**Recovery of Economic Loss from a Design Professional by a Contractor**

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Economic losses include inadequate value, costs of repair and replacement of the defective work and consequent loss of profits.[1] These losses are contract-type losses amounting to disappointed commercial expectations and are distinct from personal injury or property damage.[2] In the construction context, when the project proves to be more expensive than anticipated by the contractor, the contractor may seek to recover its losses from the architect or engineer by alleging defects in the design, inefficiencies or interferences during the administration of the work and the like. Whether such economic losses are recoverable in actions by contractors against design professionals[3] if negligence can be proved is an issue that has been subject to debate throughout the country for decades.[4]

## I. HISTORICAL DEVELOPMENT OF LEGAL THEORY REGARDING ECONOMIC LOSS

Courts have decided construction dispute cases involving economic loss by looking to the law of products liability.[5] In the field of products liability at common law, privity was necessary in order to recover in tort.[6] Courts devised this concept because they thought that no duty to protect the purchaser

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[1] *See, e.g.,* Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L. Rev. 917, 918 (1966).

[2] Moorman Mfg. Co. v. National Tank Co*.,* 435 N.E.2d 443, 450 (Ill. 1982).

[3] Design professionals include architects and engineers. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 990 (Wash. 1994). Although "architect" is more often used throughout this article, "engineer" could be used interchangeably.

[4] G. William Quatman, *Liability of Architects and Engineers to Third Parties*, in DESIGN PROFESSIONAL'S HANDBOOK OF BUSINESS AND LAW 561, 567 (Robert F. Cushman & James C. Dobbs eds., 1991); Marc M. Schneier, Annotation, *Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor*, 61 A.L.R. 6TH 445 (2011). Twenty years ago I first waded into this debate with *Economic Loss in the Construction Context: Should Architects Be Liable for the Commercial Expectations of Contractors?,* 31 VAL. L. REV. 257 (1996), *republished in* 14 LEGAL HANDBOOK FOR ARCHITECTS, ENGINEERS AND CONTRACTORS 71 (Albert Dib ed., 1998). In the years since, commentators have continued to discuss various rationales for application of the doctrine. *See, e.g.,* Carl J. Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services,* 84 NEB. L. REV. 162 (2005); Anthony L. Meagher and Michael P. O'Day, *Who is Going to Pay for My Impact? A Contractor's Ability to Sue Third Parties for Purely Economic Loss*, REAL ESTATE FINANCE JOURNAL, Summer 2005, at 33; Robert M. Stonestreet, *Replacing a Solid Wall with a Chain-Link Fence: Special Relationship Analysis for Tort Recovery of Purely Economic Loss,* 105 W. VA. L. REV. 213 (2002); Mark A. Olthoff, *Insurance Law Annual: If You Don't Know Where You're Going, You'll End Up Somewhere Else: Applicability of Comparative Fault Principles in Purely Economic Loss Cases,* 49 DRAKE L. REV. 589 (2001). The APPENDIX to this article provides a survey of case law on this subject throughout the 50 states.

[5] "[Tlhere is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure. . . ." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 85, at 517 (2d ed. 1955).

[6] Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Ex. 1842). In *Winterbottom,* an injured coachman was denied recovery against the supplier of a defective wheel. *Id.* at 406. The case is commonly known as the genesis of the requirement of privity as the sine qua non of duty in negligence cases. *See* Williams & Sons Erectors v. South Carolina Steel Corp., 983 F.2d 1176, 1181 (2d Cir. 1993).

existed unless the seller warranted the product purchased.[7] Courts later abandoned the requirement of privity[8] in cases of personal injury[9] and property damage.[10] Courts therefore drew a distinction between interests in tort and those in contract. In the former, the seller was held strictly liable.[11] In the latter, the seller could only be liable if in privity with the ultimate purchaser.[12] From this development grew a defense to strict liability actions called the economic loss doctrine.[13] If the losses suffered by the purchaser were solely economic in nature, as opposed to personal injury or property damage,[14] privity of contract needed to exist in order to recover.[15] No cause of action existed for pure economic losses in tort.[16] Today, some courts that have adopted the economic loss doctrine hold that privity of contract is necessary to maintain an action in tort.[17] Many jurisdictions, however, simply hold that, in cases of pure economic loss, the contract will define the remedy.[18] If no privity exists, no recovery for economic loss will lie.

