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# Quick Escape Acts - Part III, Party Based Arguments

by **Allison Mullins**  
AIA Northern Virginia Legal Columnist

Party based defenses can provide a quick escape out of some cases. Therefore, the question of which parties can sue each other can be of critical importance on a construction project. Simply put, a party based defense is when a plaintiff does not have standing to sue the defendant because of a lack of legal relationship. A much more complicated topic is how the courts define to whom the architect's relationship extends to legally.

## The Legal Relationship

The legal relationship typically required regarding design professionals is privity of contract. This is certainly true in cases involving claims of negligent errors and omissions of an architect. In fact, privity of contract is usually the first issue the court must resolve in a construction case.

Privity of contract is the relationship between two contracting parties. The nexus or relationship that is created by the contract between the contracting parties allows them the right to sue each other. At the same time, the lack of privity of contract prevents a third party from suing one of the contracting parties as if the third party was a part of that same nexus or relationship.

Virginia courts have consistently held that in a construction law case where the suit is solely for recovery of an economic loss and there is no privity of contract between the parties, the plaintiff has no standing. Hence, the defendant has a quick escape from the case.

## Defining a Relationship

Determining exactly who is in privity of contract in a construction project can be more difficult than you think. There are some limited circumstances where privity of contract can extend to parties other than the originally contracting parties. Assignment of a contract is one way a party can attempt to claim privity of contract. A second theory of claiming privity of contract is as an intended third party beneficiary.

Assignment of a contract is when the rights and/or property under a certain contract are transferred from one party to another. The most common example in the construction industry is where an owner of a construction project sells the project to another owner prior to completion. Whether contractual privity exists between the new owner and the architect varies widely depending on factors such as whether the contract allows for assignment, what stage the architectural services are at when the contract is assigned, and what stage the construction process was at when the contract is assigned, just to name a few.

A third party beneficiary is a person who, although not a party to the contract, receives a benefit from the performance of the contract. In the case of *Professional Realty Corp. v. Bender*, the Virginia Supreme Court explicitly held that a party claiming to be a third party beneficiary must demonstrate that the contracting parties "clearly

and definitely intended it to confer a benefit upon him." Therefore, a party that is an incidental beneficiary of a contract between others does not have standing to bring suit. One example of a person who may attempt to claim third party beneficiary status might be the end purchaser of a home, although the success of such suit and status as a third party beneficiary in that situation is largely unsettled.

## Questionable Relationships

In today's economic climate there are some frequent situations which give rise to the question of whether privity of contract exists. A lender foreclosing on a project and taking over the completion or sale project is one example of questionable privity. There the architect may have signed an Architect's Certificate that allows automatic assignment of the architect's contract with the owner to the lender, should the owner default on its loan. In that case, the architect may have created a contractual relationship with the lender, that otherwise did not exist. Arguably the lender may then have the right to sue the architect for design negligence.

Another example where the results are unsettled is whether the ultimate purchaser of a negligently designed building may bring suit against the architect. This is a case where the ultimate purchaser may try to claim third party beneficiary status in order to have standing to bring suit against the architect.

## Conclusion

Lack of privity of contract may provide a quick escape from a lawsuit. In Virginia, privity of contract remains a solid requirement in negligence cases purely seeking recovery for economic losses. Therefore, be aware of any assignment and third party beneficiary clauses in your contracts, and other documents you may be asked to sign, in order to protect yourself from extending your contractual privity to parties outside the contract.

*Alison R. Mullins, Esq., was an associate with Hughes & Associates, PLLC at the time she wrote this article. She is now an associate with Rees Broome, PC.*

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# Quick Escape Acts - Part IV, Legal Claim Based Arguments

by Alison Mullins  
AIA Northern Virginia Legal Columnist

There are many different legal claim based arguments that may provide quick and relatively inexpensive ways to get out of litigation. Legal claim based arguments focus on technical deficiencies or problems with a plaintiff's claim. As such, most legal claim based arguments must be raised timely in the litigation or they may be waived. Therefore, getting together with an attorney to carefully evaluate the facts of your case, the pleadings filed and the defenses you may have is of the utmost importance right from the start. This article sets forth three common legal claim based arguments that may offer a quick escape from a case as examples.

