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Responsibilities and Liabilities of Architects and Engineers for Construction Failures

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I. [2.1] SCOPE OF CHAPTER

This chapter deals with the responsibilities of architects and engineers performing their traditional roles in the construction process and with the potential liabilities of these professionals when there is a construction failure. The term “construction failure” is intended to encompass a broad spectrum of construction problems from the collapse of a structural system to a leaking roof. This chapter also discusses the responsibilities of design professionals for personal injury, particularly injuries to workers on the construction site.

The professional responsibilities and liabilities of architects and engineers are discussed here in terms of Illinois case law. However, in the analysis of legal responsibilities for construction failures, attention should be directed to the contract documents, which should establish, among other things, the law of the state to be applied, the scope of the work to be performed, and the standard of care with which the work was to be performed. In several instances, the law in Illinois is unsettled, and this chapter suggests arguments for and against the various possible results.

This chapter also discusses professional responsibilities in the context of traditional construction relationships. It is customary for the owner to contract directly with the architect and/or engineer (A/E) and separately with one or more contractors. Ordinarily, there is no privity between the A/E and the various contractors, although the A/E’s function may be described in great detail in the owner-contractor agreement as well as in the general conditions for this agreement.

Variations on the traditional role of the design professional have been increasing in popularity. In a design-build project, the entity employing the design professional also performs the construction, sometimes with the design professional as a subsidiary, consultant, or employee of the contractor and sometimes in the form of a joint venture between the design professional and contracting firms; sometimes the design professional itself is the design-builder. In a fast-track project, the construction begins before the plans and specifications have been completed, thus shortening the overall design and construction time. As one would expect, design-build and fast track arrangements would be described in agreements with the owner that must be consulted in order to understand the responsibilities that the A/E has undertaken on any given project.

II. [2.2] THE ROLE OF THE ARCHITECT/ENGINEER IN THE CONSTRUCTION PROCESS

The role of the architect/engineer customarily is defined in the owner-architect or owner-engineer agreement to which the contractor is not a party. *Ferentchak v. Village of Frankfort*, 105 Ill.2d 474, 475 N.E.2d 822, 86 Ill.Dec. 443 (1985). This agreement governs the scope of the design work to be performed, the A/E’s role during the construction phase, the budget, time requirements, compensation, and the owner’s role, as well as other customary contract terms. A carefully drafted agreement may require the owner to supply the A/E with basic data (e.g., surveys and soil testing reports) on which the A/E will rely in performing the design services. The agreement may seek to limit the representations that the A/E makes about code compliance and suitability of the design for the intended purpose and to impose limitations on the role of the A/E during the construction phase.

The American Institute of Architects (AIA) has prepared and distributed standard form contracts to be used among the various parties to the design and construction process. Many other organizations have prepared and distributed similar contract forms, but those of the AIA are by far the most widely used. The provisions in the AIA contracts have arguably established an industry standard in that a design professional tends to assume that the provisions in the AIA contracts define the normal, typical role in the absence of any agreement to the contrary. For more information regarding AIA Documents, visit the web site at www.aia.org.

A. Design Phase

1. [2.3] Description

Professional services relating to design of a project as they are customarily described in the owner-architect agreement are divided into the schematic phase, the design development phase, and the construction documents phase. Engineering contracts customarily divide the design phase into three similar subphases: conceptual engineering; preliminary engineering; and detailed engineering. In the schematic or conceptual phase, the design professional produces drawings that illustrate the scale and relationship of the major building components but without fine detail. Design development and preliminary engineering drawings add substantial detail to the design. The working drawings that result from the construction document phases contain all of the details the architect/engineer includes in the design and are sent to the contractors for bidding. Sometimes a design professional prepares “scope drawings” midway between the design development and construction documents phases. Scope drawings have enough detail to permit a contractor to make a reasonable estimate of the total construction cost but lack the final details that appear on the construction documents.

In a simplified case, the A/E will develop the physical design of the project based on information supplied by the owner as to the more technical aspects, including surveys and soil testing reports. The owner communicates his or her “program” for the project, which describes the owner’s criteria and contemplated use for the project. Budget constraints will be a prominent and early part of any owner-A/E discussions.

Based on the information that has been supplied, the A/E then develops the project from initial conceptual sketches or drawings to a set of detailed original tracings from which reproductions can be made. A detailed set of specifications will also be developed by the A/E consisting of directions to the contractors and subcontractors as to the quantity and quality of materials and construction or installation procedures to be followed. These drawings and specifications, as amended by any addenda issued prior to bidding, any change orders issued subsequent to bidding, and any drawing revisions, all comprise the technical instructions to the contractors and the subcontractors as to how the building or project is to be constructed in its final form.

It is common for other published and available documents, such as building codes, technical standards, and manufacturer’s recommendations to be incorporated into the specifications. These recommendations may provide a source of additional duties and responsibilities, not only for the contractors, but also for the A/E.

2. [2.4] Designing to the Budget

One of the most important considerations to an owner during the design phase is the cost of constructing the project in accordance with the A/E design. Design professionals are also concerned about construction costs, but they are in a poor position to guarantee that their design is buildable for a stipulated sum. Although experienced design professionals can ordinarily develop a reasonable estimate of construction costs based on such factors as square footage and type of construction, they do not have access to the more detailed price information (particularly labor costs) that contractors ordinarily possess. Furthermore, construction costs fluctuate as a result of market conditions, labor availability, and numerous other factors that cannot necessarily be predicted during the design phase.

Accordingly, absent a contractual agreement to the contrary, an A/E does not guarantee a stipulated construction cost to the owner. When an owner discovers that the construction cost of the A/E's design exceeds his or her budget, the owner normally has four alternatives:

- a. to accept the higher price and find additional financing;
- b. to rebid or renegotiate the construction project;
- c. to abandon the project; or
- d. to obtain the design professional's cooperation in modifying the design to reduce the cost of construction.

The process of modifying the design to reduce construction costs is called "value engineering." Many sophisticated owners recognize that the best time for value engineering is not after bids have been received but during the design process itself. It is becoming more frequent for owners to hire contractors or cost consultants during the design phase to work with and advise the A/E on the cost consequences of various aspects of the design.

3. [2.5] Computer-Aided Design

As in other industries, the design profession has been overtaken by the computer revolution. More and more, architects and engineers are using and relying on computers in the performance of their professional services. There is a proliferation of computer-aided design (CAD) software available on the market for both architects and engineers.

The increasing reliance on computer technology raises several novel and interesting legal issues. Perhaps the most important of these issues is whether an architect/engineer bears liability for design errors that result from "bugs" in these computer programs rather than from the A/E's own mistake. For example, if a structural engineering program contains a flaw that causes it to make a particular type of calculation inaccurately, a structure could collapse despite the fact that the engineer did not personally make a mistake. This scenario raises several interesting questions: Would the average, typical engineer have relied on the calculations generated by the computer, or

would he or she have checked them, at least roughly, by hand? Is the computer program an unreasonably dangerous product, and is the engineer placing it in the stream of commerce? Is the engineer's duty to perform the structural calculations non-delegable?

The increasing reliance on computer-aided design raises numerous other questions that may produce sources of liability for design professionals. Do design professionals have a duty to use computer resources in the performance of their services? Extensive construction-related computer databases exist; would failure to locate or use these databases be considered negligent in appropriate circumstances? Would the A/E be liable if he or she relied on information in a computer database that turned out to be incorrect? For discussion of these and other issues involving the effect of computers on the liability of design professionals, see Paul M. Lurie and Barry D. Weiss, *Computer Assisted Mistakes: Changing Standards of Professional Liability*, 2 Software L.J. 283 (1988).

There has been a trend toward clients requiring design professionals to produce and provide their plans on some form of electronic encoded media, such as computer disks. These materials can be copied relatively easily and undetectably, and the copying process could (if, for example, a disk is defective or there is a power surge) result in errors being introduced into the plans. Exposure to stray radiation in the environment may corrupt some of the data undetectably. Accordingly, whenever plans on an electronic encoded media are required, it is prudent to provide a hard copy of the plans as well and to designate the hard copy as the official record of the design professional's service.

4. [2.6] Specifying a Nonfunctioning Product

When a product that is specified and installed during a construction project fails to function properly, the owner often does not know whom to blame. The manufacturer, the installer, the general contractor, and the design professional each may be responsible for the failure. Although the parties may not agree which one is responsible, it is usually the case that only one is responsible for the failure. The general contractor may be responsible for an improper substitution, defective procurement, or improper storage. The installer may be responsible for deviating from the manufacturer's recommendations or for improper installation. The manufacturer may be responsible if the product is inherently defective or if the descriptive literature for the product is inaccurate.

An architect/engineer's responsibility for specifying a nonfunctioning product is more limited. The design professional, unlike the other parties listed above, is not in the chain of title of the product as it gets incorporated into the construction project and, therefore, does not warrant greater responsibility. One court has held that an engineering firm that was sued for breach of contract for having specified an inappropriate pump could not assert a third-party claim for indemnity against the pump manufacturer because of the absence of a contract between them. *Hennepin Drainage & Levee District v. Klingner*, 187 Ill.App.3d 710, 543 N.E.2d 967, 135 Ill.Dec. 399 (3d Dist. 1989). The A/E is responsible only for adhering to the common law standard of care in preparing the plans and specifications. See §2.19 below. Thus, the A/E is responsible for using the skill and care that the typical A/E would employ in preparing plans and specifications.

Most A/Es rely heavily on manufacturers' literature and industry publications when choosing products to specify. It is rare for design professionals to perform actual tests on most of the products they specify. Some A/Es may fortuitously have personal experience with many of the products that they specify, but there are too many products and variations of products on the market for an A/E to be familiar with all of them. Unless there is something in (or omitted from) the manufacturer's literature that would tend to call a typical design professional's attention to a potential problem with the product or in a particular application for the product or unless it is widely known that a product may have serious side effects (*e.g.*, asbestos), the design professional ordinarily relies on the representations and performance characteristics described in the manufacturer's literature when specifying particular products for particular applications.

5. [2.7] Delay in the Design Process

It is common in a contract for design services to specify a schedule by which various design milestones must be met. Many of the standard form contracts for design services require the design professional to submit for the owner's approval a schedule for the performance of the design services. Timely completion of the design phase is usually of critical importance to a construction project because, except in certain fast-track projects or when the obtaining of financing between the design and construction phases has additional obstacles, a delay in the design phase delays the start and completion of the construction project by a similar length of time.

Nevertheless, claims against the architect/engineer for delays in the design process are rare and difficult to win, in large part because the design practice is so highly interactive. Clients ordinarily supply a great deal of information to the A/E during the design phase, including decisions among alternatives and general programming criteria and goals. Most delays in the design process can be traced to problems in ascertaining or communicating this information and, as such, cannot usually be attributed solely to the design professional.

6. [2.8] Designing in Accordance with Codes

Most contracts for design services require the architect/engineer to design the structure in accordance with all applicable codes, laws, regulations, etc. Even if the contract were silent on this point, it would probably be considered an implied term of the contract because a typical design professional would ordinarily prepare plans that comply with all applicable laws.

A problem occasionally arises when the law — or, more frequently, the interpretation of the law — changes in the middle of the project. There is a great deal of room for interpretation of building codes, and a design professional's primary means of assuring that the design is in accordance with the code is to consult with the people employed by the entity that approves the plans and issues permits for construction. But the fact that the permit-issuing department agreed that a particular architectural detail meets the requirements of the building code does not necessarily bind the field inspector who issues occupancy permits and who may have an entirely different interpretation of the requirements of the relevant code.

The issue that arises in these circumstances is who, of the owner and design professional, bears the cost of redesigning or rebuilding the project to conform to the new law or the new interpretation. Any contractual provision resolving this issue would ordinarily be controlling, and many design professionals include a clause in their contracts that specifies that the risk of a new law or interpretation is the owner's. In the absence of a negotiated resolution, it is probably most logical that this risk should be an owner's to bear on the theory that changes in the laws or their interpretation affect the value of a property by making it more or less expensive to develop for the owner's intended use.

One particular statute that raises difficult issues for design professionals is Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et seq.* See 42 U.S.C. §12181, *et seq.* At least with regard to renovation projects and certain grandfathered new construction, the ADA is not a true building code. The ADA's most unusual feature is that it requires the removal of structural barriers if this removal is "readily achievable." 42 U.S.C. §12182(b)(2)(iv). This "readily achievable" standard is more dependent on economic considerations than on technical ones. 42 U.S.C. §12181(9). The ultimate decision on whether a particular construction detail complies with the ADA must be made by the building owner, often based on the advice of a design professional, a cost consultant, and an accountant or other business adviser. Logically, the design professional's typical role in determining the feasibility of the removal of structural barriers must be limited to identifying the potential structural barriers and suggesting alternative designs.

There is conflicting law as to whether the ADA permits a third party to assert a direct claim against an A/E for failure to design in accordance with the ADA by a third party. In *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.*, 945 F.Supp. 1 (D.D.C. 1996), *aff'd on other grounds sub nom. Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C.Cir. 1997), the court held that an organization representing disabled individuals was not permitted to bring a claim directly against the architect who designed a sports stadium that allegedly had inadequate seating for the disabled. However, in *United States v. Ellerbe Becket, Inc.*, 976 F.Supp. 1262 (D.Minn. 1997), the federal government was permitted to bring an essentially identical claim against the architect for the same alleged ADA violations in the same sports stadium. The *Ellerbe Becket* court disagreed with the holding of the *Paralyzed Veterans* court. See also *United States v. Days Inns of America, Inc.*, 997 F.Supp. 1080 (C.D.Ill. 1998) (disagreeing in dicta with *Paralyzed Veterans* court). None of these courts addressed the fairly obvious right of the design professional's client to bring a claim for breach of contract against the A/E for the design's failing to comply with the ADA.