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[7] *Winterbottom,* 152 Eng. Rep. at 405.

[8] The swiftness with which the requirement of privity was abandoned in the early part of the twentieth century led Justice Cardozo to remark "[t]he assault upon the citadel of privity is proceeding in these days apace." Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931).

[9] MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); William L. Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791, 793 (1966).

[10] "There is no sensible reason for distinguishing between the two kinds of damage." William L. Prosser, *The Assault upon the Citadel,* 69 YALE L.J. 1099, 1143 (1960). The defense of "privity" is not permitted in suits for personal injury, whether founded upon a claim of negligence or upon a claim of strict liability. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

[11] *MacPherson*, 111 N.E. at 1053; *Quatman, supra* note 4, at 565.

[12] David Hilton Wise, *Economic Loss Rule,* CONSTRUCTION BRIEFINGS, June 1995, at 1, 3-4.

[13] Referred to as the *Moorman* rule in Illinois. Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443 (Ill. 1982); *see generally* Mark C. Friedlander, *The Impact of Moorman and its Progeny on Construction Litigation*, 77 ILL. B.J. 654 (1989). *See also* ROBERT F. CUSHMAN & G. CHRISTIAN HEDEMANN, ARCHITECT AND ENGINEER LIABILITY: CLAIMS AGAINST DESIGN PROFESSIONALS, 148-49 (2d ed. 1995).

[14] Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1245 (Fla. 1993), *overruled by* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013), in which the court recognized that the economic loss rule prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any other property other than itself.

[15] *Moorman,* 435 N.E.2d at 453.

[16] *Id.*

[17] Ward v. Ernst & Young, 435 S.E.2d 628, 634 (Va. 1993). *See also* Gilliland v. Elmwood Properties, 391 S.E.2d 577, 580 (S.C. 1990).

[18] *Moorman,* 435 N.E.2d at 453.

Agreement that the economic loss doctrine should bar tort recovery in products liability cases is by no means universal, however. Two cases, decided in the same year by different state courts, reflect these opposing views. In *Santor v. A & M Karagheusian, Inc.,*[19] the New Jersey Supreme Court extended tort liability beyond personal injury and property damage to include economic losses.[20] This view was rejected by the California Supreme Court in *Seely v. White Motor Co.*,[21] which held that only where a contract or express warranty existed between the parties would economic losses be recoverable.[22] The United States Supreme Court endorsed Judge Roger Traynor's opinion in *Seely* with regard to admiralty jurisdiction when it reasoned that if liability was opened to a potentially indeterminate class of third parties for diminished commercial expectations, "contract law would drown in a sea of tort."[23] The Supreme Court's ruling notwithstanding, tort recovery is allowed in many jurisdictions for pure economic loss against professionals.[24]

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[19] 207 A.2d 305 (N.J. 1965), *overruled by* Alloway v. General Marine Industries, L.P., 695 A.2d 264 (N.J. 1997).

[20] *Id.* at 312. In *Santor*, the plaintiff brought an action alleging breach of implied warranty of merchantability. *Id.* at 307. The carpeting which the plaintiff had ordered from the defendant's dealer began to unravel soon after being installed. *Id.* The carpeting was marketed as Grade #1 by the manufacturer. *Id.* The court allowed recovery by the plaintiff from the manufacturer, even though the plaintiff had no privity with that manufacturer, only the dealer. *Id.* at 314.

[21] 403 P.2d 145, 151 (Cal. 1965). In *Seely,* a truck driver sued the truck manufacturer, with whom he had no privity, for economic losses resulting from an accident caused by the defective brakes of the truck. *Id.* at 147. The court allowed the suit because of an express warranty by the manufacturer to the plaintiff. *Id.* at 148. The express warranty to the plaintiff read: "The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof. . . ." *Id.* Although a cause of action for breach of warranty was allowed in that case despite lack of privity, damages in tort were denied. *Id.* The court in *Seely* also attempted to distinguish the facts of its case from *Santor. Id.* at 151. Had the carpet in *Santor* been sold "as is" instead of "Grade #1," the court in *Seely* posited that no basis of recovery would have existed. *Id.*

[22] *Id.* at 148.

