1 Responsibilities and Liabilities of Architects and Engineers for Construction Failures

HEIDI HENNIG ROWE
Venable LLP
JEREMY S. BAKER
Baker Law Group LLC
Chicago

I. [1.1] SCOPE OF CHAPTER

This chapter deals with the responsibilities of architects and engineers in 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 caselaw. 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 to that agreement.

Variations on the traditional role of the design professional have become popular. 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 to understand the responsibilities that the A/E has undertaken on any given project.

II. [1.2] THE ROLE OF THE ARCHITECT/ENGINEER IN THE CONSTRUCTION PROCESS

The role of the architect and/or engineer is customarily 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). *See also Thompson v. Gordon,* 241 Ill.2d 428, 948 N.E.2d 39, 349 Ill.Dec. 936 (2011). This agreement governs the scope of the design work to be performed, the A/E's role during the construction phase, the budget, the time requirements, the compensation, and the owner's role, as well as other 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 AIA contract provisions define the normal, typical role in the absence of any agreement to the contrary. For more information regarding AIA documents, visit www.aia.org.

A. Design Phase

1. [1.3] 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 and/or engineer includes in the design and are sent to 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 its "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 after 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 manufacturers' 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. [1.4] 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 architect and/or engineer design. Design professionals are also concerned about construction costs, but they are in a poor position to guarantee that their design can be constructed 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 the owner's 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. [1.5] Computer-Aided Design

The computer revolution overtook the design profession decades ago. Architects and engineers rely almost exclusively 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 reliance on computer technology raises interesting legal issues. One is whether design professionals bear liability for design errors that result from computer program errors rather than from their own mistakes. 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 architect and/or engineer did not personally make a mistake. This scenario raises interesting questions. For example, would the typical design professional rely exclusively on computer-generated calculations? Or does the standard of care require such calculations to be checked, at least roughly, by hand? Is exclusive reliance on computer-generated calculations an

impermissible delegation of design responsibility? On the opposite end of the spectrum is under-reliance on computer resources. Given the extensive data available in online and other databases, would an A/E's failure to locate and use relevant information be considered negligent? To what extent may a design professional rely on such information provided by others? Time will tell how these kinds of issues are resolved by courts and arbitrators.

4. [1.6] Building Information Modeling

Another common practice in the construction industry is the use of building information modeling (BIM). BIM is a design process that results in a three-dimensional model that represents the physical and functional characteristics of a structure. However, BIM is more than just the model itself; it is also the process of the various project team members collaborating to produce the "model elements" that comprise the BIM model. Although the architects and/or engineers input the basic design of the building into the computer, the contractors input additional levels of detail into the model as well, similar to the shop drawing process. Material suppliers also participate in the modeling by reducing their products to digitized analogs that, when included in the model, will move, bend, or otherwise display the actual physical qualities of the project. The BIM model can even become four-dimensional when the contractor inputs its plan for construction, showing how the building will change and grow over the life of the project. BIM models are dynamic tools. They assist not only with design and construction of new projects but with the management of buildings over their lifecycle.

BIM and digital data can be a tremendous asset to a project, but project participants should be aware of the pitfalls as well. Unlike printed documents, which are static and unchanging, untraceable changes in digital data can occur due to factors beyond the control of the creator or sender. Improper coordination of BIM model elements can lead to confusion about their level of development and the corresponding extent to which they may be relied on. Other issues may include the following:

Data entry errors. This risk is similar to the historical transition of architectural drawings from paper to computer-aided design. A/Es will be responsible for inputting information into a program with which they may not be fully familiar and may make errors in doing so that are difficult to detect. Even if the design intent is flawless, the BIM model may contain errors or omissions through inaccurate data input.

Data loss or archiving problems. Even if data is inputted correctly into the model, the A/E, or anyone else manipulating the data in the BIM model, may inadvertently alter or lose some of the existing data, or the process of archiving the data may be imperfect, causing some of it to be lost. Since the individual responsible for the loss may not be identifiable, claims may be made against the A/E, who typically is the host or administrator of the model.

Misuse of data by others. Even if the data comprising the model is proper and accurate, it may be misunderstood by one or more of the other parties using the BIM model. The problem is similar to that of ambiguities in typical construction documents, but it is enhanced by the fact that the BIM process is not as well understood by its users as traditional two-dimensional drawings. Claims may be made against the A/E for including data in the model that is susceptible to misinterpretation or misuse.

Insufficient knowledge of BIM. An owner or client who is dissatisfied with the functionality of the BIM model or the cost of the design process may make a claim against the A/E for insufficient knowledge of or familiarity with the BIM process and technology. A standard of care may develop regarding an A/E's required degree of expertise with BIM.

Diffuse design responsibility. Unlike a set of drawings, which is signed and often sealed by the preparing party, a great number of different parties may have input into the modeling process. Identifying which individual's input was responsible for a particular error or omission may prove difficult or impossible. Alternatively, a combination of multiple parties' input (such as two incompatible materials side-by-side) may itself be the error. As the A/E is ultimately responsible for the model and resulting design, claims may be made against the A/E for this problem.

Improper delegation of design responsibility. The practice acts governing architecture and engineering in Illinois require that all professional services, including design, be performed either by or under the direct supervision of the appropriately licensed professional. BIM, however, contemplates that many parties, including contractors and manufacturers, will participate and provide input into the design process. Many of these companies are not professionally licensed, and the BIM process does not contemplate the degree of oversight by an A/E necessary to qualify as "supervision" under the law.

Reliance on wrong information supplied by others. Most A/Es do not have direct, firsthand experience with many of the products that they specify and rely on information from vendors and other third parties regarding, among other things, the size, composition, and functionality of the products. The fact that BIM models may incorporate the functionality and physical characteristics of certain products exposes the A/E to greater risks than with two-dimensional drawings, which usually just show the size and shape of the product. If an A/E inputs inaccurate information into the model and such information results in extra costs or project failure, the claim is likely to be made against the A/E, even if the ultimate source of the information was a third party.

These issues may lead to potential claims. For example, a contractor may submit a change order for additional costs and/or delay due to errors in the BIM model that caused the contractor to misjudge the required quantities of materials or the orientation of various spaces. To protect against such claims, owners and A/Es sometimes make clear in their contracts that BIM is a tool that can be used to facilitate the work but cannot be relied on and should be cross-referenced against hard copies of the plans and specifications to confirm an accurate understanding of the design intent.

5. Contractual Allocation of Building Information Modeling and Digital Data Risks

a. [1.7] Contract Provisions and Electronic File Transfer Agreements

Owners and architects and/or engineers often use their contracts with one another, and owner contracts with contractors, to manage the risks associated with building information modeling and digital data use. In some instances, the parties do so by noting that use of BIM or other electronic files is subject to protocols or separate agreements yet to be determined. Section 1.8 of AIA Document A201-2017, *General Conditions of the Contract for Construction* (AIA A201-2017), for example, provides that use of or reliance on BIM without agreeing to protocols governing such use shall be at the using or relying party's sole risk as follows:

§1.8 Building Information Models Use and Reliance

Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.

A/Es may also require parties to sign an electronic file transfer agreement (EFTA) as a condition of receiving designs and specifications or other instruments of service in electronic format. Such EFTAs often require the receiving party to acknowledge the infirmities and errors that can exist in the electronic files and that, as a result, the electronic files shall not be relied on. A/E may also use the EFTAs to disclaim responsibility or liability for any such issues in the electronic files, and some EFTAs go as far as to require the using or receiving party to defend and/or indemnify the A/E from any losses arising out of use of the files.

In all of the instances described above, the parties essentially "agree to agree" to protocols or separate agreements at a future date. To avoid having separate, further negotiations after the agreement is signed, owners and A/Es may prefer to negotiate the terms of such use in the owner-architect agreement or the owner-contractor construction contract itself.

b. [1.8] AIA Digital Practice Documents

Recognizing that building information modeling and digital data related risks, like other risks, can be most predictably managed by contract, various industry groups have developed protocols, processes, and contract documents over recent decades to address the risks associated with increased BIM use and increased early project collaboration, including various BIM-enabled project delivery methods.

One such group involved in this — exceedingly complex — endeavor is the AIA, which released its first set of contract documents to encourage the useful sharing of digital data in 2007. Recognizing the rapidly evolving trends in how parties use and rely on BIM and digital data, the AIA began to reevaluate its original digital practice documents in 2011. This effort resulted in the development of updated and reconfigured contact documents to govern the use and transmission of digital data stored in electronic media. Those documents, which were released by the AIA in 2013, were retired in 2024 and replaced by the AIA's 2022 revisions to its suite of digital practice documents. As of the 2025 update to this chapter, those 2022 digital practice documents are the most current "for use" AIA digital practice contract documents.

The AIA's 2022 digital practice documents reflect a substantial revision to their 2013 predecessor documents to recognize further evolution of how parties use and rely on BIM and digital data and contractually allocate the related risks. The AIA identified several important trends that drove not just an update to the 2013 digital practice documents, but a substantial overhaul of

the number, content, and structure of the 2022 documents described below. One of those trends is a "knowledge divide" between stakeholders who focus on contract negotiations (attorneys, risk managers, etc.) and those who work on the day-to-day BIM and digital data aspects of a project (project owners, architects, contractors, etc.).

Please visit AIA's *Contract Documents* website, https://shop.aiacontracts.com, for the most current BIM and digital practice documents, which include this 2022 suite of documents:

1. AIA Document E201-2022, *BIM Exhibit for Sharing Models with Project Participants, Where Model Versions May be Enumerated as a Contract Document* (AIA E201-2022);

2. AIA Document E202-2022, *BIM Exhibit for Sharing Models with Project Participants, Where Model Versions May Not be Enumerated as a Contract Document* (AIA E202-2022)

3. AIA Document E401-2022, *BIM Exhibit for Sharing Models Solely Within the Design Team* (AIA E401-2022);

4. AIA Document E402-2022, *BIM Exhibit for Sharing Models Solely Within the Construction Team* (AIA E402-2022)

5. AIA Document G203-2022, *BIM Execution Plan* (AIA G203-2022);

6. AIA Document G204-2022, *Model Element Table* (AIA G204-2022); and

7. AIA Document G205-2022, *Abbreviated Model Element Table* (AIA G205-2022).

These contract documents take important steps in trying to align contract terms with modern trends in BIM and digital data use. However, like their 2013 predecessors, they create processes that can be complex to use and administer, particularly on a user's first several projects. These processes also require significant early "buy in" from a project's owner, its contractors, and its design professionals. They cannot be used casually. Perhaps as a result, three years after the AIA released its 2022 digital practice documents, they are neither widely used nor well understood. The same fate befell the 2013 digital practice documents, which were seldom used in the decade before their retirement. Not even a presumption that the 2013 documents would be used on all projects in the standard text of the AIA's flagship 2017 contract documents (AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect* (AIA B101-2017); AIA Document A101-2017, *Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum;* AIA A201-2017, *General Conditions of the Contract for Construction;* AIA Document A401-2017, *Standard Form of Agreement Between Contractor and Subcontractor;* and AIA Document C401-2017, *Standard Form of Agreement Between Architect and Consultant*) led to widespread adoption of the 2013 documents; that text was usually deleted or ignored.

