Liability by Design

There are exceptions to the rule that designers aren’t liable for defects

Traditionally, contractors or engineers are held legally liable for construction defects, rather than the design professional. But like any rule, there are exceptions.

In a New Jersey case, the builder-developer’s project was so large that the firm had virtually mass-produced and sold identical homes. When a dispute arose over certain defects, however, the builder refused to take responsibility.

Instead, the firm pointed a finger at the design professional. But in turn, the designer cited traditional legal doctrine that generally puts the onus for construction defects on engineers or contractors.

However, the court found the present case an exception to the rule. When plans and specifications are produced from a stock supply or are mass-produced, the court ruled—when engineers were engaged in a routine, mechanical rendition of services, rather than exercising judgment—an implied warranty can be imposed upon the design professional.

(See Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A. 2d 314 (1965); cited in Board of Trustees v. Kennerly 400 A. 2d at 853.)

Another case where design professionals were held liable for defective construction occurred in New Mexico. Here the court ruled design engineers were subject to the state’s building code for contractors.

The defendant design engineers had been subcontracted by an architect (the plaintiff) to design a college dormitory and student union building. When negligence in the design was discovered, the architect sued to recover damages.

Similarly, a California case found real property purchasers could sue a building designer and civil engineer for negligent design when evidence suggested the design professional had violated the state’s Building Code, the case was allowed to go to a jury on a theory of “negligence per se?”

The two cases illustrate that failure to observe building codes or statutes can impose liability for negligence upon a designer, when injury occurs to a person within the class protected by the code or statute.

(See Barron v. Dambold, 422 F.2d 133, 10th Cir. (1970); and Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984).)

While designers can in some cases be held liable for injuries caused by negligence, cases of intentional misrepresentation against design professionals are infrequent as a cause of action following a construction failure.

However, such was a Minnesota case where a contractor fraudulently claimed to the owners that he: was an engineer; had 17 years’ experience; possessed a net worth of $70,000; and could obtain a performance bond. In fact, the contractor had no engineering experience; was worth only $45,800; and due to a previous bankruptcy filing, could not obtain bonding.

The court laid out a four-part test for proving intentional misrepresentation:

■ The misrepresentation must regard a material fact, rather than be, say, a mere expression of professional opinion.
■ The purpose of the fact was to induce reliance upon the misrepresentation.
■ Subsequently, the misrepresentation was in fact relied upon.
■ Reliance upon the misrepresentation caused the damages in question.

All four tests were met in the present case, the court ruled. Thus the proper measure of damages was deemed the homeowner’s out-of-pocket loss— or the difference between the owner’s construction costs, and the home’s reasonable value.

(See Strouth v. Wilkinson, 302 Minn. 297, 224 N.W. 2d 511 (1974).)

About the Author...

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