[23] East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986) (citation omitted). For examples of how courts have placed limits upon the number of potential third party claimants against design professionals, see Local Joint Executive Bd. of Las Vegas v. Stern, 651 P.2d 637 (Nev. 1982); Craig v. Everett M. Brooks Co., 222 N.E.2d 752 (Mass. 1967). In *Las Vegas*, employees of a hotel that burned down sued the architects of the hotel to recover lost wages and benefits as a result of the fire. *Las Vegas,* 651 P.2d at 637-38. The court denied recovery against the architect on theories of negligence and strict liability because of the lack of privity. *Id.* at 638.

In *Craig,* a contractor was allowed to sue a consulting engineer with whom it had no privity for negligence. *Craig,* 222 N.E.2d at 755. The engineer, pursuant to its contract with the developer, staked out areas on the property so that the contractor would have guideposts in constructing a road on the property. *Id.* at 753. The stakes were placed in incorrect locations, necessitating the rebuilding of the road on another portion of the site. *Id.* The court stated that because the user of the information was known to the engineer at the time he supplied it, liability would not be unlimited. *Id.* at 754-55. *See also* William L. Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 248-50 (1966).

[24] These include claims of malpractice against accountants, health care professionals, attorneys, and design professionals. In the absence of privity of contract between two disputing parties, the general rule is that "there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 92, at 657 (5th ed. 1984). *See generally* Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 537

## II. APPLICATION OF LEGAL THEORY TO THE CONSTRUCTION INDUSTRY

Under its contract with an owner, an architect is held to a professional standard of care in completing the contract documents and observing the construction of the project.[25] This standard, made explicit in the owner/architect agreement,[26] is a tort standard. The architect contracts to use that degree of skill and care that a reasonably prudent architect would use under the same or similar circumstances.[27] When an architect breaches this standard of care and personal injury or property damage results, courts readily find liability.[28] When plaintiffs suffer solely economic loss because of a breach of this standard, the owner usually sues the architect, whose remedy for such loss is provided for by the owner-architect agreement.[29] In some cases, though, a contractor suffers economic losses because of the architect's negligence.[30] How far courts should go in imposing liability on the architect for damages caused to a contractor is a matter of difficulty because the contractor and the architect are typically not in privity with one another.[31]

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N.E.2d 624 (Ohio 1989); Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984); Local Joint Executive Bd. of Las Vegas v. Stem, 651 P.2d 637 (Nev. 1982). However, this view is not held by many courts when architects are involved. *See, e.g.,* Milton J. Womack, Inc. v. State House of Representatives, 509 So. 2d 62 (La. Ct. App. 1987); Owen v. Dodd, 431 F. Supp. 1239 (N.D. Miss. 1977); Mayer of Columbus v. Clark-Dietz & Assocs.-Eng'rs, Inc., 550 F. Supp. 610 (N.D. Miss. 1982); Davidson & Jones, Inc. v. County of New Hanover, 255 S.E.2d 580 (N.C. Ct. App. 1979); Berkel & Co. Contractors v. Providence Hosp., 454 So. 2d 496 (Ala. 1984). Thus, allowing claims against architects by third parties for economic loss is an anomaly with respect to claims against other types of professionals.

[25] Quatman, *supra* note 4, at 567.

[26] B141 Standard Form of Agreement Between Owner and Architect (14th ed. 1987) [hereinafter B141]. *See also* B101 Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services (2007). These agreements, as well as the A201 General Conditions of the Contract for Construction (14th ed. 1987) [hereinafter A201] are published by the American Institute of Architects (AIA). *See* AMERICAN INSTITUTE OF ARCHITECTS, THE HANDBOOK OF ARCHITECTURAL PRACTICE (6th ed. 1951).

[27] *See* American Fidelity Fire Ins. Co. v. Pavia-Byrne Eng'g Corp., 393 So. 2d 830, 838 (La. Ct. App. 1981) (holding that "the duty owed by those practicing learned professions to their clients, patients or retainers, is that of exercising that degree of professional care and skill customarily employed by others in the same profession in the same general area.").