The authors believe the construction industry's failure to adopt the AIA's digital practice documents is due to their complexity, not because the documents fail at their aim of providing a contractual framework for the transmission, use, and reliance on digital data, particularly on BIM

projects. Most users of design and construction contracts are not looking to make contract negotiation or administration more complex. Project participants who embrace the 2013 or 2022 digital practice documents will add dozens of pages, and many additional requirements, to already lengthy and complex design and construction contracts. While the authors are generally proponents of the AIA's digital practice documents, we have typically considered recommending their use only on projects that present unique digital data or BIM risks.

Historically, the decision whether to use the digital practice documents on any given project fell almost entirely on the project owner. Owners have played the largest role in making this decision, as the 2013 documents were required to be incorporated into owner agreements with the prime design professional and contractor (and incorporated by them into their respective downstream agreements). To some extent, this remains true. Like their 2013 predecessors, AIA E201-2022 and AIA E202-2022, styled as "*BIM Exhibits,*" are contract exhibits intended for incorporation into the contracts of most project participants. However, as their full names imply, AIA E401-2022 and AIA E402-2022 have more limited scope, binding only the design or construction teams, respectively. This innovation makes these 2022 documents more flexible and, perhaps, more usable on a variety of projects.

The most important innovation in the 2022 digital practice documents, arguably, lies in the potential to designate certain BIM "Model Portions" as "Contract Documents." As its full name implies, this is possible under AIA E201-2022, under which "Model Versions" may be enumerated as a "Contract Document." That is not possible, as its name implies, under AIA E202-2022, under which "Model Versions" may not be enumerated as a "Contract Document." This is the distinguishing characteristic of AIA E201-2022 and AIA E202-2022, which are otherwise verbatim.

The ability to designate certain BIM "Model Portions" themselves as "Contract Documents" under AIA E201-2022 is a sea change. Typically, "Contract Documents," a term of art, form the "Contract for Construction" and define the construction, or "Work," the owner requires of the contractor. See AIA A201-2017 §§1.1.2, 1.1.3. Historically, BIM was considered a tool through which project participants could collaborate in three dimensions. Digital BIM "Model Portions" were not, themselves, considered "Contract Documents." They were considered too impermanent, too imprecise — the product of "too many cooks in the kitchen" — to receive the elevated "Construction Documents" designation. BIM authors typically admonish others to not rely on their digital output. Rather, that output is used to create two-dimensional "construction documents" that are tightly controlled, stamped by design professionals, and designated as "Contract Documents." AIA E201-2022 changes this assumption, allowing project participants to rely on three-dimensional BIM "Model Portions" as "Contract Documents," while AIA E202-2022 maintains the traditional approach.

The first step to use AIA's 2022 digital practice documents is to choose among the four *BIM Exhibits* appropriate for the project and project participants. The AIA intends this choice to be made when the prime owner-architect and owner-contractor or owner-design builder contracts are let, in the earliest stages of the project, by project executives, lawyers, risk managers, or contract negotiators of the project participants. This is sensible because the *BIM Exhibits* are contract exhibits; they should be addressed when contracts are let. In concept, it may be possible to later implement AIA E401-2022 or AIA E402-2022, but the best practice is to implement AIA E201-2022 or AIA E202-2022 at project outset.

Most contract negotiators should expect to collaborate closely with their clients' BIM users to prepare meaningful *BIM Exhibits* to align actual intended uses with contract language. All four of the AIA *BIM Exhibits* establish definitions of the key terms that are repeated throughout the digital practice documents (Article 1); the authorized Uses of BIM models or model portions (*i.e.,* planning, design, construction management, construction, and/or post-construction uses), and the extent to which BIM model portions can be changed, replaced, shared, and relied on by the project participants (Article 2); selection of the "BIM Execution Plan," including who will prepare, review, discuss, and possibly revise the plan (Article 3); "Levels of Development" descriptions that define the minimum characteristics for each model element (Article 4); handling of "Non-BIM Digital Data" (Article 5); "Ownership, Sharing, and Security of Digital Data" (Article 6); and "Insurance for BIM and Digital Data Risks" (Article 7).

The second step is to choose the most appropriate BIM execution plan to pair with the BIM exhibit selected by the project participants. This can include either AIA G203-2022 or a BIM execution plan not prepared by the AIA. The AIA intends that senior BIM users, people with technical BIM acumen, who are designated by their employers, the major project participants, will complete the first BIM execution plan (*i.e.,* "BIM Execution Plan Version No. 001") shortly after selection of the BIM contract exhibits. As more contracts are let and the list of project participants expands, and the project comes into focus, the initial BIM execution plan version can be updated, if appropriate.

Most contract negotiators will find it necessary to collaborate closely with their clients' BIM users because BIM execution plans, including AIA G203-2022, are more technical than BIM contract exhibits. For example, AIA G203-2022 addresses things like "Designated Delivery Milestones for Model Versions" (Article 2); modeling software, file exchange protocols, collaboration protocols, training, and support (Article 3); "Data Security Measures" (Article 4); "Modeling Protocols" like project coordinates, model data subdivisions, common data fields, construction phasing, sheet formatting, design options, file naming conventions, and model standards (Article 5); "Model Management Protocols," including allocation of responsibility and internal and external model quality control (Article 6); "Levels of Development" (Article 7); "Reliance Authorization Protocols for Interim Deliverables" (Article 8); identification of model versions enumerated as contract documents (Article 9); "Other BIM or Modeling Provisions" (Article 10); and "Exhibits and Attachments" to the BIM execution plan (Article 11).

The third and final step to use AIA's 2022 digital practice documents is selecting a "Model Element Table," a matrix that itemizes various elements of the project (often along the vertical axis) and the level of development each project element shall be developed to by their respective "Model Element Authors" at various project milestones (often along the horizontal axis). Nothing prevents project participants from using non-AIA model element tables, but the AIA has created two options for consideration:

1. AIA G204-2022 (the model element table); and

2. AIA G205-2022 (the abbreviated model element table).

Model element tables are complex, technical documents. Both AIA model element tables are organized around the Construction Specification Institute's (CSI) UniFormat, an alphanumeric system classifying building elements and systems widely recognized in the design and construction industry. For example, under CSI Uniformat, A = Substructure, A10 = Foundations, A1010 = Standard Foundations, and A1010.10 = Wall Foundations. AIA Document G204-2022 can include over 650 rows of CSI Uniformat building elements along its vertical axis assigned levels of development to correspond to various project milestones. "Levels of Development" refers to the minimum content requirements for BIM model elements at five increasingly detailed levels of development: LOD 100 (conceptual); LOD 200 (approximate quantities, size, shape, and location); LOD 300 (specific quantities; size, shape, and location); LOD 400 (fabrication/shop drawing detail); and LOD 500 (field verified, as-built conditions). The AIA intends day-to-day BIM users, and the more senior BIM users who prepared the BIM execution plan, will together prepare the model element table. Most contract negotiators find themselves entirely unequal to the task, which encompass an almost day-by-day work plan, without substantial client assistance.

Read together, the BIM exhibit, BIM execution plan, and model element table identify the extent to which project participants can make "authorized reliance" on BIM model elements at various "Designated Delivery Milestones." Authorized reliance is paired to model element content requirements at specific points in their development. Accordingly, a cautious party (say, a cost estimator) can determine, by way of one of many hypothetical examples, that it may use certain model elements at the LOD 100 stage of development at certain milestones for conceptual estimating, but it may not use those model elements to perform more detailed take-off estimating until they reach LOD 300. In this way, AIA's 2022 digital practice documents allow project participants to share a common understanding of the extent to which they can use and rely on BIM models throughout the life of the project and life cycle of the building.

A risk to be guarded against is project participants placing greater reliance on model elements than intended by the model author. This could happen, by way of one of many hypothetical examples, if a design professional were to include a detailed seemingly final placeholder element, perhaps from a prior project — say, a lighting fixture identified by manufacturer and model and other identifying detail — into a BIM model at an early level of development. The model element author for that lighting fixture may very well plan to reconsider, and possibly remove and replace, that model element when finishes are added to the model at a later level of development. That might not be apparent to a project participant who sees the detailed light fixture, assumes it is a well-developed model element that will not change, and relies on this assumption perhaps for cost estimation or early procurement reasons.

So what happens if a project participant relies on model elements beyond the "authorized reliance" set out in the BIM exhibit, BIM execution plan, and model element table? "Any reliance on a Model Version not in accordance with this Exhibit and the BIM Execution Plan shall be at the Project Participant's sole risk." AIA E201-2022 §2.5.1. This concept appears, though with slightly different phraseology, in the other BIM exhibits. AIA Document E202-2022 §2.5.1; AIA Document E401-2022 §2.5.1; AIA E402-2022 §2.5.1. Of course, that "sole risk" language binds only project participants whose contract incorporates a BIM exhibit.