B. Construction Phase

1. [2.9] Description

Historically, the architect/engineer functioned as a master builder, conceptualizing the building, committing his or her dreams to paper in the form of drawings, acting as an autocrat on the jobsite, stopping the work entirely when it contradicted his or her intentions, and rejecting work that he or she deemed to be unsuitable.

Litigation, or the fear of litigation, has greatly altered the practice of architecture and engineering, particularly the role of the A/E during the construction phase. In order to protect himself or herself against claims for injuries sustained by workers on the site, the role of the A/E has changed. The A/E no longer wants “stop work” authority. The A/E no longer “supervises” the work, but rather “observes.” The A/E is not responsible for the means, methods, or techniques of construction. And the A/E does not guarantee that the contractor and subcontractors will complete their work in accordance with the drawings and specifications. The A/E may even limit the number of times that he or she will visit the site to observe the construction.

The role of the A/E with respect to shop drawings has also changed. At one time, the A/E reviewed and approved the shop drawings that are typically provided by subcontractors and material suppliers, including steel fabricators and erectors, curtain wall contractors, and window and door suppliers, to detail further the design of the building. In their contracts, design professionals now seek to limit their liability for design detail provided by others to a review for overall compliance with the design intent. The responsibility of an A/E for shop drawing review is currently one of the more controversial aspects of the practice.

2. [2.10] Common Contractual Provisions To Protect Architects and Engineers from Anticipated Liability

In response to unfavorable court decisions, architects have attempted to limit and to define more precisely their role during the construction phase. In addition to listing specific activities for which the architect will be responsible during this phase, most architectural contracts now contain standard exculpatory language. For example, AIA Document B141, *Standard Form of Agreement Between Owner and Architect* ¶2.6.2.1 (1997), attempts to limit the architect’s liability for work performed by the various contractors and subcontractors that is not in accordance with the drawings and specifications:

2.6.2.1 The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor’s operations, or as otherwise agreed by the Owner and the Architect in Article 2.8, (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. 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, since these are solely the Contractor’s rights and responsibilities under the Contract Documents.

The provision that states that the architect is not responsible for contractors’ mistakes has been the subject of inconsistent interpretation in courts of other jurisdictions. Some courts in other states interpret this language to bar as a matter of law any claim an owner may make against

the design professional arising out of a contractor's defective construction. See *Moundsview Independent School District No. 621 v. Buetow & Associates, Inc.*, 253 N.W.2d 836 (Minn. 1977); *Shepard v. City of Palatka*, 414 So.2d 1077 (Fla.App. 1981); *J & J Electric, Inc. v. Gilbert H. Moen Co.*, 9 Wn.App. 954, 516 P.2d 217 (1973); *Weill Construction Co. v. Thibodeaux*, 491 So.2d 166 (La.App. 1985). Other jurisdictions have interpreted this language to mean that a design professional does not guarantee the contractor's performance but may still be liable for a contractor's defective construction if the architect/engineer's negligence, such as in observing the construction, was a proximate cause of the defect. See *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933 (Tex.App. 1987); *First National Bank of Akron v. Cann*, 503 F.Supp. 419 (N.D. Ohio 1980), *aff'd*, 669 F.2d 415 (6th Cir. 1982). The Illinois courts have yet to take a position on the interpretation of this provision.

Further, to prevent the A/E from assuming greater liability, either intentionally or inadvertently through his or her conduct during the construction phase, AIA Document B141 contains the following additional language:

2.6.1.4 Duties, responsibilities and limitations of authority of the Architect under this Article 2.6 shall not be restricted, modified or extended without written agreement of the Owner and Architect with consent of the Contractor, which consent will not be unreasonably withheld.

AIA Document B141 also contains the following language to help the A/E avoid liability for construction costs that exceed the owner's budget or preferred limit of construction expenditures:

2.1.7.2 Evaluations of the Owner's budget for the Project, the preliminary estimate of the Cost of the Work and updated estimates of the Cost of the Work prepared by the Architect represent the Architect's judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's budget for the Project or from any estimate of the Cost of the Work or evaluation prepared or agreed to by the Architect.

The National Society of Professional Engineers (NSPE) also publishes a standard form agreement between owner and engineer for professional services that similarly seeks to limit the liability of the design professional during the construction phase and includes provisions essentially similar to those cited above. For more information, visit the NSPE web site at www.nspe.org.

3. Other Areas of Liability During the Construction Phase

a. [2.11] Site Observation vs. Supervision

Despite the attempts to protect the architect/engineer from liability through the use of protective language, problems may arise from the presence of the design professional on the

construction site. When construction defects arise for which the A/E is alleged to have responsibility, the question of whether an architect or engineer has failed to act in accordance with contractual or common law standards of professional care is one of fact. A frequent issue is whether the A/E should have discovered the alleged defect during one of these site visits or, in accordance with the standard of practice of the reasonably prudent professional, whether the A/E should have scheduled a site visit when a certain item was under construction. When put into practice at the jobsite, the distinctions between observation and supervision become blurred, often even in the mind of the A/E for whose protection they were devised. It is not uncommon for the A/E, during the construction phase, to assume greater responsibility for the construction defect than has been provided in the contract documents.

b. [2.12] Former Structural Work Act

The Structural Work Act was repealed by P.A. 89-2, effective February 14, 1995. However, the authors have included this discussion in this chapter because several court decisions have equated the concept of being in “charge” of the construction work with having a duty in tort to maintain safe conditions at the jobsite. *See, e.g., Kelly v. Northwest Community Hospital*, 66 Ill.App.3d 679, 384 N.E.2d 102, 23 Ill.Dec. 466 (1st Dist. 1978). Thus, a decision in which the court discusses whether an architect/engineer is in charge of the jobsite under the Structural Work Act remains relevant to determining whether the A/E has a duty in tort to take safety precautions on behalf of construction workers.

Design professionals who provide the usual site observation services for the purposes of checking the construction for conformity to the design were ordinarily not liable for construction worker injuries under the Structural Work Act. Liability under the Structural Work Act was predicated on “having charge of ” the construction work, which required a defendant to have some direct connection with the construction operations as well as the particular operations giving rise to the injury. *McGovern v. Standish*, 65 Ill.2d 54, 357 N.E.2d 1134, 2 Ill.Dec. 691 (1976). Whether one has charge of the construction work is a question of fact depending on the totality of the circumstances, including contractual obligations and actual jobsite conduct, but an important factor is whether the defendant has the right to stop the construction work for being performed in a dangerous manner. *Id.*; *Fruzyna v. Walter C. Carlson Associates, Inc.*, 78 Ill.App.3d 1050, 398 N.E.2d 60, 34 Ill.Dec. 385 (1st Dist. 1979).

In *McGovern, supra*, the Illinois Supreme Court affirmed the appellate court’s reversal of a judgment against an architect for an injured construction worker’s claim under the Structural Work Act. The court reviewed the architect’s contractual duties and actions on the jobsite and concluded that there was no evidence that he had any right to control or direct the manner or methods by which the construction was accomplished or to order the work stopped for being performed in a dangerous manner. The court further noted that the architect’s right to reject the work in the case of construction that deviated from the plans was for the owner’s protection and did not imply that the architect had the right to stop work when dangerous methods not affecting the quality of the construction were used.

Fruzyna, supra, arose from an order granting summary judgment to an architect on an injured construction worker’s claim under the Structural Work Act. The architect’s agreement was an

AIA form contract, and the court held that its provisions did not place any duties on the architect to have charge of the construction work. Despite acknowledging that the issue of who has charge of the work is generally a question of fact to be determined from the totality of the circumstances, the court held that there were no inferences to support a finding that the architect was liable under the Structural Work Act.

Several appellate courts have used a ten-factor test to determine whether a company was in charge of the work within the meaning of the Structural Work Act. The ten factors are whether the defendant

1. supervised and controlled the work;
2. retained the right to supervise and control the work;
3. constantly participated in the ongoing activities at the construction site;
4. supervised and coordinated the subcontractors;
5. took responsibility for safety precautions at the jobsite;
6. had the authority to issue change orders;
7. had the right to stop the work;
8. owned the equipment at the jobsite;
9. was familiar with construction customs and practices; and
10. was in a position to assure worker safety or alleviate equipment deficiencies or improper work habits. *Zukauskas v. Bruning, division of AM International*, 179 Ill.App.3d 657, 534 N.E.2d 680, 128 Ill.Dec. 498 (2d Dist. 1989).

This ten-factor test was originally applied to analyze whether an owner was in charge of the work as defined in the Structural Work Act. However, some courts have applied this test to determine whether engineering firms were in charge of the work. *Sasser v. Alfred Benesch & Co.*, 216 Ill.App.3d 445, 576 N.E.2d 303, 159 Ill.Dec. 634 (1st Dist. 1991); *Coyne v. Robert H. Anderson & Associates, Inc.*, 215 Ill.App.3d 104, 574 N.E.2d 863, 158 Ill.Dec. 750 (2d Dist. 1991).

Sasser, supra, involved a claim against an engineering firm that was performing construction inspection services for roadway and bridge construction on a state tollway. The engineer's contract incorporated the "Construction Section Engineer's Manual," which specifically made the engineer responsible for "monitoring the safe and efficient movement of traffic through construction zones" and for stopping the work or requiring changes in the work when necessary to correct traffic management deficiencies. 576 N.E.2d at 304, 305. These, in addition to numerous other requirements, led the court to conclude that there were conflicting facts as to whether the engineer was in charge of the work.

In *Coyne, supra*, the defendant engineer had designed and observed the construction of a sewer system under a fairly normal contract that provided for observation but not for control of the work or responsibility for safety precautions. The court acknowledged that the engineer's contract excluded safety responsibilities and that the engineer did not really control the work, had no right to stop the work, and was not in a position to take any meaningful steps to improve safety conditions. Nevertheless, the court relied on the following factors to determine that there was adequate evidence to support a jury verdict that the engineer was in charge of the work: all of the construction work and materials were subject at all times to the engineer's observation; the engineer had the right to request the contractor to discharge careless or incompetent workers; the engineer made daily visits to the jobsite, participating in the activities there; and the defendant, as an engineer, was familiar with construction methods.

From the perspective of the design professional, *Coyne* is troubling because it implies that under normal circumstances, like those in *Coyne*, an A/E may be in charge of the work as defined in the Structural Work Act. Traditionally, an A/E could expect to prevail on a motion for summary judgment if it were sued under the Structural Work Act for a worker injury on a project if its services were retained under a standard form contract and the design professional did not voluntarily assume safety responsibilities. If the analysis in *Coyne* is followed, design professionals' exposure under the Structural Work Act was increased significantly.

The *Coyne* court seems to have disregarded the critical distinction articulated by the Illinois Supreme Court in *McGovern, supra*, and *Norton v. Wilbur Waggoner Equipment Rental & Excavating Co.*, 76 Ill.2d 481, 394 N.E.2d 403, 31 Ill.Dec. 201 (1979). In *McGovern* and *Norton*, the court distinguished an architect's duty to observe, supervise, or inspect the work for the purpose of ensuring that the structure, when completed, would be what was designed from actual involvement in the means, methods, or procedures by which the individual construction tasks are carried out. Furthermore, in both *McGovern* and *Norton* and in *Miller v. DeWitt*, 37 Ill.2d 273, 226 N.E.2d 630 (1967), the court placed great emphasis on whether the architect had the authority to order the work stopped because of dangerous conditions. In contrast, the court in *Coyne* seems not to have given great weight to the engineer's inability to stop the work and did not consider the distinction between observing the finished product and observing the process of performing the construction when determining that the engineer supervised the work and participated in ongoing activities. The *Coyne* court also concluded without explanation that an engineering firm would inherently be familiar with construction methods (despite the fact that courts have taken judicial notice of the fact "that employees of contractors and subcontractors place and operate hoists and that architects and their employees never do so" (*Wheeler v. Aetna Casualty & Surety Co.*, 11 Ill.App.3d 841, 298 N.E.2d 329, 338 (1st Dist. 1973), *vacated as moot*, 57 Ill.2d 184 (1974); *Fidelity & Casualty Company of New York v. Envirodyne Engineers, Inc.*, 122 Ill.App.3d 301, 461 N.E.2d 471, 473, 77 Ill.Dec. 848 (1st Dist. 1983), quoting *Wheeler, supra*)).

