Strangers No More? Trends In The Architect's No Privity Defense

By John P. Cahill, Jr., Esquire
and Michael A. DeScioli, Esquire

What is Privity?

Simply put, "privity of contract" is "'the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." [i] The existence of 'privity' had long protected an architect in a contractual relationship with an owner or some other entity from potential liability to a contractual stranger. However, in recent years, there has been a significant amount of litigation interpreting whether the essential existence of that relationship continues to be a valid defense for a design professional from liability against those with whom the design professional does not have a direct contractual relationship, such as a contractor, subcontractor, or injured third party. If privity remains a valid defense, a contractor, subcontractor, or injured third party has valid basis to file a claim or lawsuit against an architect for deficiencies in the his or her work. Instead, such claims could only be made against the owner of the project or whomever the contractor, subcontractor, or injured party has a direct contractual relationship with relating to the project in question.

While lack of privity is still a valid defense in some jurisdictions, there has been a clear trend in many states to modify or, worse, completely abandon this defense that has benefited architects and engineers for so long. This article includes a brief discussion on the status of the law on the privity defense for a design professional in numerous jurisdictions and the approaches being used to uphold or limit such defense.

The Traditional Rule – If There is No Contract, There is No Duty or Right to Sue

Several jurisdictions continue to follow the traditional rule of contract law and hold that privity of contract is required to prevail on claims against design professionals. Texas, for instance, has long held that design professional who has a contract with an owner does not have a separate duty to a contractor or subcontractor who works on the same project absent privity of contract. [ii] In two recent Texas cases, this position was again reinforced when it was held that a design professional has no duty to a third party injured as a result of negligence by a design professional.

Architect is Not Responsible for Contractor's Delay Damages - ***LAN/STV v. Eby***

The Texas Supreme Court has held that a contractor under contract to the project owner only, may not sue an engineer for delay damages based upon design errors. [iii]

LAN/STV, a joint venture, contracted with the Dallas Area Rapid Transit Authority (DART) to provide design plans and specifications for a light rail line in Dallas. Separately, DART contracted with Martin K. Eby Construction Company (Eby) to construct the rail line. There were no contracts between Eby and LAN/STV. Very shortly after construction commenced, Eby "discovered" that the plans had numerous errors and asserted that 80% of the construction drawings required revisions and modifications. Eby contended that it lost $14,000,000.00 on the project.

Eby originally sued DART for breach of contract which was dismissed for failure to exhaust administrative remedies. After a complicated legal process, Eby and DART settled for a fraction of what Eby claimed and Eby filed suit against LAN/STV for negligence and negligent misrepresentation. The jury found fault on the part of LAN/STV (45%), DART (40%) and Eby (15%). Both parties appealed.

Eby had claimed that LAN/STV prepared the plans and knew that Eby was going to rely upon those plans in connection with the performance of its work on the project. Negligent misrepresentation is a tort (non-contract) cause of action. The noted that, in general, 'there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties.' Texas had previously recognized an exception for the recovery of purely economic losses in connection with the negligent performance of services in professional malpractice cases involving lawyers. The Court reiterated its previous recognition of the negligent misrepresentation cause of action set out in Section 552 of the Restatement (Second) of Torts and its application to legal malpractice cases. Mc*Camish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999). Eby wanted to extend that holding to a construction context.

The Court noted that negligent performance of services and negligent misrepresentation are "both torts…based on the same logic" with similar "general theor[ies] of liability." In agreeing that an architect's plans are "intended to serve as a basis for reliance by the contractor, the Court stated that 'the contractor's principal reliance must be on the presentation of the plans by the owner, with whom the contractor is to reach an agreement, not the architect, a contractual stranger. The architect is liable to the owner for deficient plans. Therefore, the Court concluded that the general contractor had no direct cause of action against the architect retained separately by the owner for economic losses caused by allegedly defective plans.

Architect owes no Duty to Owner's Guests – *Black & Vernooy v. Smith*

In *Black + Vernooy v. Smith,* an architect was hired to design a home with a balcony off of the master bedroom. [iv] The contractor constructed the balcony, but significantly deviated from the design documents. The method of attachment, was photographed by the architect on site visits, but not specifically observed. About a year after moving in, the owners had houseguests visit the home. When two guests stepped onto the balcony, it collapsed. Both were seriously injured, one paralyzed. In addition to suing the owner and contractor, both of whom settled prior to trial, the house guests sued the architect for negligence and won at the trial level. The architect appealed. The basis of the claimants' suit was that the architect owed both a common law duty and contractual duty to them as third party beneficiaries because the contract stated that the architect would periodically visit the construction site "to report observed deviations from the design plans to the [owners], and to guard the [owners] against defects in the construction of the home". The agreement also authorized the architect "to reject Work that does not conform to the Contract Documents".

