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## Architect and Performance Bond Surety – No Relationships Here

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By Timothy R. Hughes  
& Alison R. Mullins

A recent Maryland decision helps clear up the often-confusing question, “who can sue whom?” on a construction project.

The question of which parties can sue each other can be of critical importance on a construction project. A recent decision issued by the United States District Court for the District of Maryland may potentially offer some guidance on Maryland’s somewhat muddled law surrounding the question.

**Privity In Maryland** In the seminal Jacques case, the highest court of Maryland ruled that a party must demonstrate an “intimate nexus” in order to sue for economic losses. That intimate nexus could only be satisfied by “contractual privity or its equivalent” such as third party beneficiary status. This case would seem to require privity in almost all cases.

The Court of Appeals of Maryland complicated the issue in Council of Co-Owners v. Whiting-Turner. The court ruled that cases involving dangerous conditions were an exception to the requirement of privity. The logic of the court was that we should not wait for death or injury to occur to permit a claim for repair, but rather should encourage fixing the problem by permitting a legal remedy.

In practice, the Whiting-Turner case has spawned hordes of claims alleging dangerous conditions. In one personal example, we successfully defended a claim involving



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a pool. The plaintiff claimed that efflorescence on brick at the pool demonstrated water problems which could lead to deterioration, collapse of the bricks and grievous personal injury or death.

**So Close, Yet So Far** In RLI Ins. Co. v. John H. Hampshire, Inc., the architect was hired to design exterior panel work on a building at a university. The general contractor hired a subcontractor to fabricate and install the panels. The subcontractor in turned hired a panel fabrication subcontractor.

During construction, the subcontractor fell behind schedule. The subcontractor, with the approval of the general contractor, hired the fabrication subcontractor to aid with installation. During the installation, the general contractor found the subcontractor to be in default. The subcontractor abandoned the project. The fabrication subcontractor completed the panel installation. The project architect inspected the work, and the general contractor and the owner accepted the work.

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The subcontractor who had abandoned the job had obtained a performance bond. The surety company who issued that bond had entered into a typical general agreement of indemnity between it and the abandoning subcontractor. As part of that indemnity agreement, the surety was entitled to step into the subcontractor's shoes

and assert the subcontractor's claims in the event the surety company issued payment from any bonds.

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new contractor to complete the reinstallation when the fabrication subcontractor refused to perform the remedial work.

The surety then claimed that the architect was negligent and failed in its duty to inspect and supervise the work of all the contractors. The surety filed suit against the architect claiming a breach of the stan-

dard of care and resulting repair and replacement costs.

The year after installation was complete, some of the exterior panels began to fall off the building. Luckily, no one was hurt. After some investigation, the owner determined that six percent of the exterior panels were installed improperly. The fix required removal of all the exterior panels and complete reinstallation. As the subcontractor had abandoned the job, the performance bond surety agreed to complete the repair efforts under the bond. The surety hired a

and ruled that the architect owed no duty of care to the surety. The court found that the surety and the architect were not in privity, nor was their relationship the equivalent to privity. In making the finding, the court stated that "[t]he duty of architects to use due care in their inspections extends to those persons foreseeably subjected to the risk of personal injury created." The court found that a dangerous condition was properly alleged. However, the archi-

tect's duties to pay the owner for correction costs did not extend to the defaulting subcontractor's performance bond surety. The court dismissed the claims.

**Conclusion** The RLI case involves a critical clarification of Maryland privity law. Plaintiffs can often allege that a construction design flaw involves some risk of personal injury or death. The court, however, limited that concept to the owner's claims for correction costs. This important clarification may provide some clarity to an area of law that has been the subject of extensive litigation and debate in Maryland for more than twenty years since the Whiting-Turner case. <<

*This article is not intended to provide specific legal advice, but instead as general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice you may receive will depend upon your facts and the laws of your jurisdiction.*

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