Most appellate courts to consider the issue have held that under contract language similar to that quoted in §2.10 above, A/E's are not in charge of the construction work under the Structural Work Act. *See, e.g., Wartenberg v. Dubin, Dubin & Moutoussamy*, 259 Ill.App.3d 89, 630 N.E.2d 1171, 197 Ill.Dec. 47 (1st Dist. 1994); *Block v. Lohan Associates, Inc.*, 269 Ill.App.3d 745, 645 N.E.2d 207, 206 Ill.Dec. 202 (1st Dist. 1993); *Mahoney v. 223 Associates*, 245 Ill.App.3d 562, 614 N.E.2d 249, 185 Ill.Dec. 115 (1st Dist. 1993); *Busick v. Streator Township*

High School District No. 40, 234 Ill.App.3d 647, 600 N.E.2d 46, 175 Ill.Dec. 423 (3d Dist. 1992); *Diomar v. Landmark Associates*, 81 Ill.App.3d 1135, 401 N.E.2d 1287, 37 Ill.Dec. 194 (1st Dist. 1980); *Kelly, supra*; *Getz v. Del E. Webb Corp.*, 38 Ill.App.3d 880, 349 N.E.2d 682 (1st Dist. 1976). Some courts have held that the language of the A/E's contract in combination with the facts involving the A/E's actions at the jobsite may put the A/E in charge of the work. *See, e.g., Manisca v. Rakstang Associates, Inc.*, 256 Ill.App.3d 756, 628 N.E.2d 408, 194 Ill.Dec. 911 (1st Dist. 1993); *Ivanov v. Process Design Associates*, 267 Ill.App.3d 440, 642 N.E.2d 711, 204 Ill.Dec. 810 (1st Dist. 1993).

c. Other Functions During the Construction Phase

(1) [2.13] Shop drawings

An architect/engineer customarily checks shop drawings that are prepared by manufacturers of some building components to indicate detailed installation requirements. Attempts have been made to limit the liability of the A/E in this area by contractually providing that the A/E will review shop drawings only for compliance with the overall design concept and not for detailed or dimensional accuracy. *See Paul M. Lurie, How Can I Manage the Legal Risks to Which I Am Exposed?*, in *AVOIDING LIABILITY IN ARCHITECTURE, DESIGN, AND CONSTRUCTION: AN AUTHORITATIVE AND PRACTICAL GUIDE FOR DESIGN PROFESSIONALS*, pp. 239 – 241 (Robert F. Cushman ed., 1983).

AIA Document B141, *Standard Form of Agreement Between Owner and Architect* ¶2.6.4.1 (1997), contains a clause severely limiting the A/E's scope of review of shop drawings and permitting the design professional to rely on certain types of information provided by the general contractor:

2.6.4.1 The Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

(2) [2.14] Processing the contractor's application for payment

In processing the contractor's monthly applications for payment, the architect/engineer is often asked to certify that the work has progressed to a certain state of completeness. Despite contract language to the contrary, this certification is often interpreted to mean that the work covered by the application is in conformance with the contract documents.

In AIA Document G702, *Application and Certificate for Payment* (1992), the architect's certificate consists of the following language:

In accordance with the Contract Documents, based on on-site observations and the data comprising the application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

(3) [2.15] Issuing certificates of partial, substantial, and final completion

The architect/engineer who issues the certificates of completion customarily does not intend them to be a representation that all the work is in conformance with the drawings and specifications. In fact, it is usually impossible for the A/E to make such a representation because even a full time on-site design professional cannot ordinarily inspect all of the contractor's work throughout the construction project.

However, it is customary for a construction lender to require a design professional's signature on a certificate warranting that the construction work is proper and complete. It is sometimes possible to negotiate the language of these certificates with the lender so as to include language limiting the design professional's representation to "the best of his or her knowledge based on his or her periodic observations" of the construction work. The discrepancy between the limited certification that design professionals customarily provide and the requirement of the lender can create problems for the owner who may be caught between inconsistent provisions in his or her contract with the A/E and the lender.

(4) [2.16] Preparing punch-list items at or near the end of the job

When the construction is substantially complete, the design professional conducts an inspection from which he or she prepares a "punch list," which is a list of still uncompleted or improperly completed details of the construction. Construction is generally considered to be substantially complete when "the Owner can occupy or utilize the Work for its intended use." AIA Document A201, *General Conditions of the Contract for Construction* ¶9.8.1 (1997).

The architect/engineer may face liability for problems with items omitted from the punch list. Unlike the design professional who makes periodic observations during the construction, an A/E customarily conducts a detailed inspection to determine whether substantial completion and, subsequently, final completion have been attained. While this requirement does not make the A/E the guarantor of the contractor's work, it does involve a higher degree of scrutiny than the periodic observations that the design professional conducts.

d. [2.17] The Design Professional as Construction Manager

With increasing frequency, design professionals are providing services as construction managers rather than in their traditional roles. There is considerable confusion over the duties that a construction manager ordinarily provides.

As ordinarily conceived, a construction manager would operate more or less like a general contractor, organizing, dividing, and scheduling the work, soliciting bids from contractors to perform the work, and compiling the bids in the form of a guaranteed maximum price for the owner. Then the construction manager would contract with the owner to perform the construction within the guaranteed maximum price and would act as the general contractor, coordinating the work of trades, with the exception that the contractors would have direct contracts with the owner.

Other construction management agreements call for the construction manager to be far less involved in the actual planning and performance of the construction work. In these cases, the construction manager is little more than a consultant to the owner who works with the contractors and advises the owner on timing and scheduling, cost control, and other similar issues. Most construction management agreements impose duties that fall somewhere between these two extremes.

Thus, it is not possible to determine the duties and obligations of a construction manager without an analysis of the construction manager's contract. It is reasonable to assume that if the contract imposes duties on the construction manager similar to those of a general contractor, even a design professional working as a construction manager would be held to the warranties and liabilities normally associated with a general contractor and that if the construction manager provides only consulting and not actual construction services, the design professional functioning as construction manager would be held to the obligations and standard of care customarily or traditionally associated with an architect/engineer.

e. [2.18] Consulting Architects/Engineers

Architectural or engineering firms are often hired by other design professionals to provide professional services in a particular area of expertise. It is not uncommon for professionals with structural, mechanical, or electrical expertise to contract with the architectural or engineering firm that actually has contracted with the owner. The responsibilities and liabilities of an architect/engineer discussed in this chapter are intended to cover these consultants as well as the professionals contracting directly with the owners.

It should be noted, however, that the prime A/E (*i.e.*, the A/E in direct contract with the owner) remains liable to the owner for errors or omissions committed by any consulting A/E when the prime A/E is contractually obligated to provide the services in question, either itself or through a consultant. To minimize liability, some design professionals refuse to retain consultants and insist that the owner retain the consultant directly under a separate contract.

The question of whether an owner has a direct cause of action against a sub-consulting A/E with whom the A/E is not in privity has been settled and is discussed in detail in §§2.22 and 2.25 – 2.27 below. The owner does have a direct cause of action in tort when the negligence of the sub-consulting A/E results in personal injuries or in sudden and calamitous damage to property. However, when only economic loss or disappointed commercial expectations are involved, no direct tort claim out of privity may be maintained.

III. THEORIES OF LIABILITY

A. [2.19] The Common Law Standard of Care

The standard of care in Illinois for architects and engineers is set forth in *Miller v. DeWitt*, 59 Ill.App.2d 38, 208 N.E.2d 249 (4th Dist. 1965), *aff'd in part, rev'd in part on other grounds*, 37 Ill.2d 273 (1967). In discussing the standard of care owed by the defendant architects, the *Miller* court noted that the architects were

under a duty to exercise ordinary, reasonable care, technical skill, and ability and diligence, as are ordinarily required of architects, in the course of their plans, inspections, and supervision during construction. 208 N.E.2d at 284.

The duty owed by architects and engineers was further defined in *Mississippi Meadows, Inc. v. Hodson*, 13 Ill.App.3d 24, 299 N.E.2d 359, 361 (3d Dist. 1973):

An architect's efficiency in preparing plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession. (See, Annot., 25 A.L.R.2d 1088.) The duty of an architect depends upon the particular agreement he has entered with the person who employs him and in the absence of a special agreement he does not imply or guarantee a perfect plan or satisfactory result; rather, he is only liable if he fails to exercise reasonable care and skill. 5 Am.Jur.2d, Architects, Sec. 8.

However, as the *Mississippi Meadows* court recognized, the standard of care owed by an architect/engineer may be altered by agreement with the owner. A provision in an owner-A/E agreement by which the A/E represents that he or she will follow the highest professional standards in performing all professional services under the agreement would appear to override the standard of ordinary and reasonable skill established by *Miller* and *Mississippi Meadows*, at least with regard to a claim by the other party to the design professional's contract.

The court in *Rosos Litho Supply Corp. v. Hansen*, 123 Ill.App.3d 290, 462 N.E.2d 566, 571, 78 Ill.Dec. 447 (1st Dist. 1984), *overruled in part on other grounds by 2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990), commented on the rationale underlying an architect's standard of care:

Among the reasons architects have been found answerable in malpractice actions is because they hold themselves out and offer services to the public as

experts in their line of endeavor. Those who employ them perceive their skills and abilities to rise above the levels possessed by ordinary laymen. Such persons have the right to expect that architects, as other professionals, possess a standard minimum of special knowledge and ability, will exercise that degree of care and skill as may be reasonable under the circumstances and, when they fail to do so, that they will be subject to damage actions for professional negligence, as are other professionals.

In *Taake v. WHGK, Inc.*, 228 Ill.App.3d 692, 592 N.E.2d 1159, 1170, 170 Ill.Dec. 479 (5th Dist. 1992), the court approved the use of the following Illinois Pattern Jury Instruction (I.P.I. — Civil No. 105.01 (1971)) in a malpractice claim against an architect:

In performing services, an architect must possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified architects. A failure to do so is a form of negligence that is called malpractice.

The only way in which you may decide whether the defendant architects possessed and applied the knowledge, and used the skill and care which the law required of them, is from evidence presented in this trial by architects called as expert witnesses. You must not attempt to determine this question from any personal knowledge you have.

The court noted that the last two sentences should be included only when the trial court determines that the case does not fall within the “common knowledge” exception in which the professional negligence is so grossly apparent that an ordinary person would have no difficulty in recognizing it. See *Board of Education of Community Consolidated School District No. 54 v. Del Bianco & Associates, Inc.*, 57 Ill.App.3d 302, 372 N.E.2d 953, 14 Ill.Dec. 674 (1st Dist. 1978) (instruction regarding need for expert witness inappropriate when architect’s malfeasance is obvious to average layperson).

In an effort to improve the quality of practice, a number of professional organizations have developed manuals of professional practice. There is great concern with the existence of these manuals and fear that they will be used not as a tool for increased professionalism but as a standard against which the professional services of an A/E will be measured. See, e.g., American Society of Civil Engineers, *QUALITY IN THE CONSTRUCTED PROJECT: A GUIDE FOR OWNERS, DESIGNERS AND CONSTRUCTORS* (2d ed. 2000). See also Illinois Society of Professional Engineers, *MANUAL OF PRACTICE FOR PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE* (1974), which attempted to set forth basic aspects of engineering practice relating to design of highways and bridges, civil, structural, mechanical and electrical, construction testing and observation, and geotechnical services. The American Institute of Architects also publishes and periodically updates *THE ARCHITECT’S HANDBOOK OF PROFESSIONAL PRACTICE* (13th ed. 2002).

B. Actions Based on Contract

1. [2.20] Express Warranties

Express warranties regarding the quality of architectural and engineering services to be performed may appear in an owner-architect or owner-engineer agreement. These warranties usually concern compliance with local codes, rules, and regulations, and state and federal laws. However, more often than not, qualifying language will have been inserted limiting the architect's or engineer's liability to compliance "to the best of his or her knowledge, information, and belief." In the absence of any contract language or given the qualifier noted above, the architect/engineer would presumably be held to the standard of ordinary and reasonable care discussed in §2.19 above.

2. [2.21] Implied Contract Terms and Warranties

A doctrine of implied warranty in connection with the delivery of professional design services has been established in Illinois. While the Illinois Supreme Court has yet to address the issue, a number of appellate courts have noted its existence. In *Mississippi Meadows, Inc. v. Hodson*, 13 Ill.App.3d 24, 299 N.E.2d 359, 361 (3d Dist. 1973), the court noted that the architect's duty was determined by reference to his or her contract: "[I]n the absence of a special agreement he does not imply or guarantee a perfect plan or satisfactory result." In 1977, however, the First District noted the following:

Architects and engineers represent themselves to be competent in the preparation of plans and specifications necessary to the construction of suitable structures, including but not limited to the knowledge of and compliance with applicable building codes, and where they fail to use reasonable care to produce a satisfactory structure in compliance therewith, they may be sued for breach of an implied contract term. *Himmel Corp. v. Stade*, 52 Ill.App.3d 294, 367 N.E.2d 411, 414 – 415, 10 Ill.Dec. 23 (1st Dist. 1977).

The First District further extended the doctrine of implied terms in *Board of Education of Community Consolidated School District No. 54 v. Del Bianco & Associates, Inc.*, 57 Ill.App.3d 302, 372 N.E.2d 953, 14 Ill.Dec. 674 (1st Dist. 1978), in which the defendant architect specified a type of mortar for an exterior brick wall that was improper for the Chicago area. Although there was no express contract provision that required the architect to specify a mortar suitable for use in the Chicago area, the court noted as follows:

These expressed duties are not the only obligations which defendant was required to perform. Not all of the duties growing out of a contract must have been expressly stipulated for: many duties arise *ex lege* out of the relation created by the contract. (*Stanley v. Chastek* (1962), 34 Ill.App.2d 220, 180 N.E.2d 512.) Consequently, we find that defendant had the implied obligation to specify the use of reasonably good materials, to perform its work in a reasonably workmanlike manner, and in such a way as reasonably to satisfy such requirements as it had notice the work was required to meet. 372 N.E.2d at 958.