The claimants argued that the Court should hold that the architect owed them a duty under the common law, the laws not written by legislatures, but which courts, for centuries, have held govern our societies. The Court considered several interrelated factors to determine whether such a duty should be imposed on the architect, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury, and the consequences of placing the burden on the defendant. Although the Court conceded that the foreseeability and likelihood of injury factors weighed in favor of creating a duty, when weighed against the other factors, as well as the right of control over the person who created the harm, the recognition of a new common-law duty was not warranted. The Court held that the architect owed no duty to the guests injured as a result of the defectively installed balcony.

The architect's contract with the owner permitted him to reject a contractor's work, but did not authorize the architect to control the actual work performed. The contract stated that the architect "shall neither have control over or charge of, nor be responsible for, the construction, means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work", that such obligations "are solely the Contractor's rights and responsibilities", that the architect "shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work", and that the architect was not "responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents". The Court further held that although there is

significant social utility in having an architect provide some oversight to construction and ensuring that the design plans are being met, the magnitude and consequences of the burden by creating a duty would be too significant as it would require the architect to essentially serve as an insurer or guarantor of all construction matters. Finally, the Court held that creating such a duty would curtail the freedom of an architect and an owner to contract for a specific nature of scope of services to be provided. The Court refused to create that new duty.

The Court did go further to note that the guests were not third party beneficiaries because nothing in the contract indicated that they were intended third party beneficiaries. The contract specifically stated "[n]othing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the [homeowner] or the [architect]." As a result, it held that the architects owed no duty either under contract or common law to the third party claimants without privity of contract. That being said, Court did leave open the possibility that an architect who retains control over a contractor's work may be liable to injured third parties. Therefore, language contained within a design professional's contract regarding control is important and should be considered carefully prior to entering into any project.

Architect Owes No Duty to Subcontractor – *SME v. TVSA*

The Supreme Court of Utah has also refused to allow third parties to prevail on claims for negligence, including negligent misrepresentation, against design professionals.[v] *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assoc., Inc.*, involved renovations to expand the Salt Palace Convention Center in Salt Lake City. The design team contracted directly with the owner. The general contractor contracted with the owner and its subcontractors. Neither the general contractor not its subcontractors had contractual relationship with any member of the design team. One subcontractor agreed to furnish, fabricate, and erect the structural steel for the project. The subcontractor had numerous problems in performing its work as a result of problems with the design documents related to the structural steel. It submitted more than 450 requests for information and made numerous requests for change orders for clarifications of the plans and specifications. The subcontractor's work was delayed and completed more than two million dollars over budget. The subcontractor sued the design team for professional negligence to recover those costs, alleging that the design team's responses to its RFIs and change orders were late, inconsistent, conflicted with the plans and specifications, and that this was the cause of the delay and extra costs. These claims were dismissed by the trial court. In affirming this decision, the Supreme Court held that "the general rule in this jurisdiction prohibiting the recovery of purely economic loss in negligence is applicable to a contractor's or subcontractor's

negligence claim against a design professional" and affirmed the trial court's dismissal. The Court citing its prior opinion in *American Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*[vi], wherein it reasoned that "[t]o allow the claims would be to impose [the subcontractor's] economic expectations upon parties whom [the subcontractor] did not know and with whom [the subcontractor] did not deal and upon contracts to which [the subcontractor] was not a party," which it refused to do.