Relatedly, one pitfall for the unwary from the 2013 digital practice documents that is carried forward in the 2022 updated documents is the failure of a party whose principal contract incorporates a BIM exhibit to dutifully incorporate that BIM exhibit into its agreements with each project participant that may develop or use digital data on the project. Failure to do so can expose such party to third-party beneficiary claims under §1.3.1 of AIA E201-2022, which states:

> **§1.3.1 The Parties agree that each Project Participant developing or utilizing Digital Data on the Project is an intended third-party beneficiary of the Section 1.3 obligation to incorporate this Exhibit into agreements with other Project Participants and, therefore, is entitled to assert any rights and defenses associated with that obligation. This Exhibit shall not be construed to create a contractual relationship of any kind between Project Participants who are not otherwise in contractual privity, nor does it create any third-party beneficiary rights other than those expressly identified in this Section 1.3.1.**

Similar "third-party beneficiary" language is found in the other BIM exhibits. As of this writing, there appear to be no judicial decisions on the third-party beneficiary issue or the AIA's digital practice documents, generally. Time will tell whether the AIA's 2022 digital practice documents will achieve more widespread understanding and use. Like their predecessors, the updated digital practice documents take important steps in trying to match contract terms with modern trends in digital data use. This is a good thing. The digital practice documents can, however, be complex to use and administer. They require significant early project "buy in" from the project owner, architect, and contractor, along with the other project participants. Parties should consider using the digital practice documents — but they should not use them lightly, and not without understanding their requirements.

6. [1.9] 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. 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's and/or 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 §1.26 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.

Litigation spawned by the failure of a defective product specified by the A/E is common. One of the reasons that owners make claims against A/Es when the specified product fails is that the contractors may not be liable for installing the defective product if it was specified in the construction documents and installed properly. *See Knox College v. Celotex Corp.,* 88 Ill.2d 407, 430 N.E.2d 976, 58 Ill.Dec. 725 (1981). Unless the A/E breached its standard of care in specifying the product, however, the owner's proper remedy in such situations is a claim against the material supplier on its warranty.

7. [1.10] 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 and/or engineer for delays in the design process are not always straightforward and can be difficult to win and costly to pursue. The design process is highly interactive and may be impacted by a number of project participants, making it difficult to isolate the A/E's impact on the schedule in some cases. In addition, expert testimony is often required. An owner may need an expert to testify as to the standard of care in order to prove that the A/E's acts, errors, or omissions constitute professional negligence. An owner may also need to retain a scheduling expert to demonstrate the impact of that professional negligence on the critical path of the project.

8. [1.11] Designing in Accordance with Codes

Most contracts for design services require the architect and/or engineer to design the structure in accordance with all applicable codes, laws, regulations, etc. Even if the contract was 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.

9. [1.12] Designing in Accordance with Accessibility Requirements

Design professionals must comply with a variety of federal, state, and local statutes, rules, and codes that require certain public and commercial buildings to be designed in a manner such that they are readily accessible to, and usable by, persons with disabilities. Such "accessibility requirements" address things like ensuring that persons in wheelchairs have accessible routes into buildings; that doors are designed wide enough to allow their passage; that light switches, thermostats, and electrical outlets are within their reach; and that kitchens and bathrooms include features, and are laid out in such a way, that an individual in a wheelchair can maneuver around and make use of the space.

These requirements have important and worthy aims, but they can create unique liability exposures for design professionals. Federal legislation aimed at achieving these ends — including Title III of the Americans with Disabilities Act of 1990 (ADA), Pub.L. No. 101-336, 104 Stat. 327, codified at 42 U.S.C. §12101, *et seq.,* and the Fair Housing Act (FHA), Pub.L. No. 90-284, Title VIII, 82 Stat. 81 (1968) — are federal civil rights statutes that create particularly acute risks for designers. These statutes are not building codes. The ADA and FHA are federal civil rights statutes that a variety of parties, including the U.S. Department of Justice (DOJ), can enforce. These laws are written by the U.S Congress, enforced and implemented by regulations and agencies, refined through judicial decisions, and interpreted by governmental officials. As a result, the technical requirements of the ADA and FHA can be inconsistent and difficult to ascertain, even for designers who do their best to comply.

The way these statutes are enforced compound architect and/or engineer risks and liability exposures. Unlike the standard of care, which acknowledges that no set of plans and specifications is entirely free of errors and omissions, accessible design requirements are strictly enforced. Regardless of the A/E's good intentions or best efforts, if a design does not comply with the technical aspects of these accessibility requirements, the A/E can face liability exposure. The

difference between compliance and noncompliance is often literally a question of inches. Some argue that builders should be afforded some "construction tolerance" wiggle room because construction to mathematical precision is impossible. But design is arguably different; architectural plans can arguably be drawn with such precision. Claimants under the ADA and FHA often argue for remediation of all noncompliant conditions that arise from design errors, in many cases regardless of cost. Thus, if a design error results in every toilet within a facility being one inch too far from the adjacent wall, claimants often advocate, with some legal basis, to relocate every toilet. Compounding this risk, common-law doctrines like economic waste generally are not applied to ADA and FHA claims as they are in other contexts. Further, these statutes provide for recovery of a prevailing party's attorneys' fees and costs. It is easy for skilled and well-intentioned A/Es to make expensive mistakes, and claimants are financially incentivized to bring claims.

a. [1.13] Americans with Disabilities Act

Title III of the Americans with Disabilities Act, 42 U.S.C. §12181, *et seq.,* prohibits discrimination on the basis of disability in places of public accommodation and services operated by private entities and requires newly constructed or altered places of public accommodation to comply with the ADA standards for accessible design.

Congress delegated responsibility for issuing regulations to enforce Title III to the U.S. Department of Justice. 42 U.S.C. §12186(b). These regulations must be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board (Access Board), an independent federal agency. 42 U.S.C. §12186(c); 29 U.S.C. §792. Among other things, the Access Board is tasked to "develop advisory information for, and provide appropriate technical assistance to, individuals or entities with rights or duties under regulations prescribed pursuant to [29 U.S.C. §791, *et seq.,*] or titles II and III of the Americans with Disabilities Act of 1990." 29 U.S.C. §792(b)(2). The Access Board's guidelines are known as the Americans with Disabilities Act Accessibility Guidelines (ADAAG). In July 1991, the Access Board published its first ADAAG. 56 Fed.Reg. 35,408 (July 26, 1991). Also in July 1991, the DOJ issued the first set of ADA Standards for Accessible Design (1991 Standards). 56 Fed.Reg. 35,544 (July 26, 1991); 28 C.F.R. pt. 36, app. D. In 2004, the Access Board issued substantial revisions to the 1991 Standards, effective September 21, 2004. 69 Fed.Reg. 44,084 (July 23, 2004). The DOJ adopted those revisions into enforceable regulations in 2010, effective March 15, 2011. 28 C.F.R. §36.406; 2010 ADA Standards for Accessible Design (2010 Standards), www.ada.gov/law-and-regs/design-standards/2010-stds. The 2010 Standards, which took full effect on March 15, 2012, after a transition period, are more stringent than the 1991 Standards. Thus, many buildings designed under the 1991 Standards may not comply with the 2010 Standards. Further, many existing facilities contain barriers to accessibility that comply with neither the 1991 Standards nor the 2010 Standards.

This creates risk for owners — and the architects and/or engineers they employ — because the ADA requires removal of accessibility barriers in existing facilities. Specifically, discrimination under the ADA includes a private entity's "failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." 42 U.S.C. §12182(b)(2)(A)(iv). The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. §12181(9). This determination is made case-by-case and can

depend as much on economic considerations as technical ones. Whether it is "readily achievable" for an owner to remove a particular barrier depends, in part, on financial considerations, including its assets and operations. It is not just an architectural or engineering issue. Thus, A/Es who advise owners on whether removal of existing barriers in existing facilities is readily achievable can subject themselves to unanticipated liability exposure. *See, e.g., Garcia v. Macias,* Case No. CV 20-9888 FMO (ASx), 2022 WL 22286659, *1 (C.D.Cal. Feb. 22, 2022) (owner who can show that removal of barrier is not readily achievable can still be liable if it fails to "make [its] goods, services, facilities, privileges, advantages, or accommodations available through alternative methods" that are readily achievable), quoting *Lopez v. Catalina Channel Express, Inc.,* 974 F.3d 1030, 1034 (9th Cir. 2020) (quoting 42 U.S.C. §12182(b)(2)(A)(v)). A design professional's role in determining the feasibility of barrier removal should typically be limited to identifying the potential barriers and suggesting alternative designs.

New construction and alteration projects are subject to the even higher "readily accessible" standard. For newly constructed facilities, "discrimination . . . includes a failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities." 28 C.F.R. §36.401(a)(1). Similarly, for new projects involving alteration of existing facilities, compliance with the ADA requires the altered facilities to be "readily accessible" to the "maximum extent feasible":

> **Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.** 28 C.F.R. §36.402(a)(1).

Whether a facility is "readily accessible" is determined, in part, by the ADAAG. See 28 C.F.R. §36.406(a); 28 C.F.R. pt. 36, app. A; *Miller v. California Speedway Corp.,* 536 F.3d 1020, 1024 – 1025 (9th Cir. 2008) (describing ADA's regulatory framework). However, the "readily accessible" standard for new construction or alteration projects is higher than the "readily achievable" standard that applies to removal of existing barriers in existing facilities.

For new buildings, some argue that "readily accessible" requires, essentially, strict compliance with the 2010 Standards. By contrast, the ADA provides limited exceptions for alterations to existing facilities when strict compliance is not feasible. For example, an exception for "technically infeasible" alterations exists, but it applies to physical constraints like load-bearing members that are an essential part of the structure. 36 C.F.R. pt. 1191, app. B; 28 C.F.R. §36.401; 28 C.F.R. pt. 36, apps. A, B, C; Access Board ADA Compliance Guide, Appendix III Accessibility Standards, 2004 WL 5038126. Accessibility is required "to the maximum extent feasible" except when "it would be 'virtually impossible' in light of the 'nature of an existing facility' " to achieve compliance with the ADA standards. *Roberts v. Royal Atlantic Corp.,* 542 F.3d 363, 371 (2d Cir. 2008), quoting 28 C.F.R. §38.402(c).

ADA jurisprudence provides little wiggle room for failure to comply. The "ADAAG's requirements are as precise as they are thorough, and the difference between compliance and noncompliance with the standard of full and equal enjoyment established by the ADA is often a matter of inches." *Chapman v. Pier 1 Imports (U.S.) Inc.,* 631 F.3d 939, 945 – 946 (9th Cir. 2011).

