1. Defining Design-Build.

In a design-build process, both the design and construction of a project are performed by a single entity. This differs significantly from the traditional *design-bid-build process*, in which an architect or engineer is selected by the owner to design the project, and competitive bids are taken from other entities for the performance of construction services. *Consulting Engineers and Land Surveyors of California* v. *Dept of Transportation* (2008) 167 Cal. App. 4th 1457, 1462, 84 Cal. Rptr. 3d 900.

Typically, under the traditional design-bid-build system, the owner warrants the correctness of the plans and specifications to the construction contractor under the *Spearin* Doctrine, *United States v Spearin* (1918) 248 U.S. 132, 137, 63 L. Ed. 166, 39 S. Ct. 59, applied in California by *Souza & McCue Constr. Co. v. Superior Court* (1962) 57 Cal. 2d 508, 511, 20 Cal. Rptr. 634, 370 P.2d 338. A design professional does not warrant the sufficiency of the plans and specifications furnished to the owner, unless there is an express warranty agreement that the design professional assumes responsibility for the accuracy of the plans. *Allied Properties v. John A. Blume & Associates* (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259; *Gagne v. Bertran* (1954) 43 Cal. 2d 481, 487, 275 P. 2d 15. Accordingly, a contractor who has followed plans, specifications or directions provided by the owner, or one acting on behalf of the owner, traditionally cannot be held liable for alleged construction defects or insufficiencies attributable to the plans. *McConnell v. Corona City Water Co*. (1906) 149 Cal. 60, 64.

In contrast, design-builders assume the responsibilities of a design professional (architect/engineer) and furnish all services – designing, engineering, constructing – necessary to deliver a completed project for an agreed price. *Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal. App. 2d 812, 815. A design-builder assumes total responsibility from design through completion -- until "handing over the key" to the turnkey project to the client. See, e.g., *White v. Cascade Oil Co.* (1936) 14 Cal. App. 2d 695, 702. Consequently, in a design-build contract, the builder has no one to blame but itself for defective plans and specifications or differing site conditions. See *M.A. Mortenson Co.*, 93-3 BCA par. 26, 189, No. 39, 978 (ASBCA 1993). A design-builder is expected to exercise its own expertise in attaining the objective. *Sterling Millwrights, Inc. v. United States* (Ct. Cl. 1992) 26 Cl. Ct. 49; *Aleutian Constructors v. United States* (Ct. Cl. 1991) 24 Cl. Ct. 372.

The making of a contract for design services with an owner necessarily implies that the designer possesses architectural and/or engineering skill and ability and that he or she promises to exercise them reasonably and without neglect. See *Benenato v. McDougall* (1913) 166 Cal. 405, 408. This duty includes the obligation to properly design all components and equipment needed for the project without "short cuts" or substitutions that are not equal or better. Moreover, an architect assuming supervision duties is required to exercise due care in the performance of that supervisory function and is liable to the owner for negligent supervision. *Palmer v. Brown* (1954) 127 Cal. App. 2d 44, 59-61, 273 P. 2d 306. Thus, a design-builder assumes a fiduciary duty as the project designer and is also obligated to exercise due care in the performance of his design and supervision duties.

A design professional is required to keep apprised of building restrictions, codes and regulations, and must prepare plans and specifications in accordance with those various regulations. *Davis v. Boscou* (1925) 72 Cal. App. 323, 327, 237 P. 401. A design-builder voluntarily assumes the responsibilities of an architect and/or engineer. To protect the public,

design responsibility for proper design must lie with the design professional (design-builder), not owners, who likely have a limited knowledge of architecture and engineering.

In the absence of privity, engineers in California have a duty of care to owners based on the special relationship factors first promulgated by the Supreme Court in the 1950's: the extent to which the transaction was intended to affect plaintiff, the foreseeability of harm to plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. *Biakanja v Irving* (1958) 49 Cal. 2d 647, 650; *Rowland v. Christian* (1968) 69 Cal. 2d 108, 113; *Tarasoff v. The Regents of the University of California* (1976) 17 Cal. 3d 425, 435. Moreover, a registered engineer retained to investigate structural integrity who discovers structural defects and code violations, that pose an imminent risk of serious injury to occupants, has a "whistleblower's" duty to warn the occupants or the authorities of that determination. 68 *Ops Atty Gen* 250 (1985).[1] Indeed, former Attorney General Janet Reno stressed this very point in a speech to a group of architects: "If a client told you to design a building with one fire exit when two are required, or to use a design that was structurally unsound, we'd expect you to tell your client that you could not participate in creating such a safety risk." Michael Cannell, *Down in Front*, Architecture 116, 118 (Aug. 1999).