Other states, including Missouri, Virginia, Washington, continue to preclude recovery against design professionals without privity of contract.[vii]

THE BREAKDOWN OF THE DEFENSE

Negligent Misrepresentation Claims

The most common exception to the privity of contract requirement is for claims of "negligent misrepresentation" made by contractors against a design professional. These states allow a contractor or subcontractor who relies on a design professional's plans to make a claim for "negligent misrepresentations" contained within the professional's plans or specifications. Such theory of liability is based upon §522 of the Restatement (Second) of Torts, which allows a person to sue another who negligently provides guidance to others as part of their business. Section 522 reads as follows:

<u>§ 552 Information Negligently Supplied for the Guidance of Others</u>

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Negligent Misrepresentation is an Exception to the Economic Loss Rule *Bilt-Rite v. The Architectural Studio*

Pennsylvania law, for instance, allows a claim to be made by a contractor if it relied on incorrect plans and specifications based on the Restatement (Second) of Torts provision set forth above.[viii]

In *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, a school district entered into a contract with an architect to design a new school. The architect prepared plans, drawings, and specifications that were used by contractors to prepare bids for the project. In preparing its bid, Bilt-Rite relied on the plans and specifications and its bid was accepted. The plans and specifications stated that the "standard construction means and methods" could be used to build the required aluminum curtain wall system, slope glazing system, and metal support system. However, standard construction means and methods could not successfully be used and the required changes significantly increased the cost of construction. Bilt-Rite's initial bid, therefore, was too low to cover the cost of construction. Bilt-Rite sued the design firm for negligent misrepresentation despite the absence of a direct contractual relationship. The Court held that § 552 of the Restatement (Second) of Torts provided support for Bilt-Rite's negligence claim and therefore allowed recovery of economic damages without the existence of privity of contract. The Court reasoned that one who supplies information to others for pecuniary gain and "intends or knows that the information will be used by others in the course of their own business activities" is grounds for the existence of a duty to those who are foreseeable users of such information in furtherance of their own business. The Court further held that negligent misrepresentation claims are an exception to the economic loss rule, therefore allowing a contractor or subcontractor to recover monetary losses from relying on plans or specifications prepared by a design professional.

Negligent Misrpresentation – *Guardian v. Tetra*

Similarly, Delaware allows negligent misrepresentation claims to be made against design professionals based on § 552 of the Restatement (Second) of Torts. *Guardian Construction Co. v. Tetra Tech Richardson, Inc.* has a very similar fact pattern to the *Bilt-Rite* case discussed above. [ix] In *Guardian Construction*, a design professional was hired to prepare plans and specifications for a breakwater structure

and the contractor used those plans to submit a bid to the owner of the project. After the contractor was awarded the bid, it hired its own subcontractors to complete the project. Neither the contractor nor the subcontractors had a contract with the design professional. The height calculations and benchmarks contained within the design professional's plans and specifications were incorrect, causing the bid to be significantly lower than actual costs to complete the project. The contractor sued the design professional for negligent misrepresentation and the Court held that the design professional should be liable for foreseeable economic losses by parties who they could reasonably expect to rely on their plans and specifications. Specifically, the Court held that, based on §552 of the Restatement (Second) of Torts, that the design professional could be held liable for negligent misrepresentation because the design professional:

> negligently obtained and communicated incorrect information specifically known and intended to be for the guidance of Plaintiffs, and if it is specifically known and intended that Plaintiffs would rely in calculating their project bids on that information, and if Plaintiffs rely thereon to their detriment, then [the design professional] should be liable for foreseeable economic losses sustained by Plaintiffs regardless of whether privity of contract exists.

Massachusetts is yet another jurisdiction that follows the negligent misrepresentation exception to the privity of contract requirement.[x] In *Nota Constr. Corp. v. Keyes Assocs.*, which again has an almost identical fact pattern as *Bilt-Rite* and *Guardian Construction*, the Court held that there is "no reason why a design professional such as an architect should be exempt from liability for negligent misrepresentation to one where there is no privity of contract."

Certainly, the Restatement of (Second) of Torts has been interpreted by many courts, and can be expected to be used by more courts in the future, to provide support for holding a design professional liable to those who are not in privity of contract but who rely upon the design professional's work to perform its own work. The Restatement of (Second) Torts, however, has not been interpreted to allow recovery, despite absence of privity, to injured third parties who are not involved in construction.

Liability for Duty Owed to those Based on Foreseeability – *Flagstaff Affordable Housing v. Design Alliance*

In *Flagstaff Affordable Housing, L.P. v. Design Alliance, Inc.*, the Arizona Supreme Court re-visited a prior decision that held a design professional owes a duty *to anyone* for foreseeable injuries to foreseeable victims resulting from professional services.[xi] The earlier case, *Donnelly Construction Co. v. Oberg/Hunt/Gilleland,*

involved a contractor that relied on an architect's erroneous design and suffered damages as a result of relying on the design.[xii] The Arizona Supreme Court in *Donnelly* not only held that design professionals owe a duty to contractors who rely on the design professional's work despite an absence of privity, but that "design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from their negligent performance of their professional services." and that a negligence claim can be made by anyone upon showing the existence of a duty, a breach of the duty, and resulting damages.