See Kirola v. City & County of San Francisco, 860 F.3d 1164, 1178 (9th Cir. 2017), *Disabled in Action v. City of New York,* 360 F.Supp.3d 240, 245 (S.D.N.Y. 2019), and *Park v. Las Virgenes Mobil, Inc.,* Case No. 2:21-cv-09206-VAP-RAOx, 2022 WL 2102016, *3 (C.D.Cal. Apr. 25, 2022), all citing *Chapman*. According to the U.S. Supreme Court, this is because "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect." *Alexander v. Choate,* 469 U.S. 287, 83 L.Ed.2d 661, 105 S.Ct. 712, 717 (1985); *Payan v. Los Angeles Community College District,* 11 F.4th 729, 734 (9th Cir. 2021), quoting *Alexander, supra.* Thus, "[o]bedience to the spirit of the ADA" does not excuse noncompliance with the ADAAG's requirements. *See Long v. Coast Resorts, Inc.,* 267 F.3d 918, 923 (9th Cir. 2001). Few A/Es fully comprehend the exacting nature of ADA standards.

Some federal courts have held that architects cannot be liable under the ADA; other federal courts disagree. The confusion is rooted in the language of ADA §§302 and 303, respectively 42 U.S.C. §§12182 and 12183, which imply, to some, that merely designing a noncompliant facility is not sufficient for a party to become liable under the ADA. That language implies that a party must "design and construct" noncompliant conditions, or otherwise own or operate the facility with the inaccessible conditions, to be liable. 42 U.S.C. §12183(a).

For example, in *Longberg v. Sanborn Theaters, Inc.,* 259 F.3d 1029, 1035 – 1036 (9th Cir. 2001), a wheelchair-bound patron sued a theater and its architect for ADA violations. The court dismissed claims against the architecture firm because it designed but did not construct the theater. The ruling was affirmed on appeal, but on different grounds. The court held that only owners and operators of a facility can be liable under the ADA. *Id.* The decision was grounded in the ADA's text. The section that prohibits discrimination, §302, mentions only owners and operators. Section 303, which sets forth what constitutes discrimination, contains the phrase "design and construct." 259 F.3d at 1032. According to the court, finding an architect liable under the ADA would "create[ ] a category of liability found nowhere in the text or legislative history of the ADA." 259 F.3d at 1034. Similarly, *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.,* 945 F.Supp. 1, 2 (D.D.C. 1996), held that architects are not covered by the ADA's prohibition against discrimination by people who own, lease, or operate or who design and construct facilities. In dismissing claims against the architect, the court reasoned that the "design and construct" language in §303(a) is conjunctive, referring only to parties responsible for both functions, such as contractors or owners who hire others to both design and construct. *Id.* Decisions like these essentially immunize designers from ADA violations.

Other courts have reached the opposite conclusion. "If architects are not liable under the ADA, then it is conceivable that no entity would be liable for construction of a new commercial facility which violates the ADA." *Johanson v. Huizenga Holdings, Inc.,* 963 F.Supp. 1175, 1178 (S.D.Fla. 1997). *See also United States v. Ellerbe Becket, Inc.,* 976 F.Supp. 1262, 1267 – 1268 (D.Minn. 1997) (same result as *Johanson* on similar facts).

A decision of the U.S. District Court for the Northern District of Ohio discussed these competing approaches and sided with the cases that construe the "design and construct" language in §303(a) as conjunctive. In *Mortland v. Hotel Stow, L.P.,* Case No. 5:19CV02019, 2020 WL 7074714, *6 (N.D. Ohio Dec. 3, 2020), a hotel patron sued various parties, including an architecture

firm, under the ADA. After discussing the competing approaches in some detail, the court held that "only owners, operators, lessors, or lessees of either public accommodations or commercial facilities may be liable under Title III for designing and constructing an inaccessible or not readily usable facility." *Id.* In granting the architecture firm's motion to dismiss, the court reasoned that none of the complaint's allegations showed that the firm "maintained a significant degree of control over the design *and* construction of the Hotel." [Emphasis in original.] 2020 WL 7074714 at *7.

Illinois federals courts disagree that defendants must both "design and construct" to be liable. The U.S. District Court for the Northern District of Illinois addressed architect liability under 42 U.S.C. §3604, an accessibility statute with similar "design and construct" language, and the court sided with decisions that hold architects liable. In *Doering v. Pontarelli Builders, Inc.,* No. 01 C 2924, 2001 WL 1464897 (N.D.Ill. Nov. 16, 2001), another decision that considered whether a party must "design and construct" to be liable, an architect moved to dismiss by arguing that the Fair Housing Amendments Act of 1988 (FHAA), Pub.L. No. 100-430, 102 Stat. 1619, imposes liability only on those who both design *and* construct, thus excluding architects from liability. The *Doering* court rejected the pro-architect reasoning of *Paralyzed Veterans, supra,* in favor of the reasoning in *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.,* 3 F.Supp.2d 661, 664 (D.Md. 1998), and its progeny. Those cases hold, essentially, that regardless of whether the "design and construct" language is conjunctive or disjunctive, the language should be interpreted to effectuate the broad remedial sweep of the accessibility statute. Quoting *Baltimore Neighborhoods,* 3 F.Supp.2d at 665, the *Doering* court held that "those who are wrongful participants [in such discrimination] are subject to liability" and denied the architect's motion to dismiss. 2001 WL 1464897 at *4. In an earlier decision, *United States v. Hartz Construction Co.,* No. 97 C 8175, 1998 WL 42265, *1 (N.D.Ill. Jan. 28, 1998), the court explained that it "disagrees totally with" *Paralyzed Veterans, supra,* noted that the statute "does proscribe nonconforming design and construction," and colorfully characterized the assertion that architects are "insulated from liability" as "a frank absurdity." The U.S. District Court for the Central District of Illinois has also disagreed with *Paralyzed Veterans.* The court held that, even though the phrase "design and construct" is conjunctive, "[t]his court finds such a narrow, literal reading of the statute inappropriate to carry out the intent of the ADA." *United States v. Days Inns of America, Inc.,* 997 F.Supp. 1080, 1083 (C.D.Ill. 1998). A 2021 decision cited both *Days Inns* and *Baltimore Neighborhoods* for the proposition that "claims against owners, builders, developer, contractors, architects, engineers, and others" are permissible under the Fair Housing Act. *Fair Housing Rights Center in Southeastern Pennsylvania v. SJ Lofts, LLC,* Civil Action No. 20-2412, 2021 WL 2823073, *3 (E.D.Pa. July 7, 2021). Similarly, *United States v. Albert C. Kobayashi, Inc.,* Civ. No. 19-00531 LEK-RT, 2023 WL 2163678, *6 (D.Haw. Feb. 22, 2023), cited *Baltimore Neighborhoods* for the proposition that anyone who contributes to FHA violations, including architects, could be liable, and denied summary judgment for design professionals, who disputed that they designed the non-compliant conditions, for jury determination on that issue of fact.

Thus, based on current caselaw, it is likely that aggrieved third parties with standing — the DOJ, private individuals who suffer from ADA violations, groups whose members include disabled individuals, or groups dedicated to the rights of the disabled — will argue that they can state causes of action against A/Es in Illinois for ADA violations.

Another important question — whether an owner can seek indemnity from an architect for ADA violations — was resolved in Illinois in favor of the design professional. However, other courts around the U.S. have reached the opposite conclusion. It remains to be seen whether this issue will be addressed, and potentially resolved differently, by the U.S. Supreme Court.

In *Chicago Housing Authority v. DeStefano & Partners, Ltd.,* 2015 IL App (1st) 142870, 45 N.E.3d 767, 399 Ill.Dec. 96, *reh'g denied* (Jan. 19, 2016), *appeal denied,* No. 120496 (May 25, 2016), the court held that the ADA, a federal law, preempts an owner's breach-of-contract claim against an architect for failure to design in compliance with the ADA. The architect defended on the basis that the owner (the Chicago Housing Authority (CHA)) had a nondelegable duty to comply with federal accessibility standards and argued that the costs incurred by the owner to correct the accessibility violations were not recoverable from the architect under a state law breach-of-contract action. The defendant architect argued, essentially, that nothing in the language of the ADA permits an owner to shift its liability to design professionals. The architect pointed to state and federal caselaw from other jurisdictions that has consistently held that state law causes of action seeking to recover costs incurred for noncompliance with federal accessibility standards are preempted and barred — regardless of whether the actions are styled as indemnity, contribution, or breach of contract.

In *DeStefano,* the court relied heavily on *Equal Rights Center v. Niles Bolton Associates,* 602 F.3d 597 (4th Cir. 2010), in which an owner filed indemnity and breach-of-contract claims against an architect for failing to design in accordance with federal accessibility laws. There, the Fourth Circuit affirmed the trial court's order granting summary judgment in favor of the architect, finding that the owner's state law claims were preempted by federal law. The *DeStefano* court quoted from *Equal Rights Center,* which reasoned that

> **[a]llowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws. If a developer . . . who concededly has a non-delegable duty to comply with the ADA and FHA, can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices. . . . Such a result is antithetical to the purposes of the FHA and ADA.** *DeStefano, supra,* 2015 IL App (1st) 142870 at ¶21, quoting *Equal Rights Center, supra,* 602 F.3d at 602.

In *DeStefano,* the court observed "there are no provisions within the ADA, or its accompanying regulations, that permit indemnification or the allocation of liability between the various entities subject to the ADA." 2015 IL App (1st) 142870 at ¶19, quoting *Rolf Jensen & Associates, Inc. v. Eighth Judicial District Court of State of Nevada, in & for County of Clark,* 128 Nev. 441, 282 P.3d 743, 747 (2012). The court framed the question as "whether CHA's breach of contract claim is a *de facto* indemnity claim similar to that in *Equal Rights Center,"* as claimed by the architect, or a "state-law contract claim arising from a breach of a duty imposed by the particular terms of the contract," as the Chicago Housing Authority asserted. 2015 IL App (1st) 142870 at ¶23. The court cited decisions of other courts that recognized the distinction between these kinds of claims and held that "[t]he distinction, and possibility, for a state-law breach of contract claim hinges on the substance of the claim, not simply its label." *Id.* In finding the owner's claim to be a de facto

indemnity claim, the *DeStefano* court held that "no matter the label of CHA's cause of action, the breach of contract claim was a *de facto* indemnity claim and, therefore, was preempted." 2015 IL App (1st) 142870 at ¶24. The appellate court's ruling in *DeStefano* was bolstered on May 25, 2016, when the Illinois Supreme Court denied the owner's petition for leave to appeal. As of this writing, *DeStefano* remains good law. *See Epcon Community Franchising v. Wilcox Development Group,* 2021 Ohio Misc. LEXIS 4826, **8 – 9 (Ohio 2021) (citing *DeStefano* and granting motion to dismiss "de facto claim for contribution arising from FHA violations" on preemption grounds).