A design-builder has a *non-delegable duty* to properly design and construct. The design-builder cannot assert that these duties were shifted to the owner because of conduct or a contract provision. Non-delegable duties cannot be shifted. This is because overriding public policy concerns preclude a design-builder from shifting responsibility for structural design defects, code compliance, safety precautions, and supervisory duties to the owner. See *Maloney v. Rath* (1968) 69 Cal. 2d 442, 446-447, 71 Cal. Rptr. 897.

"Hybrid" liability in the design-build context is not without precedent in California. Even under the traditional *design-bid-build system*, assumption of dual roles has resulted in *hybrid liability*. For example, in *Connor v. Great Western Sav. & Loan Assn*. (1968) 69 Cal. 2d 850, the Supreme Court held that a construction lender owed a duty to third party home buyers to discover and prevent major defects in homes it was financing as "lender." Liability was imposed on Great Western Savings for construction defects because Great Western Savings had stepped into the contractor's shoes and completed the project it was financing. *Id.* at 864. The lender's assumed activities as builder/developer effectively created hybrid lender liability for the quality of the construction.[2] The *Connor* lender thus wore two hats: one as a builder/developer of a subdivision under construction and the other as the traditional financing entity for the project. *Id*. at 858.

2. A Design-Builder Assumes a Designer's *Fiduciary Duties* to the Owner.

The fiduciary duty of design professionals (architect or engineer) is long standing in California. See *Palmer, supra,* 127 Cal. App. 2d at 59 (architects owe a fiduciary duty of loyalty

[1] "It is our opinion that a registered engineer retained to investigate the integrity of a building who determines, based on structural deficiencies in violation of applicable building standards, that there is an imminent risk of serious injury to the occupants therein, and who is advised by the owner that no disclosure or remedial action is intended and that such determinations are to remain confidential, **has a duty to warn** the identifiable occupants or, if not feasible, to notify the local building officials or other appropriate authority of such determinations." 68 Ops Atty Gen 250.

[2] The *Connor* holding resulted in the 1969 enactment of Civil Code section 3434.

and good faith to their clients); *Edward Barron Estate Co. v. The Woodruff Co*. (1912) 163 Cal. 561, 576 (Design or construction professional occupies a relationship of trust to his client and owes his client a fiduciary duty of loyalty and good faith.). Likewise, an engineer has the duty to exercise the same skill and competence ordinarily exercised by professional engineers under similar circumstances. Failure to discharge that duty will subject the engineer to liability for negligence. CALJUR ARCHITECTS §53, *Liability for Professional Incompetence*; citing *Bonadiman–McCain, Inc. v. Snow* (1960) 183 Cal. App. 2d 58, 70 (The engineer's undertaking with respect to the plans he prepares is comparable to that of an architect.).

A fiduciary relationship is traditionally defined as a relationship between parties to a transaction in which one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where trust and/or confidence is reposed by one party (owner) on the integrity of another (design-builder), and where that party voluntarily accepts the confidence of the other. *Wolf v. Superior Court* (2003) 107 Cal. App. 4th 25, 29, 130 Cal. Rptr. 2d 860. In such a case, the party in whom the confidence is reposed can take no advantage from his acts relating to the interest of the other party without the trusting party's knowledge or consent. Failure to do so exposes the trusted party to breach of fiduciary duty claims. *Id.*

"Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors." *Id.* As Justice Cardozo noted, "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon* (1928) 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1.[3]

A design-build contract necessarily implies that the contractor possesses the necessary architectural and/or engineering skill and ability to perform its duties reasonably and without neglect. See *Benenato,* supra, 166 Cal. at 408 (Architect's skills and promise of professional performance implied in contract for services.). A design-builder has a fiduciary duty as the project designer to exercise due care in the performance of its design and supervision functions. See *Palmer, supra*, 127 Cal. App. 2d at 59-61 (Architect assuming supervision duties required to exercise due care in the performance of his supervisory function, and is liable to the owner for negligence on his part.). In short, a design-build contract necessarily imposes the fiduciary duty to properly design and prepare plans in accordance with the applicable standard of care and in compliance with building codes.