[28] Quatman, *supra* note 4, at 567.

[29] B141, *supra* note 26, at Art. 7.

[30] Quatman, *supra* note 4, at 567. This article is concerned solely with negligence on the part of the architect, not with intentional torts.

[31] Two commentators describe the contrast between ignoring the contract provisions altogether and giving them controlling effect. *Compare* Keith L. Davidson, The Liability of Architects, TRIAL, June 1977, at 20, 22-23 and Bibb Allen, *Liabilities of Architects and Engineers to Third Parties,* 22 ARK. L. REV. 454 (1968) (surveying personal injury and property damage liability for architects arising from the preparation of plans and specifications as well as from construction supervision). Some propose an application of various factors, including the applicable contract provisions. JAMES ACRET, ARCHITECTS AND ENGINEERS: THEIR PROFESSIONAL RESPONSIBILITIES §§ 10.2, 10.3 (1977); Anthony F. Earley, Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME L. REV. (1977)

## III. ECONOMIC LOSS DOCTRINE

### *A. Various Conceptions of the Economic Loss Doctrine*

The jurisdictions which recognize the economic loss doctrine as a defense to third party actions can be divided into three groups. The first conception states that the only way to recover in tort for economic losses is if privity of contract is present.[32] This formulation has been the most criticized in that it contradicts the very reason for contracting in the first place, which is to define the limits of liability upon breach.[33] If a party is able to recover in tort what that party was unable to negotiate at the bargaining table, the terms of the contract become meaningless.[34] The second, championed most notably by Illinois courts, states that all economic losses are to be defined by contract.[35] No cause of action, therefore, exists in tort for economic losses.

The third conception begins with the notion that privity is neither an element of the economic loss doctrine[36] nor an exception to its enforcement.[37] Thus, instead of a contract analysis, courts should

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(favoring a balancing approach of factors relating to the protection and expectations of parties involved to determine whether a duty in tort should exist). In Note, *Architectural Malpractice: A Contract-Based Approach,* 92 HARV. L. REV. 1075, 1084-86, the cause of action for negligence is advocated in two situations: (1) where the architect breaches the duty of care imposed upon him in his performance of a provision contained in the architect's contract with the owner, when it is reasonably foreseeable that the contractor would rely upon that undertaking by the architect; and (2) where the architect, by its conduct, assumes a responsibility, wherein it is reasonably foreseeable that the contractor would rely upon the non-negligent performance of that undertaking by the architect. *Id.*

[32] Ward v. Ernst & Young, 435 S.E.2d 628, 634 (Va. 1993). *See also* Gilliland v. Elmwood Properties, 391 S.E.2d 577 (S.C. 1990). In *Gilliland,* an owner was allowed to sue an architect both for breach of contract and tort for recovery of economic losses. *Id.* at 580. The architect had allegedly made representations about its ability to design a project that would fit within the client's budgetary constraints as well as qualify the project for certain governmental approval and tax exempt bond funding. *Id.* at 578-79. These representations induced the client to enter into a contract with the architect. *Id.* at 579. The project later failed. *Id.* The court held that the architect owed a duty in tort independent of that in contract. *Id.* at 580. The court reasoned that the common law requirements of a negligence action had been met where misrepresented facts induced the owner to enter a contract. *Id.*

[33] Danforth v. Acorn Structures, Inc., 608 A.2d 1194, 1200 (Del. 1992); Miller v. United States Steel Corp., 902 F.2d 573, 574-75 (7th Cir. 1990).

[34] Wise, *supra* note 12, at 3.

[35] Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 453 (Ill. 1982). *See also* Steven B. Lesser, *Economic Loss Doctrine and Its Impact upon Construction Claims*, CONSTRUCTION LAW., Aug. 1994, at 21; Timothy J. Muldowney, *Architects, Engineers and Construction Litigation*, 60 DEF. COUNS. J. 356 (1993); Mary Yuen, Note, *Absent Privity of Contract, Contractors May Not Recover Economic Damages Caused By an Architect's Negligence*, 60 U. CIN. L. REV. 565 (1991); Michael D. Tarullo, *The Good, the Bad, and Economic Loss Liability of a Design Professional,* CONSTRUCTION LAW., Apr. 1991, at 10.