## Workers' Compensation Laws

Workers' compensation statutes limit a worker's remedies for a work related injury. Under most circumstances, the injured worker's remedies are limited to filing a workers' compensation claim through the workers' compensation system. As a result, if the employer and co-worker of the injured worker timely raise the defense that the plaintiff wrongly named them as a party to the action as barred by workers' compensation laws, they may have a rapid release from a case. Other parties in construction site personal injury cases, such as design professionals, may also benefit from the umbrella of workers' compensation protection.

## Waivers of Subrogation

Waivers of subrogation may end tort based claims. Subrogation is a legal theory that permits one party to "step into the shoes" of another party and assert that party's claims for damages. A waiver of subrogation clause involves a contractual agreement that the parties will waive their right to "step into the shoes" of another party and assert that party's claims for damages.

An example of subrogation in the construction industry is where an insurance company has issued payment on a claim against an insured owner. The right of subrogation would allow the insurance company to step into the owner's shoes in order to sue the architect in an attempt to recoup the claim amount paid out if the architect was responsible for the damages. If the original contract between the owner and the architect included a waiver of subrogation clause, the insurance company would not have standing to sue the architect. The waiver of subrogation would provide a quick escape for the architect from the litigation.

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## Misrepresentations and Reliance

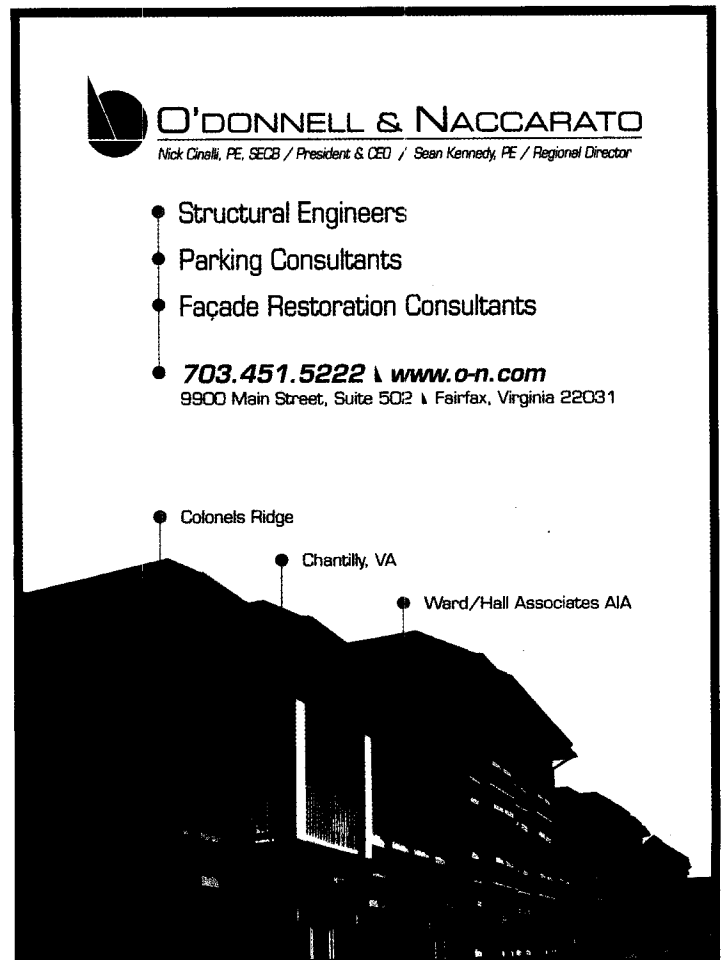
Misrepresentation claims, such as fraud and false advertising, are becoming more prevalent in construction cases. Misrepresentation claims have three key elements. The elements of a misrepresentation claim are that defendant made a false statement of fact, that the statement was directed at the plaintiff, and that the plaintiff relied on defendant's statement when entering into the contract. These three elements can be tricky to allege and prove.

A complaint alleging misrepresentations claims often must state with specificity who said what to whom and when. In addition, the statement upon which plaintiff relied generally must be more than mere promises of future performance or opinion. Therefore, if the plaintiff is relying on these types of statements to allege a misrepresentation claim, you may have a quick escape.

## Conclusion

Factual defenses are wonderful but generally only work at trial (i.e. after an expensive and time consuming battle). Legal defenses offer a potential way to short circuit the case and achieve a rapid resolution.

Alison R. Mullins, Esq., was an associate with Hughes & Associates, PLLC at the time she wrote this article. She is now an associate with Rees Broome, PC.



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