While the specific facts in the *Flagstaff* deal with a cause of action by an owner against an architect, the Court took the opportunity to revisit and confirm the existence of duties by architects to third parties as set forth in *Donnelly*, but clarified the applicability of the economic loss rule to those who do have a direct contract with a design professional. *Flagstaff* involved the construction of a low income housing project. The owner, in customary fashion, contracted directly with the architect and the architect had no contractual relationships with others involved on the project. The owner was eventually sued by the U.S. Department of Housing and Urban Development (HUD) because the low income housing did not meet applicable accessibility guidelines. The owner settled with HUD and brought claims for negligence and breach of contract against the architect. The owner argued that it was entitled to bring both contractual and tort claims against the architect and that the economic loss rule did not protect the architect from tort claims as a result of the special relationship between architects and their clients. The trial court dismissed the tort claims based on the economic loss rule, while the appellate court reversed and held that the economic loss rule did not apply to claims against design professionals. The owner argued that limiting it to contractual claims only conflicted with its decision in *Donnelly*. Ultimately, the Arizona Supreme Court held that the economic loss rule does apply to design professionals and because the owner and the architect had a direct contract, the owner was limited to contractual remedies. The Court explained that this does not conflict with its decision in *Donnelly* because in *Donnelly*, a contractor was allowed to proceed with a negligence claim against a design professional when it did not have a contract and implied that the economic loss doctrine "would not apply to negligence claims by a plaintiff who has no contractual relationship" with the design professional. The current state of Arizona law, therefore, is that privity of contract is not required to sue a design professional for foreseeable injuries to foreseeable victims. However, if a party does have privity of contract, it is limited to contractual remedies and cannot prevail on claims based in tort.

Architect Owes Duty to Ultimate Owner of Property – *Beacon v. SOM*

California officially joined the trend of states holding that a design professional owes a duty to individuals or entities without regard to the existence of privity. In *Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP*, the California Supreme Court held that a design professional, providing plans and specifications on a project, owes a duty of care to homeowners, members of a community association, neither of whom had a contractual relationship with the design firm."[xiii] *Beacon* involved a homeowners' association suing two architectural firms for damages allegedly caused by negligent architectural and engineering design, observation, and construction work related to water infiltration, fire separations, and structural cracks. The trial court granted the architects' motion for summary judgment based on lack of privity of contract. The California Supreme Court noted that the architect had a "primary role in the design of the project" that bore a "close connection" to the claimed damages. The court pointed out several times the architect's expertise in design. Relying upon its prior holdings, the Court noted the considerations in applying direct liability: 1) design is intended to benefit the ultimate owners of the property; 2) foreseeability that the future owners would be in the class of persons harmed by negligent design; 3) injury; 4) close connection between the design and the injury; 5) moral blame on design professional because of being well paid and having knowledge that owners would rely on design work; and 6) a public policy directive to prevent future harm to others.[xiv] While limited to the design of an architect, the holdings and policy implications clearly indicate that California is prepared to expand this holding to any level of subconsultants of the prime designer.

If There Is No Other Remedy, Let the Architect Pay – *Conforti v. Eisele*

A New Jersey court has held that New Jersey law disfavors the privity of contract defense in favor of design professionals and prefers to allow tort claims to be made by contractors and injured third parties absent privity of contract.[xv] *Conforti & Eisele, Inc. v. John C. Morris Associates* involved a claim against a design professional by a contractor whose costs were too high as a result of relying on inaccurate specifications. The Court allowed a cause of action in tort despite the fact that there was no contractual relationship between the design professional and the contractor. The Court held that the following tests could be used to determine whether a valid negligence claim exists:

1. The extent to which the transaction was intended to affect the plaintiff;

2. The foreseeability of harm to the plaintiff;

3. The degree of certainty that the plaintiff will suffer injury;

4. The closeness of the connection between defendant's conduct and the injury suffered;

5. The moral blame attached to defendant's conduct; and

6. The policy of preventing future harm.

Without explanation or analysis, the *Conforti* Court held that such factors weigh in favor of recognizing a cognizable action by the contractor against the design professional.