Nevertheless, in *Lowrie v. City of Evanston*, 50 Ill.App.3d 376, 365 N.E.2d 923, 8 Ill.Dec. 537 (1st Dist. 1977), the court refused to recognize an implied warranty of fitness for a particular purpose arising from the services provided by the architects, engineers, and contractors in building a parking garage. The plaintiff had alleged that the defendant architects and contractor impliedly warranted that the garage was “fit for the purpose of allowing persons to safely park their automobiles there and to safely use said premises.” 365 N.E.2d at 929. Noting that there were no authorities to support such an implied warranty, the court refused to extend the existing line of builder-vendor cases. This indicates that in certain circumstances there may be an implied warranty of habitability when a builder sells or leases a residence directly to a purchaser.

In *Waterford Condominium Ass’n v. Dunbar Corp.*, 104 Ill.App.3d 371, 432 N.E.2d 1009, 60 Ill.Dec. 110 (1st Dist. 1982), the court refused to permit the plaintiffs, a condominium association and individual condominium owners, to recover from the defendants, a structural engineer and mechanical engineer, for breach of a warranty of habitability. The court reaffirmed the position that the plaintiff’s remedy for breach of the warranty of habitability is against the builder/developer-seller, not against the engineers who had contracted with the builder-seller for the delivery of professional services.

3. [2.22] Recovery by Third Parties Under Third-Party Beneficiary Theory

Illinois courts have taken a restrictive position with respect to recovery by third parties on a third-party beneficiary theory:

The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed. *Altevogt v. Brinkoetter*, 85 Ill.2d 44, 421 N.E.2d 182, 187, 51 Ill.Dec. 674 (1981), quoting *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 178 N.E. 498, 501 (1931).

The *Altevogt* court noted that it is unnecessary to specify the intended beneficiary by name. A third party may be described as a class, such as prospective purchasers of houses constructed pursuant to a contract between a developer and a contractor. However, the *Altevogt* court denied the right to a purchaser to sue on a third-party beneficiary theory in the situation in which the seller had contracted with a builder to build only one individual house, noting that it had not clearly been established that the builder knew that the house was to be offered for sale to third parties rather than occupied by the seller.

In reaching its conclusion, the *Altevogt* court cited an earlier Illinois Supreme Court decision, *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.*, 78 Ill.2d 381, 400 N.E.2d 918, 36 Ill.Dec. 338 (1980), in which the court recognized the State of Illinois as a third-party beneficiary of a contract between a building authority and the architect for the construction of a building. In keeping with the conclusion reached later in *Altevogt*, the state was identified as the intended third-party beneficiary by name in *Resnik* and also was the intended user of the premises.

However, for the most part, attempts to expand recovery by third-party beneficiaries against design professionals, along the lines of *Resnik*, have not been successful. In *Illinois Housing Development Authority v. Sjostrom & Sons, Inc.*, 105 Ill.App.3d 247, 433 N.E.2d 1350, 61 Ill.Dec. 22 (2d Dist. 1982), the Illinois Housing Development Authority (IHDA), as mortgagee of a residential development project, sought to enforce the provisions of the owner-architect and owner-supervising architect agreements (as well as the owner-contractor agreement). While all three contracts contained extensive references to the IHDA, the *Sjostrom* court distinguished the instant case from *Resnick* on the basis that in *Resnick* the party that asserted the third-party beneficiary status (the State of Illinois) was to be the ultimate user of the project. On the other hand, the IHDA was merely a regulatory authority and a mortgagee, as the *Sjostrom* court noted:

Here, unlike *Resnik*, the development is not being constructed to directly benefit the IHDA. The beneficial owner, Valley View, is the user; the IHDA is merely a mortgagee. In its entirety the contract directly benefits only the parties, and the contract provisions which the IHDA seeks to enforce only [incidentally] and collaterally benefit the IHDA, as a mortgagee. 443 N.E.2d at 1358 – 1359.

In evaluating IHDA's position, the court also noted the following:

In the present case, the injury allegedly suffered by the mortgagee was simultaneously suffered by the mortgagor. To allow both the IHDA and Valley View to sue on the same injury, subjects the defendant to the possibility of being doubly liable for only one injury. Moreover, allowing a direct action in this case would give every holder of a security interest a right to bring a suit against one who negligently injures the secured property and would thus unduly multiply and complicate litigation. 433 N.E.2d at 1361.

The court pointed out that, as mortgagee, the IHDA had other remedies that it could pursue to protect its security interest that did not expose the architects and contractors to double liability. A similar decision was reached by the First District in *Illinois Housing Development Authority v. M-Z Construction Corp.*, 110 Ill.App.3d 129, 441 N.E.2d 1179, 65 Ill.Dec. 665 (1st Dist. 1982), in which the IHDA attempted to sue an architect on a third-party beneficiary theory for breach of contract for professional services.

Altevogt is also in accord with *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969), in which a subsequent purchaser of a piece of property sued a surveyor hired by the seller for damages resulting from an inaccurate survey. In spite of an express warranty on the face of the survey and the fact that the surveyor knew that it would be relied on by others, the Illinois Supreme Court refused to expand the third-party beneficiary theory.

The Supreme Court has allowed a plaintiff to maintain an action as a third-party beneficiary. *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982). In *Redarowicz*, the plaintiff homeowner sought to enforce an agreement between the City of Bloomington and the

defendant in which the defendant agreed to make certain repairs to the premises to conform the work to the city code. The court noted as follows:

As a third party to the agreement it is intended that benefits accrue directly to the plaintiff through performance of the contract. Because the identification of the plaintiff as a direct beneficiary is clear, and the intent of the parties to the agreement is unmistakable in indicating as much, the plaintiff is permitted to maintain an action as a third-party beneficiary. 441 N.E.2d at 328.

A federal court applying Illinois law has allowed a contractor to make a direct claim against an architect hired for construction coordination purposes as a third-party beneficiary of the architect's contract with the Chicago Public Building Commission (PBC). *Crown Corr, Inc. v. Wil-Freds Construction, Inc.*, No. 94 C 6535, 1995 U.S. Dist. LEXIS 15160 (N.D.Ill. Oct. 10, 1995). The court reasoned that since the architect was being hired to be the PBC's representative with authority to act on behalf of the PBC, the architect "thus stepped into the PBC's shoes — carrying out the work of coordination that was the PBC's duty toward its contractors." 1995 U.S. Dist. LEXIS 15160 at *9. The court concluded that the contractor was intended to be a third-party beneficiary of the architect's services and had a right to sue the architect directly for damages resulting from breach of the architect's contract with the PBC.

4. Uniform Commercial Code

a. [2.23] Application of the UCC to Construction Contracts

Although the Illinois Supreme Court has not addressed the issue, two appellate courts have held that the Uniform Commercial Code (UCC), 810 ILCS 5/1-101, *et seq.*, is not applicable to construction contracts. In *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill.App.3d 577, 342 N.E.2d 65 (1st Dist. 1976), the plaintiff brought an action for breach of the implied warranties contained in §§2-314 and 2-315 of the UCC (810 ILCS 5/2-314, 5/2-315) against the contractor and fabricator of a pressure vessel for damages due to the failure of a converter. The court examined the language of the contract between the parties and noted that the contract was clearly one for work, labor, and materials and not for the sale of the converter vessel. Therefore, the allegations of breach of implied warranty of fitness for a particular purpose and implied warranty of merchantability based on the UCC were not applicable:

In the instant case we note that throughout the contract plaintiff is denominated "Owner" not buyer, and defendant is denominated "Contractor" not seller. The agreement expressed a desire by plaintiff to have an ammonia plant "designed, constructed and completed" by defendant, not a desire to purchase the facility from defendant. Defendant was represented as being engaged in the business of "designing and constructing" rather than selling. The agreement called for defendant to do all process, design and engineering work. It did not call for defendant to sell anything to plaintiff. With respect to the converter and other component parts, defendant was to "procure, expedite, receive, install and erect all equipment." No mention is made of selling equipment. Defendant's sole fixed fee was to be compensation for services including "purchasing services, including the

services of buyers, expeditors and inspectors.” Most important to our determination are two provisions found in article VIII of the contract. As noted above, section 8.2 placed ultimate control of purchasing decisions in the hands of plaintiff, not defendant. Under section 8.23 “title to all machinery and equipment and supplies for the work shall, as between Owner and Contractor, be in Owner.” Thus defendant never had title to any component part of the plant, including the converter. 342 N.E.2d at 78.

A similar conclusion was reached the same year by the Fourth District in *J & R Electric Division of J.O. Mory Stores, Inc. v. Skoog Construction Co.*, 38 Ill.App.3d 747, 348 N.E.2d 474 (4th Dist. 1976). In reaching its decision, the court noted that the UCC had not addressed a decision of the First District under the Uniform Sales Act, which preceded the UCC’s enactment. In *Continental Illinois National Bank & Trust Company of Chicago v. National Casket Co.*, 27 Ill.App.2d 447, 169 N.E.2d 853 (1st Dist. 1960), a contract for the manufacture and installation of a steel marquee and canopy on the front of a building was held not to constitute a sale of goods within the meaning of the Uniform Sales Act. In reaching its decision regarding the application of the UCC in *J & R Electric*, the court relied on the fact that the UCC, as enacted, made no attempt to supersede *National Casket* by extending the meaning of the phrase “contract to sell goods” to include a construction contract under which goods are furnished and incorporated into the constructed building. 348 N.E.2d at 477.

b. [2.24] Application of the UCC to the Performance of Professional Services

Only one Illinois court has decided the issue of whether the performance of professional services by an architect or engineer comes within the application of the Uniform Commercial Code. *Rosos Litho Supply Corp. v. Hansen*, 123 Ill.App.3d 290, 462 N.E.2d 566, 571 – 572, 78 Ill.Dec. 447 (1st Dist. 1984). However, the Illinois Supreme Court in *2314 Lincoln Park West Condominium Ass’n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990), overruled *Rosos* on arguably related grounds (*i.e.*, the applicability of the economic-loss doctrine), so the vitality of *Rosos* is open to question. That said, the court in *Stewart Warner Corp. v. Burns International Security Services, Inc.*, 343 F.Supp. 953 (N.D.Ill. 1972), declined to apply the UCC’s implied warranties to the sale of detective services. In *Rosen v. DePorter-Butterworth Tours, Inc.*, 62 Ill.App.3d 762, 379 N.E.2d 407, 19 Ill.Dec. 743 (3d Dist. 1978), the court held that the purchase of tickets from a travel agent did not come within the UCC. Since the services provided by design professionals would not easily be characterized as products, the UCC would ordinarily not apply to architects and engineers.

C. Actions Based in Tort

1. [2.25] Application of the Economic-Loss Doctrine to Tort Claims Against Design Professionals

A number of Illinois courts have indicated that suits in negligence against design professionals are permissible. It should be noted, however, that these courts’ decisions preceded the Illinois Supreme Court’s decisions in *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441

N.E.2d 324, 65 Ill.Dec. 411 (1982), and *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983), prohibiting suits in negligence when solely economic losses are alleged. For many years, the Illinois Supreme Court declined to rule directly on the applicability of the economic-loss doctrine to suits in negligence against design professionals.

For a considerable time, the appellate courts were split on the issue of whether a claim for solely economic loss could be maintained in tort against a design professional. See *Palatine National Bank v. Charles W. Greengard Associates, Inc.*, 119 Ill.App.3d 376, 456 N.E.2d 635, 74 Ill.Dec. 914 (2d Dist. 1983) (tort claim against architect barred by economic-loss doctrine); *Rosos Litho Supply Corp. v. Hansen*, 123 Ill.App.3d 290, 462 N.E.2d 566, 78 Ill.Dec. 447 (1st Dist. 1984) (economic-loss doctrine does not apply to claim of professional malpractice against engineer); *City of East Moline v. Bracke, Hayes & Miller*, 133 Ill.App.3d 136, 478 N.E.2d 637, 88 Ill.Dec. 322 (3d Dist. 1985) (in dicta, professional negligence in the failing of heating, ventilating, and air conditioning system would be actionable only in contract and not in tort); *People ex rel. Skinner v. Graham*, 170 Ill.App.3d 417, 524 N.E.2d 642, 120 Ill.Dec. 612 (4th Dist. 1988) (claim for structural design and construction defects in Capital Area Vocational Center necessitating closing of building barred by economic-loss doctrine); *People ex rel. Skinner v. FGM, Inc.*, 166 Ill.App.3d 802, 520 N.E.2d 1024, 117 Ill.Dec. 673 (5th Dist. 1988) (economic-loss doctrine not applicable to claim against architect for negligent design and supervision of construction of roof resulting in leaks). See Steven G.M. Stein et al., *A Blueprint for the Duties and Liabilities of Design Professionals after Moorman*, 60 Chi.-Kent L.Rev. 163 (1984); Mark C. Friedlander, *The Impact of Moorman and Its Progeny on Construction Litigation*, 77 Ill.B.J. 654 (1989).