The *DeStefano* decision is not an outlier; it is based on a well-developed body of federal precedent that holds that owners cannot pursue indemnification for their own ADA violations. *See generally Feltenstein v. City School District of New Rochelle,* No. 14-CV-7497 (CS), 2015 WL 10097519, *3 (S.D.N.Y. Dec. 18, 2015) (ADA preempts state law indemnification and contribution); *United States v. Murphy Development, LLC.,* No. 3:08-0960, 2009 WL 3614829, *2 (M.D.Tenn. Oct. 27, 2009) (state law claims for indemnity and/or contribution "would frustrate the achievement of Congress' purposes in adopting the . . . ADA"); *Equal Rights Center v. Archstone Smith Trust,* 603 F.Supp.2d 814, 824 (D.Md. 2009) (action for indemnification under state law would frustrate basic enforcement of ADA). *See also Shaw v. Cherokee Meadows, LP,* Case No. 17-CV-610-GKF-JFJ, 2018 WL 2967708, *4 (N.D.Okla. June 12, 2018) ("Other federal district courts consistently adopt the reasoning of *Equal Rights Center* to preempt state law indemnity claims.").

However, courts have also handed down decisions contrary to the reasoning of *Equal Rights Center, supra,* and *DeStefano, supra.* In 2017, the Ninth Circuit held that the ADA did not preempt "a city's state-law claims for breach of contract and *de facto* contribution against contractors who breached their duty to perform services in compliance with federal disability regulations." *City of L.A. v. AECOM Services, Inc.,* 854 F.3d 1149, 1152 (9th Cir. 2017). In *AECOM,* the court distinguished *Equal Rights Center* on the basis that, there, "the developer 'sought to allocate the *full* risk of loss to [the architect]," undermining any incentive to comply with the ADA and FHA by completely insulating itself, whereas in *AECOM* the "relevant contractual provisions assign[ed] liability to Appellees only to the extent that their own actions g[a]ve rise to liability." [Emphasis in original.] 854 F.3d at 1156, quoting *Equal Rights Center, supra,* 602 F.3d at 602.

Notably, a 2023 Illinois federal court decision denied an architecture firm's motion to dismiss, which relied on *Equal Rights Center, supra,* and *DeStefano, supra,* to argue that an owner's claims against the architecture firm should be dismissed because "the ADA's failure to include a contribution or indemnification remedy warrants a presumption that congress deliberately intended a non-indemnifiable and non-delegable duty for [the property owner] Plaintiffs to comply with the ADA." *County of Livingston v. PSA-Dewberry, Inc.,* 691 F.Supp.3d 907, 916 – 917 (C.D.Ill. 2023). In *PSA-Dewberry,* the court held that the property owner's state law claims for breach of contract and negligence were not preempted because "they constituted permissible claims for *de facto* contribution," finding that "there is no affirmative indication whereby the ADA should be presumed to preempt state law" in its text or the cited cases. *Id.*

The Central District of Illinois' decision in *PSA-Dewberry* has been favorably cited by other U.S. district court decisions. *George v. Overall Creek Apartments, LLC,* Civil Action No. 3:23-CV-00297, 2024 WL 1539848, **7 – 9 (M.D.Tenn. Apr. 9, 2024) (owner's state law

third-party claims against architect for contribution, indemnity, and breach of contract not preempted by ADA or FHA); *Bowman v. Shadowbriar Apartments, LLC,* Civil Action H-22-2106, 2023 WL 6798119, **3 – 4 (S.D.Tex. Oct. 13, 2023) (claims not preempted by ADA or FHA when seeking only redress for design professional's "own errors in the plans and specifications" rather than to completely shift liability).

On balance, the interpretation that the ADA and FHA do not preempt state law claims seems to have garnered more support in recent years. *PSA-Dewberry, supra; George, supra; Bowman, supra; Doe v. JPMorgan Chase Bank, N.A.,* 687 F.Supp.3d 405, 414 (S.D.N.Y 2023) ("the Court cannot simply presume that Congress intended to preempt all state-law claims for contribution or indemnification that are based upon federal-law violations"); *Clover Communities Beavercreek, LLC v. Mussachio Architects P.C.,* 676 F.Supp.3d 82, 92 (N.D.N.Y 2023) (finding *AECOM, supra,* persuasive and holding FHA does not preempt owner's state law contribution claim against architect). *But see Downing v. Osceola County Board of County Commissioners,* Case No: 6:16-cv-872-Orl-40KRS, 2017 WL 5495138, *5 (M.D.Fla Nov. 16, 2017) (observing split between Fourth and Ninth Circuits and suggesting that facts more clearly followed *Equal Rights Center, supra,* than *AECOM*, which might have supplied basis for decision, were holding not compelled by other Eleventh Circuit precedent). Only the U.S. Supreme Court can resolve this spilt of authority. The future of *DeStefano, supra,* a state court decision that remains good law, and similar federal court decisions that follow *Equal Rights Center* remain unclear as of this writing.

b. [1.14] Fair Housing Act

The Fair Housing Act, as amended by the Fair Housing Act Amendments of 1988, aims to eliminate discrimination against, and to equalize housing opportunities for, disabled persons. The FHAA's design and construction requirements apply to "covered multifamily dwellings" with four or more units, subject to some exceptions. 42 U.S.C. §§3604(f)(3)(C), 3604(f)(7). The FHAA's requirements are similar to those of the Americans with Disabilities Act, except they apply to the design and construction of common areas and dwelling units of covered residential multifamily facilities. 42 U.S.C. §3604(f)(3)(C).

In 1989, the U.S. Department of Housing and Urban Development (HUD) promulgated FHAA design and construction regulations (FHAA Regulations), 24 C.F.R. §100.200, *et seq.,* to effectuate the 1988 amendments to the FHA. These regulations provide that "accessible[,] when used with respect to the public and common use areas of a building containing covered multifamily dwellings, means that the public or common use areas of the building can be approached, entered, and used by individuals with physical disabilities." See 24 C.F.R. §100.201. The phrase "readily accessible to and usable by" is synonymous with "accessible." *Id.* To define "accessible," the FHAA Regulations refer to standards promulgated by industry groups. See generally International Code Council and American National Standard Institute, Accessible and Usable Buildings and Facilities (2017 ICC A117.1). The FHAA Regulations provide safe harbors and deem facilities that meet those standards to comply with the FHAA. See 24 C.F.R. §100.205; 42 U.S.C. §3604. HUD also publishes manuals with explanations and illustrations that are useful to designers.

42 U.S.C. §3604 has been interpreted, both nationally and in Illinois federal courts, to expose design professionals to liability. Some of those cases are discussed in connection with the ADA in

§1.13 above. *See generally Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.,* 3 F.Supp.2d 661 (D.Md. 1998) (architects can be liable for FHAA violations); *United States v. Shanrie Co.,* No. 05-CV-306-DRH, 2007 WL 980418 (S.D.Ill. Mar. 30, 2007) (citing *Baltimore Neighborhoods* and holding any participant in design or construction that contributes to FHAA violation can be liable); *Doering v. Pontarelli Builders, Inc.,* No. 01 C 2924, 2001 WL 1464897 (N.D.Ill. Nov. 16, 2001) (citing *Baltimore Neighborhoods* and denying design professional's motion to dismiss). Unlike ADA jurisprudence, which is not entirely consistent on the extent of architect and/or engineer liability exposure, design professional liability under the FHAA is generally considered to be much more straightforward.

However, the appellate court's decision in *Chicago Housing Authority v. DeStefano & Partners, Ltd.,* 2015 IL App (1st) 142870, 45 N.E.3d 767, 399 Ill.Dec. 96, *reh'g denied* (Jan. 19, 2016), *appeal denied,* No. 120496 (May 25, 2016), discussed in §1.13 above, and the federal court precedents on which it is based do provide some basis for design professionals to argue that claims by owners who seek to be indemnified for FHAA violations are preempted by federal law. Some cases reason that "[i]f developers and owners knew they could shift liability for FHA and ADA violations to architects, they would have little incentive to self-test to discover potential violations during the planning and construction phases." *United States v. Bryan Co.,* No. 3:11-CV-302-CWR-LRA, 2012 WL 2051861, *5 (S.D.Miss. June 6, 2012). *See also Baltimore County, Maryland v. Buck Consultants, LLC,* Civil Action No. RDB-15-0089, 2016 WL 1222155, *8 (D.Md. Mar. 29, 2016) (recognizing preemption of indemnity claims that attempt to pass on FHA and ADA liability); *United States v. Dawn Properties, Inc.,* 64 F.Supp.3d 955, 960 (S.D.Miss. 2014) ("the FHA and the ADA preempt state law claims for both indemnity and contribution"). Thus, A/E liability exposure to owners for FHAA violations is less clear than their liability exposure to other aggrieved parties with standing under the statute. As of this writing, however, the reasoning of decisions like *City of Los Angeles v. AECOM Services, Inc.,* 854 F.3d 1149, 1152 (9th Cir. 2017), seem to be garnering increasing caselaw support over decisions like *Equal Rights Center v. Niles Bolton Associates,* 602 F.3d 597 (4th Cir. 2010), and *DeStefano, supra.*

c. [1.15] Other Accessibility Requirements

Architects and/or engineers must be cognizant of numerous other federal, state, and local accessibility requirements and standards that can affect their professional services. For example, §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which protects the civil rights of persons with disabilities, overlaps with the Americans with Disabilities Act and applies to programs or businesses that receive federal funds. The Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.,* makes failure to "design and construct" accessible buildings a civil rights violation. 775 ILCS 5/3-102.1. The Illinois Accessibility Code, 71 Ill.Admin. Code 400.110, *et seq.,* implements the Environmental Barriers Act, 410 ILCS 25/1, *et seq.,* which seeks to remove "environmental barriers" for "individuals with disabilities." 410 ILCS 25/2. Local building codes also often contain accessibility requirements. For example, certain provisions of the Chicago Building Code closely mirror the 2010 ADA Standards for Accessible Design, www.ada.gov/law-and-regs/design-standards/2010-stds.