This position, however, has been distinguished by two recent (unpublished) decisions, both of which held that a contractor can sue a design professional absent privity of contract when the contractor would have been left without a remedy.[xvi] The Courts in *Spectraserv, Inc. v. Middlesex Cnty. Util. Auth.* and *Horizon Group of New England, Inc. v. N.J. Sch. Constr. Corp.* both state that in situations where there are comprehensive contractual relationships that allocate risk and remedies between the various parties of a construction project and *a contractor has a valid remedy for the alleged harm* against someone other than the design professional, even in the absence of a direct contractual relationship, the "economic loss doctrine will apply and serve its purpose of limiting the expansion of tort liability where contractual remedies exist." New Jersey courts, therefore, may look to determine whether an injured party can recover elsewhere, but ultimately may hold the design professional liable if no alternate recovery is available.

Relationship of Parties Exception

Other jurisdictions look to whether there is a "special relationship" between the design professional and the third party in determining whether the third party can sue the design professional for negligence.

In West Virginia, for example, it has been held that "[w]here a special and narrowly defined relationship can be established between the tortfeasor and a plaintiff who was deprived of an economic benefit, the tortfeasor can be held liable. [xvii] The special class of plaintiffs must be particularly foreseeable to the tortfeasor and the economic losses proximately caused by the tortfeasor's negligence. The court noted that because contractors must rely upon design documents to bid upon and complete their projects and design professionals may provide oversight during the construction phase, the relationship between a contractor and a design professional is such a

"special relationship" allowing the contractor to sue for damages despite a lack of privity. This holding was subsequently extended to sureties, not just contractors.[xviii]

Functional Equivalent of Privity Exception

New York law allows negligence and misrepresentation claims in the absence of privity if the relationship between the plaintiff and the design professional creates the "functional equivalent of contractual privity." The New York Court of Appeals in *Ossining Union Free School District v. Anderson LaRocca Anderson* held that an engineering consultant can be held liable to someone that it is not in privity of contract with if there is the "functional equivalent of privity". [xix] The Court held that the functional equivalent of privity exists if:

(1) a defendant knows that its plans or specifications will be used for a particular purpose by a known plaintiff;

(2) the known plaintiff relies upon the services for that particular purpose; and

(3) the conduct between the parties evidences an understanding of this reliance.

The functional equivalent of privity standard is more limited than the Restatement (Second) of Torts negligent misrepresentation standard discussed above and is to be strictly applied.[xx] The Court in *Travelers Cas. & Sur. Co. v. Dormitory Auth*. stated "[n]ot only does New York not permit recovery of economic loss on the basis that a plaintiff was "foreseeable," but the New York Court of Appeals has repeatedly "rejected even a somewhat narrower rule that would permit recovery where the reliant party or class of parties was actually known or foreseen but the individual defendant's conduct did not link it to that third party." The Court explained that in order for the functional equivalent of privity to exist, the design professional "must have known" at the time the services were performed or the statements made "that the particular plaintiff bringing the action would rely on its representations."

A more recent case in New York, albeit at the trial court level, held that an engineer further owes a duty not to endanger the general public if it has the requisite "participation" and "control" of the design of the item that caused the harm.[xxi] *Fried v Signe Nielsen Landscape Architect, PC* involved allegations of negligence against engineers involved in designing a pier without vehicle-resistant barriers to prevent motorist from driving into the water. The plaintiffs in *Fried* were the family and guardian of a woman injured after driving off the pier. After a trial on the merits, the jury found that the engineer was negligent. The engineer, in a motion to set aside the verdict, argued that it did not owe a duty to the injured plaintiff because there was no privity of

contract. The Court disagreed and held that, given the requisite degree of participation and control, an engineer will be deemed to owe a duty to the general public to use reasonable care in the design of a roadway. Specifically, the Court held that an engineer "owe[s] a duty to motorists and pedestrians to use reasonable care in the design so as not to expose them to an unreasonable risk of foreseeable harm." This case does not discuss the "functional equivalent of privity" rule discussed in the Ossining and there was no subsequent appellate history on such issue.