The Illinois Supreme Court subsequently resolved the conflict among the appellate courts. In *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990), the plaintiff, who was not in privity with the architect, brought an action against the architect complaining of loose windows and doors, roof leaks, inadequate heating and cooling systems, and settlement of the garage. The case went to the Supreme Court on a permissive interlocutory appeal certifying the following question: "Should there be an exception to the rule set forth in *Moorman* which would permit Plaintiffs seeking to recover purely economic losses due to defeated expectations of a commercial bargain to recover from an architect or engineer in tort?" 555 N.E.2d at 348. The court emphasized that the basis of *Moorman* was the distinction between contract and tort interests and refused to permit a tort action against the architect:

As our prior decisions concerning the construction industry fully illustrate, [the plaintiff's] claim concerns the quality, rather than the safety, of the building and thus is a matter more appropriately resolved under contract law. . . . We decline to impose on Mann a duty in tort to protect the unit owners from the sort of loss asserted. The architect's responsibility originated in its contract with the original owner, and in these circumstances its duties should be measured accordingly. Recovery of the nature requested here essentially seeks damages for a difference in quality. "There is room in the market for goods of varying quality, and if the purchaser buys goods which turn out to be below its expectations, its remedy should

be against the person from whom it bought the goods, based upon the contract with that person.” *Schiavone Construction Co. v. Elgood Mayo Corp.* (1981), 81 A.D.2d 221, 229, 439 N.Y.S.2d 933, 938, (Silverman, J., dissenting), *rev’d* (1982), 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720. [Citations omitted.] 555 N.E.2d at 352 – 353.

The Illinois Supreme Court subsequently confirmed that its holding in *2314 Lincoln Park West* also applies to claims against engineers alleging solely economic loss. *Fireman’s Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill.2d 160, 679 N.E.2d 1197, 223 Ill.Dec. 424 (1997). In *Fireman’s Fund*, the subrogee of a construction subcontractor brought a tort action directly against an engineering firm with which the subcontractor was not in privity, seeking solely economic loss consisting of the cost of repairing an underground water system allegedly due to the engineer’s negligently prepared plans. Following *2314 Lincoln Park West*, the *Fireman’s Fund* court held that the economic loss doctrine applies to engineers. 679 N.E.2d at 1200 – 1201.

However, the issue may not be closed. There was a significant dissent in *Fireman’s Fund*. Nevertheless, and despite Illinois Supreme Court precedents finding that the economic-loss doctrine is not applicable to claims for professional malpractice against lawyers (*see Collins v. Reynard*, 154 Ill.2d 48, 607 N.E.2d 1185, 180 Ill.Dec. 672 (1992)) or accountants (*see Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill.2d 137, 636 N.E.2d 503, 201 Ill.Dec. 71 (1994)), the First District Appellate Court held in *Martusciello v. JDS Homes, Inc.*, 361 Ill.App.3d 568, 838 N.E.2d 9, 297 Ill.Dec. 522 (1st Dist. 2005), that the economic-loss doctrine does bar a claim for architectural malpractice that alleges errors or omissions in the preparation of architectural plans in light of the Illinois Supreme Court’s holding in *2314 Lincoln Park West*. For a detailed discussion of the issues involved in applying the economic-loss doctrine to claims for professional malpractice, see Mark C. Friedlander and Andrea B. Friedlander, *Malpractice and the Moorman Doctrine’s “Exception of the Month,”* 86 Ill.B.J. 600 (1998).

2. [2.26] Cases Refining the Definition of Economic Loss

There has been considerable litigation and confusion over the meaning of “economic loss” as used in the line of cases following *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). The discussion in this §2.26 is intended to be an overview of some of the issues involved in defining “economic loss” in the context of claims against architects and engineers. It is not intended to be an exhaustive analysis of this subject.

Some courts have held that “economic loss” is all damages other than personal injuries or damage to property excluding the defective item in question. *See, e.g., Scott & Fetzer Co. v. Montgomery Ward & Co.*, 129 Ill.App.3d 1011, 473 N.E.2d 421, 426, 85 Ill.Dec. 53 (1st Dist. 1984); *Starks Feed Co. v. Consolidated Badger Cooperative, Inc.*, 592 F.Supp. 1255 (N.D.Ill. 1984); *U.S. Home Corp. v. George W. Kennedy Construction Co.*, 565 F.Supp. 67 (N.D.Ill. 1983); *Abco Metals Corp. v. J.W. Imports Co.*, 560 F.Supp. 125 (N.D.Ill. 1982). Other courts have held that the distinction between claims for economic loss and other types of claims is the nature of the claimant’s interest (*i.e.*, whether the injury is primarily to the claimant’s qualitative or commercial expectations or whether the claimant’s interest was in the avoidance of sudden, dangerous occurrences that ordinarily characterize tort actions). *See, e.g., Bagel v. American*

Honda Motor Co., 132 Ill.App.3d 82, 477 N.E.2d 54, 87 Ill.Dec. 453 (1st Dist. 1985); *Bi-Petro Refining Co. v. Hartness Painting, Inc.*, 120 Ill.App.3d 556, 458 N.E.2d 209, 76 Ill.Dec. 70 (4th Dist. 1983); *Chicago Heights Venture v. Dynamit Nobel of America, Inc.*, 782 F.2d 723 (7th Cir. 1986); *Dixie-Portland Flour Mills, Inc. v. Nation Enterprises, Inc.*, 613 F.Supp. 985 (N.D.Ill. 1985).

An important decision in which the Illinois Supreme Court addressed this issue is *Vaughn v. General Motors Corp.*, 102 Ill.2d 431, 466 N.E.2d 195, 80 Ill.Dec. 743 (1984), *overruled in part* by *Trans State Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill.2d 21, 682 N.E.2d 45, 224 Ill.Dec. 484 (1997). In *Vaughn*, the brakes on the wheel of a truck locked at low speed, causing the truck to overturn and resulting in severe damage to the truck but no personal injuries or damage to other property. The court stated as follows:

[W]e hold that recovery for plaintiff's loss may be had in tort. The allegations of the complaint, which for purposes of the motion to dismiss must be taken as true, allege a sudden and calamitous occurrence caused by a defect in the product and state a cause of action based on strict liability. 466 N.E.2d at 197.

The *Vaughn* court appears to indicate that the type of damage is not the controlling factor in determining whether a claim in tort is stated. It was the sudden and dangerous nature of the incident, invoking tort considerations, that rendered *Moorman, supra*, inapplicable. This rationale is consistent with *Moorman* itself, in which, although the court referred to economic loss and other types of damages, the court was chiefly concerned with the nature of the claimant's interest and whether it is better and more consistently protected by tort or contract law.

The Illinois Supreme Court subsequently issued another significant opinion on the economic-loss doctrine in *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265, 223 Ill.Dec. 532 (1997). The *Chicago Flood* court noted that there are three exceptions to the economic-loss doctrine:

(1) where the plaintiff sustained damage, i.e., personal injury or property damage, resulting from a sudden or dangerous occurrence (*Moorman*, 91 Ill.2d at 86); (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, i.e., fraud (*Moorman*, 91 Ill.2d at 88 – 89); and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions (*Moorman*, 91 Ill.2d at 89). [Emphasis in original.] 680 N.E.2d at 275.

The plaintiffs in *Chicago Flood* were seeking to recover damages that they suffered as a result of a flood. In determining whether the plaintiffs could maintain a claim for negligence to recover their damages, the court held that the “sudden and dangerous” exception to the economic-loss doctrine requires both a sudden and dangerous occurrence and personal injury or property damage. As such, the court held that the plaintiffs who suffered purely economic losses could not recover in tort while those who were complaining of property damage (such lost perishable inventory) could recover in tort.

The question of what constitutes “sudden and calamitous,” however, is not always clear. In *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 137 Ill.Dec. 635 (1989), for example, the Illinois Supreme Court appeared to downplay the “sudden and calamitous” requirement. In *Board of Education*, various school districts sued the suppliers of asbestos-containing materials for damages associated with the removal of asbestos from public schools. Without deciding whether the presence of asbestos in schools constituted a sudden and calamitous event, the court held that the economic-loss doctrine did not bar the plaintiffs’ claim for negligence against the suppliers because the asbestos contaminated the school property and thereby constituted property damage properly recoverable in tort.

The Second District Appellate Court in *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Co.*, 349 Ill.App.3d 178, 810 N.E.2d 235, 249, 284 Ill.Dec. 582 (2d Dist. 2004), on the other hand, explicitly found that mold growth, even though it was gradual and manifested over a long period of time, constituted a sudden and calamitous event for purposes of applying the economic-loss doctrine:

Properly viewed from the point of injury, and not from the development of the mold and bacterial infestation, the occurrence was sufficiently sudden and calamitous to place it under the exception to the economic loss rule for property damage resulting from a sudden or dangerous occurrence.

In so holding, the court characterized the “sudden and calamitous” inquiry as one that focuses on the nature of the injury rather than the process by which the injury manifests itself.

These and other holdings may appear to offer conflicting answers to the question of what satisfies the “sudden and calamitous” requirement for purposes of the economic-loss doctrine. One way to reconcile these decisions, however, may be to draw the distinction between bodily injury and property damage. If the plaintiff complains of bodily injury (such as the asbestos contamination in *Board of Education* or the mold infestation in *Muirfield*), Illinois courts may be apt to find these damages recoverable in tort. If the plaintiff complains of property damage alone, on the other hand, Illinois courts may characterize these damages as strictly economic loss unless they were caused by a sudden and calamitous occurrence.

In the context of claims against design professionals, the issue of what constitutes economic loss most frequently arises when the design professional’s error or omission results in a qualitative defect to the structure that also involves incidental property damage. For example, if a design professional negligently designed a roof system that leaked, resulting in water damage to furniture, may the owner of the furniture maintain a claim in tort against the design professional?

Although no Illinois court has directly addressed this issue, several federal courts indicate that *Moorman* would bar a tort claim since the essence of the defect is qualitative and gradual rather than dangerous and sudden. In *Chicago Heights Venture, supra*, a building owner sued a roofer and manufacturer of a plastic roofing membrane after the membrane on two different occasions tore away from the roof during a windstorm, allowing water to leak into the building and damage the ceiling and walls. The court analogized the claim to that in *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982), noted that the roof failed to

meet the appropriate standard of quality, and held that the damage to other parts of the building caused by the lack of adequate roofing was not legally significant. The court noted that in *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980) (Illinois law; cited approvingly in *Moorman* for having disallowed tort claim), a roofing failure allowed water to enter the building and damage its contents, although the plaintiff was not seeking recovery for damage to the contents of the building.

A trend away from reliance on the existence of any damage to other property as determinative of whether a tort claim can be maintained is apparent by comparing *Abco Metals, supra*, with *Dixie-Portland, supra*. In *Abco Metals*, a wire chopper had failed to function as expected, resulting in the loss of some wire inventory improperly chopped. Citing *Moorman*, the court stated the following:

Based on those two quotes, the Illinois court has drawn the relevant distinction between those situations where the defective product simply breaks down and situations where the defective product destroys some other items of the plaintiffs' property in the course of the breakdown. In the latter case, tort remedies are available to the plaintiff. 560 F.Supp. at 130.

In *Dixie-Portland*, a flour mill mixed sand with its flour, contaminating other ingredients used in making pizza crust and causing the inventory of these materials to be used up and destroyed. Although indistinguishable on its facts from *Abco Metals*, *Dixie-Portland* was decided later, after *Vaughn, supra*, in which the court indicated that the nature of the incident, rather than the existence of property damage, determined whether a claim in tort could be maintained. The *Dixie-Portland* court reasoned as follows:

The Vaughn opinion signals, we believe, a move toward Justice Simon's well-reasoned concurrence in *Moorman*, which criticized heavy reliance on the economic loss/physical injury distinction, favoring instead an analysis which relies on the policies underlying tort and contract. . . . The Supreme Court's affirmance of the Appellate Court's opinion in *Vaughn* supports our conclusion that the physical injury/economic loss distinction is not necessarily controlling and might as well indicate a shift toward, though not yet a full embrace of, Justice Simon's analysis. [Citations omitted.] 613 F.Supp. at 988.

3. [2.27] Recovery by Third Parties in Tort

The discussion in this §2.27 is devoted primarily to two types of claims that occur relatively frequently: contractors' claims against an architect/engineer for negligent design or administration of the construction; and third-party claims of fraudulent or negligent misrepresentation against a design professional.

Prior to *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), the doctrine of recovery in negligence by a third party not in privity with the A/E had been recognized. *See, e.g., Mississippi Meadows, Inc. v. Hodson*, 13 Ill.App.3d 24, 299 N.E.2d 359 (3d Dist. 1973) (recognizing right of general contractor to proceed against architect in

negligence); *Normoyle-Berg & Associates, Inc. v. Village of Deer Creek*, 39 Ill.App.3d 744, 350 N.E.2d 559 (3d Dist. 1976) (supervising engineer owes duty to general contractor to avoid negligently causing extra expenses for contractor in completion of construction project). The subsequent cases, *W.H. Lyman Construction Co. v. Village of Gurnee*, 84 Ill.App.3d 28, 403 N.E.2d 1325, 38 Ill.Dec. 721 (2d Dist. 1980), and *Bates & Rogers Construction Corp. v. North Shore Sanitary District*, 92 Ill.App.3d 90, 414 N.E.2d 1274, 47 Ill.Dec. 158 (2d Dist. 1980), were also in accord with the position that the A/E owes a duty of ordinary care to a general contractor with whom he or she is not in privity.