10. [1.16] Environmentally Sustainable Design

A strong trend that has continued to grow in architecture and engineering has been "environmentally friendly design," known in the industry as "sustainable" design or, colloquially, as "green" design. This trend outpaced developments in the law and insurance related to green design, leaving architects and/or engineers in a state of uncertainty as to their exposure and insurance coverage for claims arising out of such work.

In an effort to bring greater clarity and specificity to the parties' respective rights and obligations relative to sustainable goals, AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect,* requires the parties to incorporate AIA Document E204-2017, *Sustainable Projects Exhibit* (AIA E204-2017), into the owner-architect agreement, as well as the agreements with the contractor and consultants, if the owner identifies an "anticipated Sustainable Objective" in §1.1.6 of AIA B101-2017. Specifically, §1.1.6.1 of AIA B101-2017 states:

> **§1.1.6.1 If the Owner identifies a Sustainable Objective, the Owner and Architect shall complete and incorporate AIA Document E204™-2017, Sustainable Projects Exhibit, into this Agreement to define the terms, conditions and services related to the Owner's Sustainable Objective. If E204-2017 is incorporated into this agreement, the Owner and Architect shall incorporate the completed E204-2017 into the agreements with the consultants and contractors performing services or Work in any way associated with the Sustainable Objective.**

AIA E204-2017 outlines the respective rights and obligations of the architect, the owner, and the contractor relative to sustainable design. For example, AIA E204-2017 requires the architect to, among other things, conduct a sustainability workshop to discuss the owner's sustainability objectives and the steps that need to be taken in order to achieve those goals, develop a sustainability plan for achieving those sustainability objectives, prepare design documents to effectuate those objectives, and evaluate how sustainability objectives are being constructed and achieved during the construction phase.

The AIA subsequently issued similar sustainability exhibits that outline the respective rights and obligations of the architect, the owner, and the construction manager relative to sustainable design:

a. AIA Document E234-2019, *Sustainable Projects Exhibit, Construction Manager as Constructor Edition* (AIA E234-2019); and

b. AIA Document E235-2019, *Sustainable Projects Exhibit, Construction Manager as Advisor Edition* (AIA E235-2019).

In addition, the AIA issued documents that are intended to bring clarity to the architect's scope of services relative to Leadership in Energy and Environmental Design (LEED) and sustainability services. AIA Document C204-2020, *Standard Form of Consultant's Services: Sustainable Project Services* (AIA C204-2020), describes a consultant's scope of services relative to sustainable services and is intended to be used with the AIA Document C103-2015, *Standard Form of Agreement between Owner and Consultant without a Predefined Scope of Consultant's Services.* The "consultant" for purposes of AIA C204-2020 may be an architect or a non-architect.

AIA E204-2017, AIA E234-2019, AIA E235-2019, and AIA C204-2020 contain virtually identical disclaimers that the architect does not make any warranties or guarantees with respect to the sustainability objective. Those disclaimers as found in AIA E204-2017 state as follows:

> **§2.7.7 Any certification, declaration or affirmation the Architect makes to the Certifying Authority shall not constitute a warranty or guarantee to the Owner or to the Owner's contractors or consultants.**
>
> * * *
>
> **§6.1 The Owner, Contractor and Architect acknowledge that achieving the Sustainable Objective is dependent on many factors beyond the Contractor's and Architect's control, such as the Owner's use and operation of the Project; the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by a Certifying Authority. Accordingly, neither the Architect nor the Contractor warrant or guarantee that the Project will achieve the Sustainable Objective.**

Virtually identical disclaimers can be found in AIA E234-2019 §§2.7.7 and 6.1, AIA E235-2019 §§2.7.7 and 7.1, and AIA C204-2020 §§1.2 and 2.7.7.

Various governmental, quasi-governmental, and private not-for-profit organizations have been created to promote sustainable design. The best known and most publicized is the U.S. Green Building Council (USGBC), which developed LEED. LEED provides various levels of certification for buildings based on a complex set of criteria that ostensibly measures environmentally responsible design. Numerous commentators have criticized the USGBC and its LEED certification program as not accurately correlating to energy savings or other measurable standards. Nevertheless, many project owners retain the services of design professionals for purposes of obtaining such LEED certifications. Providing these services poses challenges for the design professional, as the process for obtaining such certifications is time- and paper-intensive, and the ability to achieve the desired LEED certification is a function of a subjective determination and the performance of other parties not under the A/E's control, making it risky for a design professional to guarantee or warrant that a particular LEED certification, or any LEED certification, can be attained.

The following issues may create additional ambiguity or liability for A/Es who have undertaken sustainable projects:

Heightened standard of care/lack of definition. A standard of care may develop under which A/Es would be expected to possess a certain minimum amount of knowledge and expertise in sustainable design. Distinguishing between knowledge that is standard or typical versus "cutting edge" will likely be difficult.

Certified experts who are not A/Es. Claimants are likely to find individuals who are neither architects nor engineers to testify as expert witnesses in claims against A/Es alleging improper or insufficient sustainable design.

Vagaries of certification standards. The requirements to achieve LEED and other certification standards are ambiguous and uncertain. Even when the standards seem to be fairly clearly spelled out, lawyers and other advocates will undoubtedly be able to find exceptions and counterexamples.

Reliance on manufacturer's/researcher's data (*i.e.,* experimental products, systems, processes, and technology). Particularly since many products, systems, and the like are relatively new, there is unlikely to be much of an established history from which to evaluate them. A/Es will be forced to rely on data provided by unknown third parties, many of whom may have a financial interest in the product or system that they are evaluating. If the product or system does not perform as predicted, the owner may make a claim against the A/E for specifying it.

Collaborative design. More than in traditional architecture, green design is a collaborative process often involving contractors, vendors, and the owner in addition to the A/E. If results are disappointing and a claim is made, disentangling the decision-making responsibility may prove difficult.

Need for sophisticated maintenance. Owners are notorious for deferring or ignoring entirely important maintenance and upkeep. Many sustainable products and systems require more sophisticated than usual maintenance or involvement by the owner or third parties. Green products and systems are more likely than others to fail for lack of maintenance or upkeep, resulting in a greater likelihood of claims.

Subsequent users' expectations. When the developer of a project is different from or sells the project to its end users, the end users are likely to have inflated expectations regarding the functions of green products and systems because (a) the developer may have exaggerated their functionality and (b) the developer may have "cheapened" the products/systems for cost reasons.

It is too soon to be able to predict with any confidence, but the ambiguities and uncertainties regarding sustainable design are likely to give rise to new kinds of claims against A/Es. These potential claims include:

Insufficient knowledge of sustainable design. An owner or developer, dissatisfied with the environmental functionality of the building, may make a claim against the design professional alleging that the A/E has insufficient knowledge of sustainable design and construction.

Failure to achieve standards (warranty versus negligence). Projects are being undertaken with the expectation that they will achieve a certain level of LEED or other certification. A contract for architectural services that recites this expectation may be interpreted to include an uninsurable warranty by the A/E that such certification will in fact be obtained.

Failure of product/process. If a green product or system fails to function properly, the owner or developer is likely to make a claim against everyone involved in its selection and construction. Since many of these products and systems are relatively new and untested, there is a greater than usual likelihood of failure and claims.

Not presenting a full range of choices to the client. As is true in other life-cycle considerations, cost is often proportional to functionality for sustainable products and systems. Many choices can be made on the spectrum between "highly green but costly" and "ecologically wasteful but cheap." A developer or owner who is unhappy with the economics or functionality of a project may blame the A/E for failing to explain the full spectrum of available choices.

Improper mixture of performance/prescriptive specifications. It may be difficult to specify green products or systems without combining elements of performance and prescriptive specifications. This may lead to construction claims that owners pass through to A/Es when contractors seek extras because they assert that it is not possible to obtain the required performance from the prescribed systems or products.

Improper delegation of design responsibility. Just as A/Es frequently delegate the design of certain mechanical/electrical/plumbing systems to specialty subcontractors, the design of certain sustainable systems will likely be delegated similarly. Although the sustainable subcontractors may have expertise in their particular systems, they may not have the engineering licenses required by the jurisdiction of the project. In such a situation, the A/E could be accused of illegally delegating design responsibility.

Unnecessary expense to contractor or owner due to design choices. Although owners and developers often pay significant attention to sustainable issues during the design phases, cost and schedule become more important to them as construction progresses. An owner or developer who is unhappy with the ultimate construction price and/or duration of a project may blame the A/E for specifying unduly expensive or difficult-to-construct green products or systems.

Determining the appropriate measure of damages for such claims is also unclear. Project owners may pursue an additional category of damages if or when sustainable products or systems fail. Many project owners seek significant financial incentives, grants, or other entitlements that are offered for sustainable performance, or they may expect accelerated sales due to sustainable functionality. If the green products or systems do not function as expected, design professionals may be at risk for additional financial damages in addition to the usual cost of repairs. As a result, some A/Es seek to include provisions in the owner-A/E agreement that waive the owner's right to consequential damages and state that the A/E does not warrant or guarantee any particular certification or level of sustainable design. The hope is that such provisions will insulate design professionals from damages such as lost incentives, lost profits, and the like. At least one case out of Maryland, *Southern Builders, Inc. v. Shaw Development, LLC,* No. 19-C-07-011405 (Somerset Cty.Cir.Md. 2007), suggests that such waivers indeed may be effective.

B. Construction Phase

1. [1.17] Description

Historically, the architect and/or engineer functioned as a master builder, conceptualizing the building, committing the A/E's dreams to paper in the form of drawings, acting as an autocrat on the jobsite, stopping the work entirely when it contradicted the A/E's intentions, and rejecting work that the A/E 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. To protect 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 the A/E 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 further detail 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 one of the more controversial aspects of the practice.