Duty Arising from the Architect's Control over a Construction Project

Ohio Courts have allowed recovery by a third party against a design professional absent privity of contract when a Plaintiff demonstrates a "sufficient nexus as a substitute for privity." With respect to contractors or sub-contractors, such a nexus exists when the design professional exercises "excessive control over the contractor through the power to stop the work and give orders about the project."[xxii] The "control approach" may be a developing trend as the degree of control was referenced in the recent Texas and New York opinions discussed above. In the Texas case, *Vernooy*, the contractual language required the architect to report "known deviations from the Contract Documents" and to "endeavor to guard the [homeowner] against defects and deficiencies in the Work". Nothing in the contract, however, gave the architect control over the work performed by others, which the Court considered in declining to extend the duty to contractual strangers. The Court in *Fried* did not rely on contractual language to determine the extent of control, but instead examined the testimony regarding the roles of design professional in determining that it sufficient control was exercised to establish liability.

Practical Considerations: What Is an Architect to do?

Though case law and practical considerations may prevent an ability to escape the scope of potential claims, design professionals can engage in some practical considerations in an effort to reduce risk and avoid expanding potential for liability. Some practical considerations for the architect should be cautious in drafting and negotiating a contract, working on the project, and to the extent involved, during construction contract administration.

1. Avoid creating third party beneficiaries to your contract agreements;
2. Beware of other parties to whom an owner or client may expand contractual obligations and responsibilities (i.e., lenders, subsidiaries, affiliates, owner associations, etc.);

3. Beware of statements concerning lender reliance in executing architect's consent and assignment agreements;
4 Limit rights to assign contracts and contract rights;
5. Beware of what expands the provision and scope of duties to contractual strangers (i.e., contractual provisions that state that others may benefit from them; Lender's Consents for Architects which create rights in Lenders and others, conduct in which the Architect may start to give direction to a contractor/subcontractor or in which the architect takes instructions from and does work for a contractor outside of the contract terms);
6. Avoid contractual provisions that make references to or statements concerning relationships between design professional and contractor or other contractual strangers;
7. Beware of conduct that may be seen as taking instruction from third party strangers to your contract (i.e., revising plans at the direction of a contractor or subcontractor; undertaking tasks at the direction of a contractor or subcontractor at the construction site);
8. Beware of responding to and writing reports for third parties who are strangers to the contract (i.e., answering direct questions from subcontractor outside of normal chain of communication, analyzing plans or construction methods for lender) ;
9. Beware of representations or warranties intended for reliance by third parties;
10. Beware of project work that expands duties and obligations beyond written contract;
11. Beware of language of permit applications;
12. Asserting control over work of contractors, including directing contractors on work; and
13. Use AIA documents, unmodified, for its protective language.

Beyond this, one must also be very mindful of statutory provisions that may establish duties and causes of actions on behalf of third parties, including the general public. No amount of contract drafting can escape those statutory terms.

Conclusion

Although there are varying methods being used in U.S. jurisdictions to avoid application of the privity of contract defense, it is clear that courts are becoming more likely to expand available causes of action against design professionals without privity of contract. The architect should seek legal counsel to seek advice concerning the laws of

a specific jurisdiction in which they practice to determine what, if anything, can be done to protect against potential liability, such as including language in a contract to clarify the relationships and duties of the parties involved. At the very least, the Architect's counsel should be aware of the law in the jurisdiction in which they practice so they can properly defend and evaluate cases based on the growing trend of architects being less strangers to claims and the courthouse when there is no privity of contract.

---

[i] *Black's Law Dictionary (10*[th] Ed. 2014).

[ii] *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365, 375-76 (Tex. App.--Austin 1982, writ ref'd n.r.e.).

[iii] *LAN/STV, a Joint Venture of Lockwood, Andrews, Newman, Inc. and STV Incorporated v. Martin K. Eby Constr. Co., Inc.,* 435 S.W.3d 234 (Tex. 2014).

[iv] *Black + Vernooy v. Smith*, 346 S.W.3d 877, 892 (Tex. App.—Austin 2011, pet. denied).

[v] *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 45 (Utah 2001).

[vi] *American Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1190 (Utah 1996).

[vii] *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*, 870 S.W.2d 832, 834 (Mo. Ct. App. 1993); *Blake Construction Co. v. Alley*, 233 Va. 31, 36, 353 S.E.2d 724, 727 (1987); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 828, 881 P.2d 986, 993 (1994).

[viii] *Bilt-Rite Contrs., Inc. v. Architectural Studio*, 581 Pa. 454, 480-84, 866 A.2d 270, 286-88 (Pa. 2005).