This line of cases has not survived the economic-loss doctrine. The Illinois Supreme Court's holdings in *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990), and *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill.2d 160, 679 N.E.2d 1197, 223 Ill.Dec. 424 (1997), clearly seem to bar direct claims by contractors against architects in tort for solely economic loss. In particular, *Fireman's Fund* involved a claim by the subrogee of a subcontractor, facts similar to those in the line of cases discussed above, and the court held the claim to be barred.

Cases in which a defendant's fraudulent conduct or negligent misrepresentation is asserted are outside the restrictions on the recovery of economic losses in negligence imposed by *Moorman, supra*, *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982), and *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983). In *Moorman*, the court stated the following:

This court has held that economic loss is recoverable where one intentionally makes false representations (*Soules v. General Motors Corp.* (1980), 79 Ill.2d 282), and where one who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations (*Rozny v. Marnul* (1969), 43 Ill.2d 54). Neither of these cases, however, implied that economic loss was recoverable for innocent misrepresentation. Holding a manufacturer liable for economic loss for misrepresentations that were neither intentionally nor negligently made would, in effect, be an imposition of strict liability. The manufacturer would be accountable for all economic losses suffered by purchasers pursuant to such a misrepresentation. We have already discussed extensively the policy reasons militating against allowing recovery in strict liability for solely economic loss. 435 N.E.2d at 452.

It is important to note that the *Moorman* court did not declare all negligently made representations to be actionable in tort. The court imposed the additional requirement that the author of the misrepresentation be in the business of supplying information for the guidance of others in their business transactions. In *Black, Jackson & Simmons Insurance Brokerage, Inc. v. IBM Corp.*, 109 Ill.App.3d 132, 440 N.E.2d 282, 284, 64 Ill.Dec. 730 (1st Dist. 1982), *overruled in part by Fireman's Fund, supra*, the court added an additional requirement that the misrepresented information be for the guidance of others in their business transactions "with third parties." In *Black, Jackson & Simmons*, the court held that IBM was not liable for having negligently misrepresented the applicability of a computer software program because IBM was in the business of selling computers and software and not in the business of providing information for the guidance of others in their business dealings with third parties.

In *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969), the court permitted recovery in tort by a subsequent purchaser of a piece of real property against a surveyor hired by the seller for damages resulting from an inaccurate survey. The court permitted the plaintiff to recover under a theory of tortious misrepresentation, noting the following as the basis for its decision:

- (1) **The express, unrestricted and wholly voluntary “absolute guarantee for accuracy” appearing on the face of the inaccurate plat;**
- (2) **Defendant’s knowledge that this plat would be used and relied on by others than the person ordering it, including plaintiffs;**
- (3) **The fact that potential liability in this case is restricted to a comparatively small group and that, ordinarily, only one member of that group will suffer loss;**
- (4) **The absence of proof that copies of the corrected plat were delivered to anyone;**
- (5) **The undesirability of requiring an innocent reliant party to carry the burden of a surveyor’s professional mistakes;**
- (6) **[The fact that] recovery here by a reliant user whose ultimate use was foreseeable will promote cautionary techniques among surveyors. 250 N.E.2d at 663.**

For the most part, *2314 Lincoln Park West* and *Fireman’s Fund* have resolved the issue of whether a claim can be made against an A/E for negligent misrepresentation resulting in solely economic loss. In both cases (in dicta in *2314 Lincoln Park West*), the court held that no claim for negligent misrepresentation could be made against A/Es because they are not in the business of providing information to others for use in their business dealings. Instead, the courts reasoned, the work of A/Es results in a finished product, the structure they are designing. However, a federal court has allowed a claim for solely economic loss against an environmental consulting firm that was hired to produce a report rather than design a structure. *Tribune Co. v. Geraghty & Miller, Inc.*, No. 97 C 1889, 1997 U.S. Dist. LEXIS 11493 (N.D.Ill. July 22, 1997). A/Es are frequently hired to produce similar reports.

In 1999, in *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 308 Ill.App.3d 18, 719 N.E.2d 288, 296, 241 Ill.Dec. 427 (1st Dist. 1999), the court further examined the negligent misrepresentation exception to the economic-loss doctrine and concluded as follows:

[N]either *2314 Lincoln Park West* nor *Fireman’s Fund Insurance* sets forth an absolute rule that architects and engineers may never be sued under the negligent misrepresentation exception to *Moorman*. Rather, the cases simply stand for the proposition that, in the usual course of events, architects and engineers provide information, plans, and specifications that are incorporated into a tangible product.

The court further went on to recognize the possibility that such an exception might apply:

Undoubtedly, there may be circumstances where an architect or engineer is hired to perform services along the line of those in *Tribune Co.* and a negligent misrepresentation would be actionable in tort for purely economic losses. 719 N.E.2d at 298.

In *Tolan, supra*, negligent misrepresentation counts were filed against the architect and the soils engineer, both of whom were in privity with the plaintiff, and against a structural engineer who was a consultant to the architect. (Separate breach of contract counts were also part of the complaint, although they were not before the court in this matter, which arose out of a motion to dismiss the negligent misrepresentation counts). The plaintiff sought damages for remediation of the project foundations, which was solely economic loss. Based on the evidence in the record, the court concluded that the negligent misrepresentation exception to the *Moorman* doctrine did not apply to the architect and the soils engineer. In doing so, the court declined to precisely define “what situations would warrant application of the exception.” *Id.*

With respect to the structural engineer, the court did not find sufficient evidence to make such a determination, and the case was remanded to determine whether the structural engineer was hired solely as a consultant on the project (*i.e.*, to provide information for the guidance of others, which would permit the negligent misrepresentation exception to the economic-loss doctrine) or whether “he was intimately involved with construction of the project and his ideas and information were incorporated into the structures.” 719 N.E.2d at 299. Based on this reading, *Tolan* suggests that consultant architects or engineers who provide information that is incorporated into the design and construction of a project may be able to successfully defend against claims of negligent misrepresentation, while those who provide reports for other purposes (*e.g.*, purchase of property or valuation, as in *Tribune Co., supra*) may not.

In connection with the liability of an A/E in negligence for injuries resulting in economic loss to a third party, it is interesting to note a federal court that applied Illinois law. *Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc.*, 564 F.Supp. 970 (C.D.Ill. 1983). In *Waldinger*, a mechanical contractor sued an engineer retained by a sanitary district for failing to draft proper specifications for sludge dewatering equipment that was to be incorporated into one of the sanitary district’s wastewater treatment plants. The contractor also sued the supplier of the equipment for failing to perform its supply contract. The supplier in turn asserted the impossibility of performance of its supply contract because of the engineer’s negligent or intentional drafting of improper specifications for the equipment.

The court did not pass on the question of the engineer’s negligence, however. Citing *Miller v. DeWitt*, 59 Ill.App.2d 38, 208 N.E.2d 249 (4th Dist. 1965), *aff’d in part, rev’d in part on other grounds*, 37 Ill.2d 273 (1967), the *Waldinger* court noted in dicta that under Illinois law the engineer owed to the mechanical contractor and to the supplier a duty to use ordinary care not to cause them loss or damage when it was foreseeable that they would rely on the engineer’s skill. The court went on to note that as a result of *Moorman* and *Redarowicz, supra*, the contractor and supplier would not be able to recover their economic losses under a negligence theory. 564 F.Supp. at 982.

In *Waldinger, supra*, the court allowed the mechanical contractor to recover its damages, including strictly economic losses, from the engineer on the basis of intentional interference with contract. The court, citing *Moorman*, noted that economic loss is recoverable when it is attributable to intentional conduct on the part of the defendant and that *Moorman* and *Redarowicz* do not stand for the proposition that economic losses are not recoverable in tort but rather that economic losses are not recoverable under a negligence theory. 564 F.Supp. at 981.

In support of its finding of intentional interference with a contract, the *Waldinger* court noted that the engineer arbitrarily, consciously, and intentionally insisted on conformity to a set of specifications that it had drafted, with no rational or scientific engineering basis for this insistence, that the engineer patterned its specifications for the sludge dewatering equipment on the specifications for equipment produced by a particular manufacturer, that the engineer prepared exclusionary specifications in such a way that “if . . . literally enforced, which they were, other manufacturers would have been required to redesign their equipment and to retool in order to comply with the specifications” (564 F.Supp. at 974), and that the engineer designed the structure to house the dewatering equipment in such a way that the use of non-designated equipment gave rise to structural difficulties. When bids were taken by the sanitary district on a contract to supply the dewatering equipment, a supplier other than a supplier of the implicitly designated manufacturer was successful.

4. [2.28] Strict Liability in Tort

A number of courts have held that the doctrine of strict liability in tort does not apply in the construction context. In *Lowrie v. City of Evanston*, 50 Ill.App.3d 376, 365 N.E.2d 923, 8 Ill.Dec. 537 (1st Dist. 1977), the court noted that because a parking garage was not a “product” within the meaning of RESTATEMENT (SECOND) OF TORTS §402A (1965), an injured plaintiff could not sue in strict liability for alleged defects in the design and construction of the building. Similar decisions were reached in *Immergluck v. Ridgeview House, Inc.*, 53 Ill.App.3d 472, 368 N.E.2d 803, 11 Ill.Dec. 252 (1st Dist. 1977) (shelter care facility), and *Heller v. Cadral Corp.*, 84 Ill.App.3d 677, 406 N.E.2d 88, 40 Ill.Dec. 387 (1st Dist. 1980) (condominium).

In *Walker v. Shell Chemical, Inc.*, 101 Ill.App.3d 880, 428 N.E.2d 943, 57 Ill.Dec. 263 (1st Dist. 1981), the plaintiff brought suit for injuries suffered in a fall while working on a construction site, alleging defects in the manufacture and installation of a guardrail. Citing *Lowrie, supra*, *Immergluck, supra*, and *Heller, supra*, the *Walker* court noted that if the guardrail was actually a component and indivisible part of the entire building structure, it could not be considered as a product. 428 N.E.2d at 946.

As of this writing, architects and engineers rendering design services in Illinois have not been held to be subject to liability on the basis of strict liability in tort. The court in *Laukkanen v. Jewel Tea Co.*, 78 Ill.App.2d 153, 222 N.E.2d 584, 589 (4th Dist. 1966), noted, “A designing engineer cannot be held to the liability of a manufacturer.” As the traditional roles are altered, however, this may not continue to be the case. For a discussion of the application of the doctrine to the services of the architect/engineer in design-build situations, see Barry Joseph Miller, *The Architect in the Design-Build Model: Designing and Building the Case for Strict Liability in Tort*, 33 Case W.Res.L.Rev. 116 (1982).

IV. DEFENSES

A. [2.29] The Statute of Limitations

Effective September 16, 1981, Illinois enacted a statute of limitations, §13-214 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, which applied to actions based on tort, contract, or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation, or management of construction, or the construction of an improvement to real property. 735 ILCS 5/13-214.

As originally passed, the statute required a lawsuit to be brought within two years from the time that the person bringing the action knew or should reasonably have known of the wrongful act or omission and barred any claim not discovered within 12 years from the time of the wrongful act or omission, except that a person who discovered the act or omission within the 12-year period had two additional years in which to file suit. In 1985, the legislature amended the statute to change the time periods from two and twelve years to four and ten years, respectively. See P.A. 84-551 (eff. Sept. 18, 1985). Suits must be brought within four years from the time that the person bringing the action knew or should reasonably have known of such an act or omission, and suits will be barred after ten years from the time of the wrongful act or omission, except that a person who discovers an act or omission within the ten-year period has four years from discovery in which to file suit.

In May 1986, the Illinois Supreme Court in *People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 114 Ill.2d 252, 500 N.E.2d 34, 102 Ill.Dec. 412 (1986), held the statute of limitations in §13-214(a) to be constitutional. In *Hellmuth, Obata & Kassabaum*, the plaintiff had discovered water leaks in 1977 but did not file suit until 1983. The trial court held the suit barred by the statute of limitations, but the appellate court held the statute to be unconstitutional special legislation. The Supreme Court reversed and reinstated the dismissal, holding that there was a reasonable basis for the special classifications in the statute and distinguishing the statute from an earlier unconstitutional version on the grounds that the statute distinguished between people based on their activities rather than their status. The court held that the statute of limitations applied to claims against an architect, as well as the general contractor and a subcontractor, but not to a claim against the contractor's bonding company.

In a further caveat, the court in *Hellmuth, Obata & Kassabaum, supra*, stated that its ruling was confined to the statute of limitations found in §13-214(a) and did not consider the statute of repose found in §13-214(b). However, §13-214(b) has subsequently been held to be constitutional in *Calumet Country Club v. Roberts Environmental Control Corp.*, 136 Ill.App.3d 610, 483 N.E.2d 613, 91 Ill.Dec. 267 (1st Dist. 1985), and *Blackwood v. Rusk*, 148 Ill.App.3d 868, 500 N.E.2d 69, 102 Ill.Dec. 447 (3d Dist. 1986).

Despite common law rules against applying the statute of limitations to bar claims by governmental entities, the Illinois Supreme Court held in *County of DuPage v. Graham, Anderson, Probst & White, Inc.*, 109 Ill.2d 143, 485 N.E.2d 1076, 92 Ill.Dec. 833 (1985), that

§13-214 applied to claims by municipal bodies, including the County of DuPage. In *Hellmuth, Obata & Kassabaum, supra*, the court applied the statute of limitations to bar a claim by the Illinois Capital Development Board. This conclusion followed from the definition of “person” in the statute of limitations as “any individual, any business or legal entity, or any body politic.” 735 ILCS 5/13-214.