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[3] Rummaged from the archives of legal history, the new role of design-builders resurrects the extensive fiduciary duties of the "*master builder*" of ages past. For much of recorded history, the "master builder" was responsible for all phases of the building process including design, engineering, and construction. See Kahn, *The Changing Role of The Architect*, 23 St. Louis, Inc. 216 (1979). As master builder, the designer had full responsibility and ultimate liability for the project. 5 Bruner & O'Connor Construction Law § 17:52. In ancient history, this liability could be quite harsh. In 1800 B.C., the *Code of Hammurabi* imposed the death penalty on a person creating a defect in the construction of a house if the defect led to the death of its owner. Comment, *Constructing a Solution to California's Construction Defect Problem* (1999) 30 McGeorge L.Rev. 299, 306-307. Today's design-builders don the mantle of the proverbial master builder, and likewise will be held accountable as fiduciaries for the quality of their construction, although the penalties for defects are now considerably less severe.

The *all inclusive* nature of design-build contracts often triggers public policy concerns that lead courts to impose broad duties on design-builders. For example, design-builders are affirmatively obligated to exercise that level of fiduciary care that would be required of a design professional for the design and supervision of the typical construction project.

Design-build owners are entitled to rely on the design-builder's "all inclusive" representations even though they might excite suspicion on a reasonable owner's part. See *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal. App. 3d 915, 921. For example, the design-build relationship allows for a lesser duty of inquiry and the degree of justifiable reliance can also be lessened because of the fiduciary relationship. See, e.g., *Fragale v. Faulkner* (2003) 110 Cal. App. 4th 229, 232. This approach is consonant with the principle that "the faithless fiduciary shall make good the full amount of the loss" which his breach has caused. *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal. App. 4th 555, 567.

The animating principle in the fiduciary cases is that design-builders owe the highest duties to their clients. See, e.g., *Palmer v. Brown, supra*, 127 Cal. App. 2d at 59. A design-builder *assumes* this long recognized fiduciary duty of a design professional by the design activities encompassed in the design build project. Fiduciary liability may extend beyond traditional remedies and expose design builders to disgorgement of profits and/or contract proceeds.

In *Salahutdin, supra*, 24 Cal. App. 4th at 562, a fiduciary was "…liable to his principal for ***constructive fraud*** even though his conduct was not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." *Id.*, quoting 2 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 3:20, p. 119, fn. omitted. *Salahutdin* held that the **failure of a fiduciary to disclose a material fact** to his principal which was known, or should been known, to the fiduciary, could constitute ***constructive fraud***.

> "As a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another *even though the conduct is not otherwise fraudulent*. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. . . . Also, a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent*." *Salahutdin, supra*, 24 Cal. App. 4th at 562, quoting 2 Miller & Starr, *supra*, at 120-121, fns. omitted.

A broker who is merely an innocent conduit of another's fraudulent statements "…may be liable for negligence on a constructive fraud theory if he or she **passes on the misstatements as true without personally investigating them**. In such instances disgorgement of profits may be warranted. [Citations.]" *Salahutdin, supra*, at 562,[4] quoting Cal. Real Property Remedies Practice (Cont. Ed. Bar 1982) § 3.36, p. 88.

Imposition of a fiduciary duty for design activities is well supported in California. Extending that fiduciary duty to the actual performance of a design-builder should logically follow. To protect the public, imposition of fiduciary duty must evolve to include both design and construction and the entire panoply of activities and roles undertaken by the design-builder. Since the design-builder's duties are all-inclusive, its fiduciary duties to the owner must also be all-inclusive.

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[4] In *Savage v. Mayer* (1949) 33 Cal. 2d 548, 203 P. 2d 9, and *Simone v. McKee* (1956) 142 Cal. App. 2d 307, 298 P. 2d 667, the damages awarded included **disgorging of secret profits by the fiduciary**. Additionally, in *Walsh v. Hooker & Fay* (1963) 212 Cal. App. 2d 450, 459, 28 Cal. Rptr. 16, the appellate court maintained that the award of the broader measure of damages under section 3333 was not limited to the secret profit situation. *Salahutdin, supra*, at 564-565.