2. [1.18] Common Contractual Provisions To Protect A/Es from Anticipated Liability

In response to unfavorable court decisions, architects and/or engineers have attempted to limit and more precisely define their role during the construction phase. In addition to listing specific activities for which the A/E will be responsible during this phase, most architectural contracts now contain standard exculpatory language. For example, AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect* §3.6.1.2, attempts to limit the A/E's liability for work performed by the various contractors and subcontractors that is not in accordance with the drawings and specifications:

> **§3.6.1.2 The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.**

Contract provisions stating that the A/E is not responsible for contractors' mistakes have 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 Wash.App. 954, 516 P.2d 217 (1973); *Weill Construction Co. v. Thibodeaux,* 491 So.2d 166

(La.App. 1986). 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 A/E'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.

AIA B101-2017 §6.2 also contains language to help the A/E avoid liability for construction costs that exceed the owner's budget or preferred limit of construction expenditures:

> **§6.2 The Owner's budget for the Cost of the Work is provided in Initial Information, and shall be adjusted throughout the Project as required under Sections 5.2, 6.4 and 6.5. Evaluations of the Owner's budget for the Cost of the Work, and 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. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials, or equipment; the Contractor's methods of determining bid prices; or 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 Cost of the Work, 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 the owner and the A/E 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 www.nspe.org.

3. Other Areas of Liability During the Construction Phase

a. [1.19] Site Observation vs. Supervision

Despite the attempts to protect the architect and/or 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 whether an A/E 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. [1.20] Former Structural Work Act

The former Structural Work Act, 740 ILCS 150/0.01, *et seq.,* was repealed by P.A. 89-2 (eff. Feb. 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 and/or engineer is in charge of the jobsite under the former 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 former Structural Work Act. Liability under the 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 from 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,* 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 former 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 former 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 former 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 former 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 former 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 have been in charge of the work as defined in the former Structural Work Act. Traditionally, an A/E could expect to prevail on a motion for summary judgment if it were sued under the former 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* were followed, design professionals' exposure under the former Structural Work Act would be 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," as stated in *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), and *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*).

Most appellate courts to consider the issue have held that, under contract language similar to that quoted in §1.18 above, A/Es were not in charge of the construction work under the former 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 # 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) [1.21] Shop drawings

An architect and/or 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 Robert F. Cushman, ed., AVOIDING LIABILITY IN ARCHITECTURE, DESIGN AND CONSTRUCTION: AN AUTHORITATIVE AND PRACTICAL GUIDE FOR DESIGN PROFESSIONALS, pp. 239 – 241 (1983).

AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect* §3.6.4.2, contains a clause 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:

> **§3.6.4.2 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. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or 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.**

The provision above is just the latest iteration of a continuing effort to limit the architect's responsibilities relative to submittals, with the 2007 AIA update removing the architect's obligation to perform this review "with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors" and the 2017 update removing the architect's obligation to review submittals "[i]n accordance with the Architect-approved submittal schedule" and removing any suggestion that the architect would be weighing in on construction means, methods, etc.

(2) [1.22] Processing the contractor's application for payment

In processing the contractor's monthly applications for payment, the architect and/or 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 G702-1992, *Application and Certificate for Payment,* the architect's certificate consists of the following language:

> **In accordance with the Contract Documents, based on on-site observations and the data comprising this 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) [1.23] Issuing certificates of partial, substantial, and final completion

The architect and/or 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 its contracts with the A/E and the lender.

(4) [1.24] 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 the professional 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 A201-2017, *General Conditions of the Contract for Construction* §9.8.1.

The architect and/or 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. [1.25] Consulting A/Es

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 and/or 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 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. 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. [1.26] The Common-Law Standard of Care

The standard of care in Illinois for architects and/or 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 A/Es 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, Annotation, 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 A/E may be altered by agreement with the owner. A provision in an owner-A/E agreement by which the A/E represents that the A/E 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, supra,* and *Mississippi Meadows,* at least with regard to a claim by the other party to the design professional's contract.

The Illinois Supreme Court in *Thompson v. Gordon,* 241 Ill.2d 428, 948 N.E.2d 39, 349 Ill.Dec. 936 (2011), has made clear, however, that the standard of care cannot be used to create or impose duties on a design professional that the design professional did not have by contract. In that case, the plaintiff relied on expert testimony to argue that, if the defendant design professionals had performed in accordance with the standard of care, they should have designed a particular road median, even though the design of the road median was not mentioned in the defendants' contract. The Illinois Supreme Court rejected that theory, finding that the imposition of such a duty would be "contrary to well-settled law, which provides that a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented." 948 N.E.2d at 51.

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 Illinois Pattern Jury Instruction — 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 (3d ed. 2012). 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 the design of highways and bridges; civil, structural, mechanical, and electrical construction testing and observation; and geotechnical services. The AIA also publishes and periodically updates THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE (15th ed. 2013).

B. Actions Based on Contract

1. [1.27] Express Warranties

Express warranties regarding the quality of architectural and engineering services to be performed may appear in an owner-architect and/or engineer agreement. These warranties usually concern compliance with local codes, rules, and regulations and state and federal laws. In some instances, qualifying language will have been inserted to clarify that the A/E is obligated only to comply "to the best of his or her knowledge, information, and belief" or "to the extent required by the standard of care." Express warranties in A/E agreements can be problematic not only because of the potential liability they create but also because professional liability policies often do not provide coverage for breach of warranties, leaving A/Es with potentially uninsured liabilities.

2. [1.28] Implied Contract Terms

A doctrine of implied contract terms relative to 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 the architect's 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:

> **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:

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.

3. [1.29] Implied Warranties

Although Illinois courts have recognized a doctrine of implied contract terms relative to architect and/or engineer agreements, they have rejected claims asserting breach of implied warranties.

In *Lowrie v. City of Evanston,* 50 Ill.App.3d 376, 365 N.E.2d 923, 8 Ill.Dec. 537 (1st Dist. 1977), for example, the appellate 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.

Illinois courts have also rejected attempts to hold architects and engineers responsible for breach of the implied warranty of habitability. The appellate court in *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC,* 2015 IL App (1st) 123452, 48 N.E.3d 1250, 400 Ill.Dec. 810, for example, found that claims against architects for breach of that warranty were not supportable because of two underlying principles: (a) in construction, the implied warranty of habitability is generally applied to those who engage in the physical construction of a structure; and (b) "architects do not construct structures, they perform design services pursuant to contracts which set out their obligations and courts have consistently declined to heighten their express contractual obligations by implying a warranty of habitability of construction." 2015 IL App (1st) 123452 at ¶22. The *Park Point* court noted that the "breach of implied warranty of habitability claims against design professionals have already been rejected in Illinois and most other jurisdictions." 2015 IL App (1st) 123452 at ¶16.

Although *Park Point* mentions engineers only in passing, the court in *Sienna Court Condominium Ass'n v. Champion Aluminum Corp.,* 2017 IL App (1st) 143364, ¶68, 75 N.E.3d 260, 412 Ill.Dec. 280, *rev'd on other grounds,* 2018 IL 122022, extended *Park Point*'s holding to engineers by finding that "an architect or engineering firm that assisted in design but otherwise did not participate in the construction of the real property is *not* subject to the implied warranty of habitability" regardless of the developer's insolvency. [Emphasis in original.] The *Sienna Court* decision is consistent with earlier decisions such as *Waterford Condominium Ass'n v. Dunbar Corp.,* 104 Ill.App.3d 371, 432 N.E.2d 1009, 60 Ill.Dec. 110 (1st Dist. 1982), in which the appellate

court refused to permit the plaintiffs, a condominium association and individual condominium owners, to recover from the defendants, a structural engineer and a mechanical engineer, for breach of a warranty of habitability. The court reaffirmed the position that the plaintiffs' 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.

4. [1.30] 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 a 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. *See, e.g., Harleysville Insurance Co. v. Mohr Architecture, Inc.,* 2021 IL App (1st) 192427, 198 N.E.3d 1038, 459 Ill.Dec. 661 (finding that landlord property owner is not intended third-party beneficiary of agreement between its tenant and architect simply because property owner derives benefit from services being performed). 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 *Resnik* on the basis that in *Resnik* the party that asserted that 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 incidently and collaterally benefit the IHDA, as a mortgagee.** 433 N.E.2d at 1358 – 1359.

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

> **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, supra, 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 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 WL 608542 (N.D.Ill. Oct. 11, 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 WL 608542 at *3. 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.

In 2007, the First District Illinois Appellate Court in *F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, L.L.C.,* 372 Ill.App.3d 89, 865 N.E.2d 228, 234, 309 Ill.Dec. 865 (1st Dist. 2007), held that the plaintiff limited liability company (LLC) that had been formed to develop certain property was not a third-party beneficiary of a contract between those who formed the LLC and the architect, despite the fact that the architect's invoices for services were paid for by the LLC.

5. Uniform Commercial Code

a. [1.31] 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 UCC §§2-314 and 2-315 (now codified at 810 ILCS 5/2-314 and 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 a 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, expediters 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. [1.32] Application of the UCC to the Performance of Professional Services

One Illinois appellate court has decided the issue of whether the performance of professional services by an architect and/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 defective 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 A/Es.

C. Actions Based in Tort

1. [1.33] 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), *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); *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, holding professional negligence in 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 Capitol 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, supra,* 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." [**Citations omitted.**]** 555 N.E.2d at 352 – 353, quoting *Schiavone Construction Co. v. Elgood Mayo Corp.,* 81 A.D.2d 221, 439 N.Y.S.2d 933, 938 (App. 1981) (Silverman, J., dissenting), *rev'd,* 56 N.Y.2d 667 (1982).

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.* The First District Appellate Court in *F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, L.L.C.,* 372 Ill.App.3d 89, 865 N.E.2d 228, 236, 309 Ill.Dec. 865 (1st Dist. 2007), similarly held that the economic-loss doctrine barred the plaintiff's professional negligence claim in tort against an architect when the plaintiff alleged that it had "suffered 'losses of many millions of dollars' " in lost investments, among other things, due to the architect's alleged failure to prepare adequate drawings, plans, and specifications for the development of a project. 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. [1.34] 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 section is intended to be an overview of some of the issues involved in defining "economic loss" in the context of claims against architects and/or 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 States 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:

> **[**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, 61 Ill.Dec. 746, 435 N.E.2d 443); (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, 61 Ill.Dec. 746, 435 N.E.2d 443); 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. [**Emphasis in original.**]** 680 N.E.2d at 275, citing *Moorman, supra,* 435 N.E.2d at 450 – 452.