[ix] *Guardian Construction Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (Del. Super. Ct. 1990).

[x] *Nota Constr. Corp. v. Keyes Assocs.*, 45 Mass. App. Ct. 15, 21, 694 N.E.2d 401, 406 (Mass. App. Ct. 1998).

[xi] *Flagstaff Affordable Housing, L.P. v. Design Alliance, Inc.*, 223 Ariz. 320, 327, 223 P.3d 664, 671 (2010).

[xii] *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 188, 677 P.2d 1292, 1296 (1984).

[xiii] *Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP*, 327 P.3d 850, 59 Cal. 4th 568, 173 Cal. Rptr. 3d 752, (2014)

[xiv] *Biakanja v. Irving,* 49 Cal.2d 647, 320 P.2d 16, 1958 Cal. LEXIS 253 (1958).

[xv] *Conforti & Eisele, Inc. v. John C. Morris Associates*, 175 N.J. Super. 341, 342-43, 418 A.2d 1290, 1291 (1980).

[xvi] *Spectraserv, Inc. v. Middlesex Cnty. Util. Auth.*, 2013 N.J. Super. Unpub. LEXIS 2173, at *40-44 (N.J. Super. App. Div. July 25, 2013); *Horizon Group of New England, Inc. v. N.J. Sch. Constr. Corp.*, 2011 N.J. Super. Unpub. LEXIS 2271, at *20-21 (App. Div. Aug. 24, 2011).

[xvii] *Eastern Steel Constructors, Inc. v. City of Salem,* 209 W.Va. 392, 402-03, 549 S.E.2d 266, 275-77 (2001).

[xviii] *Mid-State Sur. Corp. v. Thrasher Eng'g, Inc.*, 2006 U.S. Dist. LEXIS 32342, at *27-28 (S.D. W. Va. May 16, 2006).

[xix] *Ossining Union Free School District v. Anderson LaRocca Anderson,* 73 N.Y.2d 417, 425, 541 N.Y.S.2d 335, 339, 539 N.E.2d 91, 95 (1989).

[xx] *Travelers Cas. & Sur. Co. v. Dormitory Auth.*, 734 F. Supp. 2d 368, 380-81 (S.D.N.Y. 2010).

[xxi] *Fried v Signe Nielsen Landscape Architect, PC*, 34 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2012).

[xxii] *J & H Reinforcing & Structural Erectors, Inc. v. Wellston City Sch. Dist.*, 2010-Ohio-2312, ¶ 34 (Ohio Ct. App. 2010).

BIOGRAPHIES

JOHN P. CAHILL, JR. has been licensed to practice law in the State of Texas since of November 1984. He graduated from Baylor University in 1983 with a Bachelor of Arts Degree and from Baylor University School of Law with a Juris Doctor in 1984. He joined Hays, McConn, Rice & Pickering, P.C., on December 1, 1999 was the firm's Managing Shareholder at the time of its merger with LeClairRyan on August 1, 2014. He is now the Houston Office Leader. He concentrates his practice in the representation of architects, engineers, surveyors, real estate brokers and others involved in the construction industry. He is a member of the Construction Law Sections of the State Bar of Texas and Houston Bar Association. He is a member of DRI, serving on the Construction Law Committee and Design Professional Special Law Group. Mr. Cahill is a member of the Claims & Litigation Management Alliance. Mr. Cahill has conducted numerous risk management seminars for various design professional organizations, engineering companies, insurance companies, real estate brokers and other clients. He also mediates construction and real estate disputes.

MICHAEL A. DESCIOLI has been licensed to practice law in the State of Texas since of November 2004. He graduated from Texas A&M University in May, 2001 with a Bachelor of Business Administration and from The University of Houston Law Center with a Juris Doctor in May 2004, *cum laude*. He joined Hays, McConn, Rice & Pickering, P.C., in February of 2009 and became an associate of LeClairRyan on August 1, 2014 when Hays McConn merged with LeClairRyan. His current practice includes the representation of architects, engineers, and others involved in the construction industry, as well as insurance defense work representing entities and individuals against personal injury and premises liability claims. Mr. DeScioli is a member of the American Bar Association, the Houston Bar Association, DRI, and the Texas Association of Defense Counsel. He is currently an Honorary Board Member of the Dr. Marnie Rose Foundation, which supports brain cancer research at M.D. Anderson Cancer Center.