cross & Blue Shield v. W.R. Grace & Co.*, 781 F. Supp. 420 (D.S.C. 1991) (Architect is independent contractor of building owner for matters concerning the preparation of the plans and specifications, but is an agent of the owner for all matters regarding the architect's supervision over the construction of the building.)

South Dakota *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck*, 507 F. Supp. 873 (D.S.D. 1981) (holding that the architect-client relationship is fiduciary under South Dakota law.)

Jurisdictions that have rejected or disclaimed a *per se* fiduciary relationship between design professionals and clients are:

Connecticut *Routh v. Preusch*, 2004 WL 2165906 (Conn. Super. Ct. Sept. 1, 2004) ("The relationship of client and architect does not impose on the defendant the unique level of loyalty or trust which characterizes a fiduciary relationship.")

Indiana *Strauss Veal Feeds, Inc. v. Mead and Hunt, Inc.*, 538 N.E.2d 299 (Ind. Ct. App. 1989) (architect does not owe a fiduciary duty to its employer; rather duties depend on agreement entered into with employer.)

Minnesota *Todd County v. Barlow Projects, Inc.*, 2005 WL 1115479 (D. Minn. May 11, 2005) (no fiduciary obligation exists as a matter of law between engineer and design professionals and their clients.)

Texas *Sheffield Dev. V. Carter & Burgess*, 2012 WL 6632500 (Tex. Ct. App. Dec. 21, 2012) (rejecting *per se* rule that a fiduciary duty between engineers and their clients exists as a matter of law; determination is based on facts of specific case.)

Virginia *Will & Cosby & Assocs. v. Salomonsky*, 48 Va. Cir. 500 (1999) (Rejecting *per se* rule that architect is agent of owner, and instead saying such relationship is determined on a case by case basis, based on the parties' contract and their actions.); *Kmart Corp. v. Meadowbrook, LLC*, 81 Va. Cir. 365 (no rule in Virginia that an engineer, architect, or general contractor is always an agent of the owner.)

III. Potential Exposure Under the SEC Municipal Advisor Rule

When professionals assist local governments, they must be wary of giving what may be considered financial advice. As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act, new duties for "municipal advisors" have been added. The Act makes municipal advisors fiduciaries of their client municipalities. Pursuant to the Act, it is unlawful to advise municipalities on financial products unless registered with the SEC as a municipal advisor. If design professionals assist municipalities in planning and funding of infrastructure projects, they need to be aware of the SEC regulations. One can be considered a municipal advisor if funding

options are compared and opinions are given. The Municipal Advisor Rule has exceptions for professionals where they are giving advice relating to their specialty, not advice on municipal securities. Engineers must be careful not to give advice or recommendations regarding municipal securities. For some practical examples of how the Municipal Advisor Rule may impact municipal engineers in particular, see "The Municipal Advisor Rule: Changing Rules for Professionals Who Assist Local Governments," KRWA Clarifier, August 2014 (www.krwa.net/krwa/clarifier/1408/FLASH).

The new municipal advisor rule does not include its own set of unique penalties or fines if it is violated, and thus any violation would be subject to the variety of possible sanctions and enforcement actions the SEC may employ generally including civil penalties/damages, injunctions, and even possibly referral to the justice department for criminal enforcement. Monetary penalties in administrative enforcement proceedings are generally assessed based on the culpability of the offender with fines beginning at $5000 for "first tier" violations.

IV. Design Professional Liability Where Recommendations Were Rejected or Value Engineered Away by Developer

A recent case has highlighted another potential angle of liability that can come back to haunt design professionals years after project completion. In July 2014, the California Supreme Court ruled that two large architectural firms could be forced to pay damages to a condominium association whose owners claimed the temperature in their units was too high, years after the developer had rejected the architects' recommendations as to the kind of exterior glass to install. *See Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill LLP*, 327 P.3d 850 (Cal. 2014). Because plaintiffs' alleged the architects had approved the developer's choice of glass, resulting in excessive solar heat gain, even though the architects' had originally recommended a different design and were not ultimately responsible for the construction of the building, the claims of negligence against the architects could go forward. *Id*. The Court articulated its specific holding as follows: "[W]e hold that an architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a *principal architect* on the project—that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction." *Id*. While prior California decisions had limited the liability of architects to subsequent owners/occupiers, the Court in *Beacon* went in a different direction, explaining:

> [D]efendants uniquely possessed architectural expertise. There is no suggestion that the owner or anyone else had special competence or exercised professional judgment on architectural issues such as adequate ventilation or code-compliant windows. Just as a lawyer cannot escape negligence liability to clearly intended third party beneficiaries on the ground that the client has the ultimate authority to follow or reject the lawyer's advice, so too an architect cannot escape such liability on the ground that the client makes the final decisions. An architect providing professional design services to a developer does not operate in a "client-controlled environment" comparable to the relationship between an auditor and its client.

Id. (citations omitted).

This case highlights the potential long-tail liability that can follow design professionals for years after project completion and after multiple owners, subject of course to a state's statute of repose or other limitations periods. While the Court was cognizant of the architects' argument that such a ruling may portend for design professionals "liability in an indeterminate amount for an indeterminate time to an indeterminate class," the Court brushed aside such concerns by stating that in this case, the architects knew very well that the "construction would be sold as condominiums and used as residences. . . . [and thus] there was no uncertainty, as to the existence, let alone the nature or scope, of the third party transaction that resulted in the claim." *Id*.

V. Other Developing Areas of Exposure for Design Professionals

Other trends in claims against design professionals involve pursuit of claims against design professionals individually, issues arising from the design professional's role as a subcontractor in a contractor-led design/build contract, and the role of design professionals in advising on public-private partnerships including financial forecasting of the income stream from such projects. As long as new methods of project delivery continue to be developed, new theories of liability for design professionals should be expected.

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