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 as 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 *A, C & S,* 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 *A, C & S* 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, supra,* 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:

> **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 plaintiff's 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:

> **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. [1.35] Recovery by Third Parties in Tort

The discussion in this section is devoted primarily to two types of claims that occur relatively frequently: contractors' claims against an architect and/or 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 the A/E 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 A/Es in tort for solely economic loss. In particular, *Fireman's Fund* involved a claim by the subrogee of a subcontractor and 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:

> **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, 37 Ill.Dec. 597, 402 N.E.2d 599), 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, 250 N.E.2d 656). 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. International Business Machines 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,* 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 as the basis for its decision the following:

> **(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, supra,* and *Fireman's Fund, supra,* 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 WL 438836 (N.D.Ill. July 25, 1997). A/Es are frequently hired to produce similar reports.

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:

> **[**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,* 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, though 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 A/Es 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, supra*) may not.

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 engineering firm 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 engineering firm's negligent or intentional drafting of improper specifications for the equipment.

The court did not pass on the question of the engineering firm'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 engineering firm 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 engineering firm's skill. The court went on to note that as a result of *Moorman, supra,* 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,* the court allowed the mechanical contractor to recover its damages, including strictly economic losses, from the engineering firm 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 engineering firm arbitrarily, consciously, and intentionally insisted on conformity to a badly drafted set of specifications, with no rational or scientific engineering basis for this insistence; that the engineering firm patterned its specifications for the sludge dewatering equipment on the specifications for equipment produced by a particular manufacturer; that the engineering firm 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 engineering firm 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. [1.36] 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, Immergluck,* and *Heller,* 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/or 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 A/E 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. [1.37] The Statute of Limitations

Illinois has enacted a statute of limitations, §13-214 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* which applies 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 2 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 2 additional years in which to file suit. In 1985, the legislature amended the statute to change the time periods from 2 and 12 years to 4 and 10 years, respectively. See P.A. 84-551 (eff. Sept. 18, 1985). Suits must be brought within 4 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 10 years from the time of the wrongful act or omission, except that a person who discovers an act or omission within the 10-year period has 4 years from discovery in which to file suit. 735 ILCS 5/13-214.

In October 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,* 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* 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, 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.

Design professionals can avoid the application of the discovery rule by specifying in their contracts the date on which the statute of limitations will commence. Courts will enforce such shortened limitations periods as long as they are reasonable. *See Federal Insurance Co. v. Konstant Architecture Planning, Inc.,* 388 Ill.App.3d 122, 902 N.E.2d 1213, 1217, 327 Ill.Dec. 827 (1st Dist. 2009). An example of such contractual language can be found in AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect* §8.1.1, which states:

> **§8.1.1 The Owner and Architect shall commence all claims and causes of action against the other and arising out of or related to this Agreement, whether in contract, tort, or otherwise, in accordance with the requirements of the binding dispute resolution method selected in this Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.**

The appellate court in *Konstant Architecture Planning* found that such language determined the date on which the statute of limitations began to run and precluded application of the discovery rule. 902 N.E.2d at 1217. In that case, the plaintiff had filed its action within four years of discovering the alleged defect at issue but more than four years after substantial completion or issuance of the final certificate for payment. Accordingly, the court affirmed the dismissal of the breach-of-contract action against the architect and held that the claim was time-barred. *See also J.S. Reimer, Inc. v. Village of Orland Hills,* 2013 IL App (1st) 120106, ¶38, 990 N.E.2d 831, 371 Ill.Dec. 643 (finding "practical effect of [such contract language] is to transform the statute of limitations into a statute of repose").

B. [1.38] 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. [1.39] 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 and/or engineer, it should be noted that these claims may also give rise to allegations against the A/E arising out of the performance of professional services during the construction phase. See §1.17 above.

D. [1.40] 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 and/or 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. [1.41] 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 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, UCC §2-719 recognizes the validity of these contractual arrangements. 810 ILCS 5/2-719. 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 dollar amount, a percentage of fee, or "available insurance." Design professionals may limit liability to "available insurance," as opposed to insurance limits or otherwise, because professional liability insurance policies are eroding balance policies; the available limits are "eroded" or reduced by claims and defense costs incurred during the policy term such that an amount less than the full limits is available to cover any remaining claims during that policy period.

Although these types of clauses seek to provide the architect and/or engineer with definable and insurable dollar limits for professional responsibility, they are effective only as between the owner and the A/E. To obtain additional protection, the design professional may 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 the A/E's 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. Such provisions cannot protect an A/E from all liability, however, as most jurisdictions (including Illinois) prevent a party from being indemnified from its own negligence. See §§1.43 and 1.44 below.

Finally, it is not uncommon to find limitation-of-liability provisions that seek to limit the owner's ability to recover consequential damages from an A/E. For example, AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect* §8.1.3, provides:

> **§8.1.3 The Architect and 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 of this Agreement, except as specifically provided in Section 9.7.**

Such limitations can be especially important to A/Es in light of the eroding balance nature of professional liability coverage (A/Es fear that their available insurance will be completely exhausted by consequential damages) and the fact that A/E firms often do not have much by way of assets that can be used to satisfy a judgment.

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, 600 – 595, 98 Ill.Dec. 470 (1st Dist. 1986), the 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 insurers 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.

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-indemnity statute (see §1.43 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 that

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; and

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.

Particularly in the residential housing market, a consumer might be able to make an argument that a particularly one-sided and harsh limitation-of-liability clause should not be enforced on the grounds of unconscionability. There is no law in Illinois directly on point, but in a different context the Supreme Court has not hesitated to strike remedy-limiting provisions in automobile purchase contracts on the grounds of unconscionability. *See Razor v. Hyundai Motor America,* 222 Ill.2d 75, 854 N.E.2d 607, 622 – 623, 305 Ill.Dec. 15 (2006).

V. CLAIMS

A. [1.42] 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 §§1.35 and 1.40 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 the owner 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. [1.43] The Anti-Indemnity Statute

As a matter of public policy, Illinois, like many other jurisdictions in the country, has adopted the Construction Contract Indemnification for Negligence Act (Anti-Indemnity Act), 740 ILCS 35/0.01, *et seq.* The anti-indemnity statute prohibits 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 Anti-Indemnity 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. [1.44] 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 or omission of the Consultant or its agents in the performance of the work hereunder, regardless of whether 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-indemnity statute, the Construction Contract Indemnification for Negligence Act (see §1.43 above), because the architect and/or engineer-indemnitor would bear the entire risk of loss even for circumstances in which the owner may have been negligent.

Note, however, that the Illinois Supreme Court has held that it is preferable for a court to construe the indemnity clause as valid and enforceable if it can be read in a manner that would not require the indemnitor to indemnify the indemnitee against the consequences of the indemnitee's own negligence, such as by interpreting the clause to require the indemnitor to bear the damages caused only by its own negligence. *See Braye v. Archer-Daniels-Midland Co.,* 175 Ill.2d 201, 676 N.E.2d 1295, 1303, 222 Ill.Dec. 91 (1997).

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 A/E 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-indemnity 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-indemnity 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, 338 (1st Dist. 1973), *vacated as moot,* 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.

Another exception to the anti-indemnity statute is procuring a promise from the indemnitor to purchase insurance to cover the indemnitee. Section 3 of the Anti-Indemnity Act states: "This Act does not apply to construction bonds or insurance contracts or agreements." 740 ILCS 35/3. If insurance is not purchased, the indemnitee may have a breach-of-contract claim for failure to buy insurance that amounts, in practice, to indemnity. However, one appellate court has held that the promise must be to purchase insurance from the marketplace, not to self-insure, or else the promise to insure is void for violating the anti-indemnity statute. *See USX Corp. v. Liberty Mutual Insurance Co.,* 269 Ill.App.3d 233, 645 N.E.2d 396, 400 – 401, 206 Ill.Dec. 391 (1st Dist. 1994).

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 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, 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 decision that is difficult to understand, *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 (now codified at 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 products 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-indemnity statute. *Getto v. Village of Palos Park, Illinois,* No. 97 C 4861, 1998 WL 801987 (N.D.Ill. Nov. 12, 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. [1.45] 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 (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 its 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).

D. [1.46] 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), *superseded by statute as stated in Burke v. 12 Rothschild's Liquor Mart, Inc.,* 148 Ill.2d 429, 593 N.E.2d 522, 170 Ill.Dec. 633 (1992). 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 is no longer 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, except as otherwise stated in 735 ILCS 5/2-1116, which abrogated *Alvis.* Under 735 ILCS 5/2-1116, in actions on account of death, bodily injury, or physical damage to property, the plaintiff is barred from recovering if the plaintiff is more than 50 percent at fault for the damages that it seeks. NOTE: 735 ILCS 5/2-1116 was updated, effective December 20, 2024, relative to personal injury claims based on childhood sexual abuse.

E. [1.47] 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 and/or engineer may want to join a consulting engineer in the same forum as that in which the A/E's dispute with the owner is proceeding.

The mandatory nature of an agreement to arbitrate may frustrate this desire for joinder. 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 economical 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 AIA form contracts have attempted to address this issue by including language in AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect* §8.3.4, that allows the parties to consolidate arbitration proceedings and join other parties, subject to certain conditions:

§8.3.4 Consolidation or Joinder

§8.3.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that

(1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. 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.

§8.3.4.3 The Owner and Architect grant to any person or entity made a party to an arbitration conducted under this Section 8.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Architect under this Agreement.

§8.4 The provisions of this Article 8 shall survive the termination of this Agreement.

The effect of these clauses is that an owner who has identical arbitration clauses in its construction contract with the general contractor and in its 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 a nonjoinder 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 arbitrator had consolidated two arbitrations in contravention of the clause because the protesting party had participated without objection and had thereby waived 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. [1.48] Insurance Coverage

Practically speaking, the responsibilities and liabilities of an architect and/or 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 A/Es 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 guaranties, advice on insurance and bonding of contractors, the failure of the A/E 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 guaranty to which coverage would not be extended. Further, in an indemnification provision, the obligation to defend an owner may also 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 A/E against subrogation claims is found in the waiver-of-subrogation provisions commonly included in owner-A/E 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 insurers 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 assert only 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 A/E absent the contractual waiver.