A number of courts have dealt with the question of when a party knew or should have known of a defect sufficient to commence the running of the statute. *Society of Mount Carmel v. Fox*, 90 Ill.App.3d 537, 413 N.E.2d 480, 46 Ill.Dec. 40 (2d Dist. 1980); *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 430 N.E.2d 976, 58 Ill.Dec. 725 (1981). In both *Mount Carmel* and *Knox College*, mere knowledge of the defect did not, in itself, commence the running of the statute. In *Mount Carmel*, the plaintiff was entitled to treat cracks as routine maintenance problems until it received a report to the contrary. In *Knox College*, due to special circumstances, knowledge that the roof leaked did not constitute knowledge of a wrongful act sufficient to commence the statute.

B. [2.30] Presumption of Reasonable Care

Section 8-1801 of the Code of Civil Procedure deals with a presumption of reasonable care:

Any work or service on real property or any product incorporated therein to become part of such real property which does not cause injury or property damage within 6 years after such performance, manufacture, assembly, engineering or design, shall be presumptive proof that such work, service or product was performed, manufactured, assembled, engineered or designed with reasonable care by every person doing any of such acts. However, all written guarantees are excluded from this Section. 735 ILCS 5/8-1801.

In *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill.App.3d 257, 432 N.E.2d 920, 60 Ill.Dec. 21 (1st Dist. 1982), which involved injuries sustained when the plaintiff went through a plate glass door on the premises of the racetrack, the defendant owner attempted to present the provisions of Ill.Rev.Stat. (1969), c. 51, ¶58 (*i.e.*, the predecessor to §8-1801) to the jury. The *Christou* court denied the attempt, noting that it was inapplicable to the case at hand because the plaintiff had not claimed that the glass was improperly installed or defectively manufactured. Rather, the plaintiff had claimed that the defendant was negligent in the selection of regular rather than safety glass. The court stated that the statute applied only to claims relating to work done on real property or manufactured products that were incorporated into a building. 432 N.E.2d at 924.

C. [2.31] Defective Construction

While defective construction or failure to build in accordance with the plans may be a defense to a claim of negligent design against an architect or engineer, it should be noted that these claims may also give rise to allegations against the architect/engineer arising out of the performance of professional services during the construction phase. See §2.11 above.

D. [2.32] Betterment or Enhancement

Frequently, a design professional's error does not cost the owner extra money and only disappoints the owner's expectations as to the cost of construction. For example, if an architect/engineer omits something from the design that can subsequently be installed without affecting any other elements of the construction, the owner and contractor may mistakenly assume that the cost of construction is lower than what it really must be. When the omission is discovered, the result is to increase the construction cost, but only up to what the building should properly have cost. The additional cost of installing the omitted item should not be an item of damage to the owner in a claim against the A/E, except that the owner may recover any marginally greater construction costs resulting from performing the work out of sequence or of uncovering and redoing previously completed work.

This defense of betterment or enhancement was adopted in another context in *St. Joseph Hospital v. Corbetta Construction Co.*, 21 Ill.App.3d 925, 316 N.E.2d 51, 58 – 63 (1st Dist. 1974). In *St. Joseph*, the owner replaced defective, inexpensive wall paneling with much more expensive paneling. The court held that the additional costs of the more expensive paneling were not recoverable as damages because it would unjustly enrich the owner by giving the owner for free a better product than it had bargained for and to which it was entitled under the construction contract. Similarly, the fact that an A/E improperly omits an item from the plans does not entitle the owner to recover the cost of purchasing and installing the item because the owner would then receive a windfall in the form of the free item for which the owner would otherwise have had to pay had the item been properly included in the plans.

E. [2.33] Limitation of Liability Provisions

Contractual limitation of liability provisions have been recognized for years as a vehicle for allocating risk. In the nonconstruction area, particularly in cases dealing with telephone and telegraph service, burglar and fire alarms, hotel/motel and bailee situations, and, more recently, data processing, the legal precedent is well established for the enforceability of these provisions. In the design and construction field, the use of these provisions is increasingly common, particularly in industrial construction. To the extent that the Uniform Commercial Code is applicable to the construction context, §2-719 of the UCC recognizes the validity of these contractual arrangements. 810 ILCS 5/2-719. Currently, the application of the UCC would be limited to manufacturers and material suppliers or subcontractors who provide goods for incorporation into the work. Limitation of liability provisions have also gained attention in the delay damage context, in which owners have sought to restrict a contractor's remedies for owner-caused delay solely to extensions of time with no further compensation for extended costs.

A focus on environmental issues, however, has led to the widespread advocacy of limitation of liability provisions by design professionals, regardless of whether they are providing environmental services. One of the primary motivations for the use of these provisions has been the recognition that the fee for professional design services is quite small when compared to the risks associated with environmental contamination. Another motivating factor has been the historical unavailability of professional liability insurance to cover environmental-related

services. In light of these concerns, it is not uncommon to see provisions that seek to limit the liability of the design professional, regardless of fault, to a stated amount of insurance coverage for an additional premium. Another common provision seeks to limit liability, regardless of the fault of the design professional, to a stated amount or percentage of the fee.

Although these types of clauses seek to provide the architect/engineer with definable and insurable dollar limits for professional responsibility, they are effective only as between the owner and the A/E. In order to provide total protection, the design professional often will also seek indemnification from the owner. In this regard, it should be noted that through owner indemnification provisions, an A/E may be able to limit his or her joint and several liability, as well as liability for the performance of duties or services that the court might impose but that the owner did not require the design professional to undertake. A/E liability for construction worker safety, for example, has been imposed in certain circumstances by the courts even though the parties to the owner-A/E agreement did not intend for the design professional to have this responsibility.

Finally, it is not uncommon to find limitation of liability provisions that seek to limit the owner's ability to recover consequential damages attributable to mistakes (errors and omissions) of the A/E or for damages for specific events, such as delays. For example, AIA Document B141, *Standard Form of Agreement Between Owner and Architect* ¶1.3.6 (1997), provides as follows:

1.3.6 The Architect and the Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Paragraph 1.3.8.

Indirectly, contractual provisions that define the A/E's scope of services may operate to limit liability by clarifying that it is not within the realm of the A/E's services to perform certain high-risk duties, such as construction worker safety or supervision, or duties that require specialized expertise, such as construction budgeting.

Several courts in Illinois have addressed limitation of liability concepts. In *Adams Laboratories, Inc. v. Jacobs Engineering Co.*, 486 F.Supp. 383 (N.D.Ill. 1980), the court upheld a contractual restriction against the recovery of consequential damages by an owner, although it reserved for the trial court the issue of what damages would be considered as consequential damages. In *Village of Rosemont v. Lentin Lumber Co.*, 144 Ill.App.3d 651, 494 N.E.2d 592, 595, 98 Ill.Dec. 470 (1st Dist. 1986), the Illinois appellate court ruled that an owner could not sue a contractor for the collapse of a roof when the owner had agreed (1) to waive the contractor's liability for property damage "to the extent covered by insurance" required by the contract, and (2) to procure all-risk property insurance for the entire work at the site to its full insurable value. The court reasoned that the owner's agreement shifted the risk of loss to the insurer, who is prohibited from subrogating against its own insured. In *Village of Rosemont*, the owner had recovered some insurance from the carrier but not to the full extent of the loss. The court ruled that the parties had agreed that the insurance alone would provide recovery for any loss or damage to the work, without regard to fault. Similarly, in *Intergovernmental Risk Management ex rel. Village of Bartlett v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc.*, 295

Ill.App.3d 784, 692 N.E.2d 739, 229 Ill.Dec. 750 (1st Dist. 1998), the court barred an owner's property insurer from bringing a subrogation action against the architect and contractor because of a waiver of subrogation clause in the construction contract, which it held did not violate public policy.

To date, the issues involving enforceability of limitation of liability provisions in design agreements have not been widely litigated. A number of questions arise as to the ultimate enforceability of these provisions, particularly in light of public policy considerations. Analogies to Illinois' anti-indemnification statute (see §2.35 below) are useful. If it is against public policy for a party to be indemnified for its own negligence, it may arguably be against public policy for a party to limit its liability for damages caused by its errors and omissions. Furthermore, A/Es, although performing services under private contracts, function in the arena of public interest or public service. Briefly stated, the public interest concept suggests that if a party charged with a duty of public service is paid pursuant to a private contract to perform this duty, an exemption from liability for negligence in the contract may be void as against public policy. Given the logical application of this concept to the services of A/Es, it seems likely that judicial restrictions will be placed on the enforcement of limitation of liability provisions. Provisions that limit liability only to the contracting party, however, might be upheld, assuming the following:

1. There is no other public policy violation, and the purpose of the contract is otherwise legal.
2. The limitation was arrived at as a result of negotiation by the parties.
3. The parties have relatively equal bargaining power.
4. The transaction is free from fraud or bad faith.

However, limitation provisions that seek to limit liability to third parties or members of the general public arguably would not be enforced. For example, a provision in an agreement between an owner and an engineer that restricted the liability of the engineer to the contracting owner for damages for delays caused by the engineer or that limited the recovery of property damages would be enforceable. Public policy considerations, however, would likely preclude enforcement of a provision that sought to limit liability for design errors causing structural or other safety problems involving personal injury.

V. CLAIMS

A. [2.34] Measure of Damages

Errors and omissions in design may involve the need to repair or replace a portion or all of a constructed project. In addition to concepts governing the recovery of economic-loss damages and the restrictions that are contemplated by the betterment rule (see §§2.25 and 2.32 above, respectively), there are firmly established rules governing the measure of loss or recovery of compensatory damages. Application of the cost rule (*i.e.*, the cost of repair or replacement) seeks

to put the owner in the position he or she would have occupied but for the error. *Corbetta Construction Company of Illinois, Inc. v. Lake County Public Building Commission*, 64 Ill.App.3d 313, 381 N.E.2d 758, 21 Ill.Dec. 431 (2d Dist. 1978). However, while the cost rule is favored, it will not be applied if the defective or incomplete construction is such that it cannot be cured without unreasonable economic waste. In other words, the cost rule will not be applied if the cost to remedy the defects would exceed the loss in value to the injured plaintiff. If the cost to repair or replace is excessive or disproportionate to the value of the building, the court will apply the “diminution in value rule” as the appropriate measure of damages. *Hirsch v. Bollmeier*, 34 Ill.App.2d 203, 180 N.E.2d 521 (4th Dist. 1962) (abst.).

B. Indemnification

1. [2.35] The Anti-Indemnification Statute

As a matter of public policy, Illinois, like many other jurisdictions in the country, has adopted an anti-indemnification statute — the Construction Contract Indemnification for Negligence Act, 740 ILCS 35/0.01, *et seq.* — prohibiting indemnification of a party by contract for its own negligence:

With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person’s own negligence is void as against public policy and wholly unenforceable. 740 ILCS 35/1.

The constitutionality of the Act was upheld in *Davis v. Commonwealth Edison Co.*, 61 Ill.2d 494, 336 N.E.2d 881, 884 (1975), which was decided under the former Structural Work Act:

[T]he members of the general public protected from dangers presented by, for example, the improper design, construction and maintenance of buildings would be obviously affected adversely if those charged with responsibility were able to avoid the consequences of liability through indemnity agreements. Viewed in this light, we consider that section 1 of the indemnity statute serves to protect workers in the industry and the public as well from dangers associated with construction work. The statute would thwart attempts to avoid the consequences of liability and thereby insure a continuing motivation for persons responsible for construction activities to take accident prevention measures and provide safe working conditions.

2. [2.36] Contractual Indemnification

Contractual “hold harmless” provisions are commonly classified by the degree of risk that is sought to be transferred from the indemnitee to the indemnitor, commonly called “limited form,” “intermediate form,” and “broad form” hold-harmless provisions. The following is a typical broad form hold-harmless provision:

To the fullest extent permitted by law, the Consultant shall defend, indemnify, and hold harmless the Owner, its agents, and employees from and against all claims, actions, liabilities, losses, costs, and expenses arising out of any actual or alleged (a) bodily injury or damage to property (other than the work itself) or any other damage or loss, resulting or claimed to result, in whole or in part, from any actual or alleged act of omission of the Consultant or its agents in the performance of the work hereunder, regardless of whether or not it is caused in part by a party indemnified hereunder; or (b) violation by the Consultant in the performance of the work, or any law, statute, or ordinance or any governmental order, rule, or regulation.

While no court has passed directly on this language, unless saved by the introductory clause, “To the fullest extent permitted by law,” this provision would be construed as violative of Illinois’ anti-indemnification statute, the Construction Contract Indemnification for Negligence Act, 740 ILCS 35/0.01, *et seq.* (see §2.35 above), because the architect/engineer-indemnitor would bear the entire risk of loss even for circumstances in which the owner may have been negligent.

The design professional normally desires to be indemnified against the consequences of any jobsite accidents involving bodily injuries or property damage since site safety is ordinarily a concern of the contractor, not the A/E. It is very difficult in practice, however, for the architect to obtain an enforceable promise of indemnity from the contractor against the consequences of accidents. If an accident occurs and a claim is filed against the A/E, the complaint would almost certainly allege negligence. The anti-indemnification statute renders any contractual clause purporting to indemnify the A/E from these claims void. *See Ryan v. E.A.I. Construction Corp.*, 158 Ill.App.3d 449, 511 N.E.2d 1244, 110 Ill.Dec. 924 (1st Dist. 1987) (statute renders void contractual provision requiring indemnity against former Structural Work Act violations).

A possible way around the anti-indemnification statute is to require the contractor to name the A/E as an additional insured on its general liability policy. The courts have held that a promise to purchase insurance is enforceable even if a consequence of its breach is that the contractor assumes liability similar to that of an indemnitor. *Zettel v. Paschen Contractors, Inc.*, 100 Ill.App.3d 614, 427 N.E.2d 189, 56 Ill.Dec. 109 (1st Dist. 1981); *Bosio v. Branigar Organization, Inc.*, 154 Ill.App.3d 611, 506 N.E.2d 996, 107 Ill.Dec. 105 (2d Dist. 1987).

However, this tactic also has proven less than successful. A claim of negligent attention to safety precautions, when directed against an A/E, ceases to be a general liability claim and becomes one for professional malpractice, which the courts have held is not covered by contractors’ general liability insurance. *See Wheeler v. Aetna Casualty & Surety Co.*, 11 Ill.App.3d 841, 298 N.E.2d 329 (1st Dist. 1973), *vacated on other grounds*, 57 Ill.2d 184 (1974). Thus, as a practical matter, the A/E is forced to defend such a claim under its professional liability policy, with its sizeable deductible, rather than be defended under the contractor’s general liability policy.

In some instances, there may be provisions in the contract between the owner and the design professional requiring the owner to indemnify the A/E against certain occurrences, such as, for example, the following:

The Owner hereby indemnifies and holds harmless the Architect/Engineer, its employees, and consultants from and against all claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of, in connection with, or resulting from the performance of (or failure to perform) any aspect of construction of the Project when there has been a deviation from any document prepared by the Architect/Engineer or when there has been a failure to follow any written recommendation of the Architect/Engineer.

In one difficult-to-understand decision, *Maxfield v. Simmons*, 96 Ill.2d 81, 449 N.E.2d 110, 70 Ill.Dec. 236 (1983), the Supreme Court held that a third-party complaint for implied contractual indemnity sounded in tort. In *Maxfield*, a homeowner sued a contractor for installing a defective roof, and the contractor filed a third-party complaint for implied contractual indemnity against the manufacturer who had sold it the roof trusses. The third-party complaint was filed after the four-year statute of limitations in the Uniform Commercial Code (810 ILCS 5/2-725) had run, but the court held that the third-party complaint was timely because it sounded in tort despite seeking an indemnity available only in contract. The import of *Maxfield* is not clear. The Supreme Court treated the claim as analogous to up-the-line indemnity actions in a product liability case and has never since referred to it as a basis for permitting tort claims for solely economic loss.

In a federal case arising out of a claim of improper removal and destruction of trees on privately owned property, the court allowed a municipality to seek indemnification from its engineer and contractor responsible for the project despite the anti-indemnification statute. *Getto v. Village of Palos Park, Illinois*, No. 97 C 4861, 1998 U.S. Dist. LEXIS 18215 (N.D.Ill. Nov. 10, 1998). The court reasoned that the municipality was not seeking indemnification for its own negligence, but rather for the negligence of the engineer and contractor. This conclusion would be difficult to understand if the municipality had been sued only for negligence, but the causes of action against the municipality included civil rights violations and other claims not predicated on negligence.

C. [2.37] Contribution

Without affecting the right of a plaintiff to recover the full amount of his or her judgment from any culpable defendant, the Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*, creates a separate cause of action for contribution among joint tortfeasors when one tortfeasor has paid more than his or her pro rata share of common liability:

(a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

(c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

(d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.

(e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship. 740 ILCS 100/2.

It must be noted, however, that contribution is not available in all construction claims involving jointly responsible defendants. By the terms of the Contribution Act, it is available only among joint tortfeasors. *See J.M. Krejci Co. v. Saint Francis Hospital of Evanston*, 148 Ill.App.3d 396, 499 N.E.2d 622, 102 Ill.Dec. 65 (1st Dist. 1986) (contribution not available in contractor's suit against owner for failure to pay and against architect for negligent performance of contractual duties). *But see Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill.App.3d 494, 507 N.E.2d 81, 107 Ill.Dec. 417 (1st Dist. 1987) (third-party plaintiff bank's claim for contribution alleging accounting malpractice stated cause of action despite bank's liability being based on contract duties to plaintiff). The *Cirilo's* court, quoting *Doyle v. Rhodes*, 101 Ill.2d 1, 461 N.E.2d 382, 388, 77 Ill.Dec. 759 (1984), stated, "[T]he Contribution Act focuses, as it was intended to do, on the culpability of the parties rather than on the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." 507 N.E.2d at 83. For a more detailed discussion of this issue, see Mark C. Friedlander, *The Impact of Moorman and Its Progeny on Construction Litigation*, 77 Ill.B.J. 654 (1989).

The Code of Civil Procedure establishes a statute of limitations on a claim for contribution:

In instances where no underlying action seeking recovery for injury to or death of a person or injury or damage to property has been filed by a claimant, no action for contribution or indemnity may be commenced with respect to any payment made to that claimant more than 2 years after the party seeking contribution or indemnity has made the payment in discharge of his or her liability to the claimant. 735 ILCS 5/13-204(a).

It is not clear to what degree this statute of limitations, as amended by P.A. 88-538 (eff. Jan. 1, 1995), impacts a prior line of cases in which the courts had held that all claims for contribution that result from construction failures are subject to the statutes of limitation and repose found at 735 ILCS 5/13-214. *Hartford Fire Insurance Co. v. Architectural Management, Inc.*, 158 Ill.App.3d 515, 511 N.E.2d 706, 110 Ill.Dec. 529 (1st Dist. 1987) (statute of repose); *LaSalle National Bank v. Edward M. Cohon & Associates, Ltd.*, 177 Ill.App.3d 464, 532 N.E.2d 314, 126 Ill.Dec. 629 (1st Dist. 1988) (statute of limitations). See also *Apogee Enterprises, Inc. v. Hans Rosenow Roofing Co.*, No. 84 C 4508, 1986 U.S. Dist. LEXIS 28207 (N.D.Ill. Mar. 11, 1986).

D. [2.38] Comparative Negligence

In 1981, the Illinois Supreme Court adopted the doctrine of comparative negligence. *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Prior to *Alvis*, the plaintiff's contributory negligence was a bar to the plaintiff's recovery in tort. With the adoption of comparative negligence, a plaintiff who is partially at fault will no longer be barred from all recovery. Rather, the degree to which the plaintiff is negligent will proportionately reduce the amount of any judgment that the plaintiff can recover.

E. [2.39] Arbitration and Consolidation of Claims

Construction litigation frequently takes place in arbitration hearings under the auspices of the American Arbitration Association because the standard form AIA contracts contain clauses requiring all disputes to be arbitrated. Discussing the law of arbitration is beyond the scope of this chapter, but one important aspect of these arbitration clauses merits discussion: the difficulty a litigant may have joining parties and consolidating claims in a single forum.

Most of the time, it is the owner who desires to join all parties and claims in a single forum. When something is wrong with the completed building, the owner frequently does not know whether the defect is in design or construction and desires to sue both the design professional and the contractor in a single forum in which they will fight between themselves over responsibility without the need for the owner to prove which party was responsible for the problem. However, in certain circumstances, the other parties to the construction process may also desire consolidation of parties and claims in a single forum. The general contractor may want to maintain a third-party claim for indemnity against the responsible subcontractor in the same forum in which the general contractor is being sued by the owner. Similarly, an architect may want to join a consulting engineer in the same forum as that in which the architect's dispute with the owner is proceeding.

Two aspects of the arbitration agreements may frustrate this desire for joinder. The first is the mandatory nature of an agreement to arbitrate. A party may find itself in a situation in which it desires to join two defendants in a single action but has a contract with only one of the defendants requiring arbitration of disputes. When the defendant with the arbitration clause moves to stay the litigation against it and to compel arbitration, the courts inevitably grant the motion provided that the right to arbitrate has not been waived. *Iser Electric Co. v. Fossier Builders, Ltd.*, 84 Ill.App.3d 161, 405 N.E.2d 439, 39 Ill.Dec. 686 (2d Dist. 1980); *First Condominium Development Co. v. Apex Construction & Engineering Corp.*, 126 Ill.App.3d 843, 467 N.E.2d 932, 81 Ill.Dec. 810

(1st Dist. 1984) (court has no discretion to deny motion to compel arbitration pursuant to valid arbitration clause even if joinder of claims and parties would be frustrated). Note that in *J.F., Inc. v. Vicik*, 99 Ill.App.3d 815, 426 N.E.2d 257, 261, 55 Ill.Dec. 282 (5th Dist. 1981), however, the court held that under “strictly limited circumstances” arbitration pursuant to a valid arbitration clause may be enjoined in favor of litigation if the issues and relationships among the various parties are so closely intermingled that litigation would be a speedier and more economic means of resolving the controversy.

The Illinois Supreme Court subsequently confirmed the majority rule that when a valid arbitration clause exists, the court must compel arbitration, even when to do so would prevent the claims from being consolidated into a single forum because the principal litigation involves parties who are not signatories to the arbitration agreement. *Board of Managers of Courtyards at Woodlands Condominium Ass’n v. IKO Chicago, Inc.*, 183 Ill.2d 66, 697 N.E.2d 727, 231 Ill.Dec. 942 (1998).

The other factor that renders it difficult for a litigant to consolidate all parties and claims in a single forum is a portion of the “standard” arbitration clause that permits either party to veto joinder of additional parties to the arbitration. For example, the pertinent portion of the arbitration clause in AIA Document B141, *Standard Form of Agreement Between Owner and Architect* ¶1.3.5.4 (1997), states as follows:

1.3.5.4 No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

The effect of this clause is that an owner who has identical arbitration clauses in his or her construction contract with the general contractor and in his or her architectural agreement with the design professional may not be able to arbitrate against both parties in the same proceeding even if the owner is unsure whether the construction defect was due to design or workmanship and runs the risk of inconsistent decisions by being forced to proceed in two separate forums.

The validity of this clause was affirmed in *Ure v. Wangler Construction Co.*, 232 Ill.App.3d 492, 597 N.E.2d 759, 173 Ill.Dec. 785 (1st Dist. 1992). In *Ure*, the court noted that the scope of an arbitrator’s power is governed by the agreement to arbitrate, which cannot be extended by construction or implication, and that consolidation of claims may be prohibited or limited by contract. In *Ure*, however, the court refused to vacate the arbitration award on the grounds that the protesting party had participated without objection and had waived thereby its right to insist on the nonjoinder clause.

One court has held that an arbitration clause may be binding despite a party's failure to sign the contract in which the clause appears. In *Landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill.App.3d 379, 526 N.E.2d 603, 122 Ill.Dec. 344 (1st Dist. 1988), an architect had sent a standard AIA form contract, including an arbitration clause, to the developers, who never signed or returned the agreement. However, the developers authorized the architects to perform the work, and the parties conducted their business in accordance with the terms of the contract. The court held that the contract had been accepted by the developers' conduct and compelled arbitration pursuant to the arbitration clause.

F. [2.40] Insurance Coverage

Practically speaking, the responsibilities and liabilities of an architect/engineer for its professional errors or omissions are restricted by the amount and the nature of the errors and omissions/professional liability insurance coverage carried by the design professional at the time a claim is made. The field of professional liability insurance is rather highly specialized; a limited (but growing) number of carriers provide this coverage, even in a good market.

Those design professionals who do carry professional liability insurance and the owners who employ them find that covered or insured professional activities are well-defined. Overly eager or unsophisticated owners who seek to impose unusual professional duties or liabilities on architects or engineers may find that these activities are outside the scope of coverage.

Typically, professional liability coverage will not be extended to duties or activities that constitute express warranties or guarantees, advice on insurance and bonding of contractors, the failure of the architect or engineer to complete construction documents or to review shop drawings on time, the provision of cost estimates, or the infringements of copyrights, trademarks, or patents. Of particular concern in the drafting and negotiation of agreements with owners are statements that may be construed to constitute a warranty or guarantee to which coverage would not be extended. Further, in an indemnification provision, the obligation to defend an owner also may not be covered by such a policy, even though the obligation to indemnify stems from negligent acts, errors, or omissions of the A/E. Additional insured endorsements are not customary in the area of A/E professional liability policies. Finally, professional services relating to pollution or hazardous materials (including asbestos) are often excluded from the typical professional liability policy. To the extent that the professional services provided relate to environmental matters, separate coverage or particular endorsements may need to be provided.

Additional insurance-related protection for the architect against subrogation claims is found in the waiver of subrogation provisions commonly included in owner-architect agreements. In *Intergovernmental Risk Management ex rel. Village of Bartlett v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc.*, 295 Ill.App.3d 784, 692 N.E.2d 739, 229 Ill.Dec. 750 (1st Dist. 1998), the court upheld a motion to dismiss the claims of insurance company subrogees of the owner of property damaged by fire during construction. The insurer had asserted claims against both the architect and the contractor, who both successfully argued that the owner had waived any right of recovery against them in their respective agreements. The court upheld the dismissal, noting that the insurance companies, as the owner's subrogees, could only assert the owner's right

of recovery. Since that had been waived contractually, they had no cause of action. There was no separate discussion of the right of an insurance company to recover against an architect absent the contractual waiver.