[36] *Miller*, 902 F.2d at 575. In *Miller*, the economic loss doctrine was applied to deny recovery of economic losses in tort. *Id.* The plaintiff had relied on oral representations of the defendant that Cor-Ten steel would be appropriate on his own building. *Id.* at 574. These representations proved incorrect and the plaintiff had to incur significant

use a tort analysis in determining whether or not a duty exists to protect third parties from economic loss.[38] The nonexistence of a duty results in the application of the economic loss doctrine as a *per se* rule to bar recovery. The existence of a duty results in tort liability under negligence or negligent misrepresentation. The states employing this analysis have used different formulations to determine whether such harm to the contractor is foreseeable to the architect in order to impute a duty.[39]

### 1. Privity Necessary to Sustain a Cause of Action in Tort

Some courts have held that privity of contract is an essential element of a duty in tort.[40] This requirement is necessary because the standard of quality to which the parties aspire must be defined by that which the parties have agreed upon.[41] On its face, this notion seems logical. If no privity exists, plaintiffs cannot recover economic loss damages. However, a closer examination reveals the weakness of this conception of the economic loss doctrine. Conceivably, courts would allow a party that suffers economic loss caused by another with whom that party is in privity to sue for the loss not only in contract, but also in tort.[42] This fact is significant because the measure of tort recovery is normally more liberal than that in contract.[43] Instead of confining recovery to those damages agreed upon under the contract, plaintiffs could ignore the contract, and the court would allow a tort suit.[44] This position is

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expense in rectifying the situation. Id. The court stated that tort law was a "superfluous and inapt tool for resolving purely commercial disputes." *Id.* This theory was not appropriate because the plaintiff could have asked the defendant for an express warranty, but did not. *Id.* at 575. He should therefore "not be permitted to opt out of commercial law by refusing to avail himself of the opportunities which that law gives him." *Id.*

[37] *Danforth,* 608 A.2d at 1200-01.

[38] *Id.* at 1200.

[39] *See* Lutz Eng'g Co. v. Industrial Louvers, Inc., 585 A.2d 631 (R.I. 1991), in which a subcontractor was prevented from suing an architect for negligence in approving shop drawings for a number of louvered panels in an industrial building. *Id.* at 635. The original specifications did not mention air-leakage requirements for the louvers, merely that they be similar to a brand named in the specs or an "approved equal." *Id.* at 633-34. The shop drawings were rejected once for failure to conform to this condition, but were approved later without change. *Id.* at 634. The installed louvers began to leak when rain was pushed into the building by wind. *Id.* The contractor held the sub responsible for bringing the louvers into conformance with the air-leakage requirements, and the sub sued the architect to recoup its loss. *Id.* The court held that the architect owed no duty to the sub and was thus not liable to the sub for negligence. *Id.* at 635.

[40] *See, e.g.,* Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1195 (4th Cir. 1985); Ward v. Ernst & Young, 435 S.E.2d 628, 634 (Va. 1993); Gilliland v. Elmwood Properties, 391 S.E.2d 577, 580 (S.C. 1990).

[41] *Ward,* 435 S.E.2d at 631; Blake Constr. Co. v. Alley, 353 S.E.2d 724, 726 (Va. 1987).

[42] Wise, *supra* note 12, at 3.

[43] This fact is especially true when one considers that in some owner-contractor agreements, a no-damage-for-delay clause is present.

[44] It should be noted, however, that such recovery has been denied in the past in Virginia. *See* Senaenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55, 58 (Va. 1988).

antithetical to the notion that a contract is a means by which a party can limit its liability to another in the event of a breach.[45]

**2. All Recoverable Damages Defined by Contract**

In this conception, economic losses are thought of as mere deterioration or loss of the bargain.[46] The quality standards to which the building and contract documents are held by the parties must be in reference to what was agreed upon in contract.[47] Duty is therefore imputed solely by contract.[48] But, under this conception, recovery of economic loss when privity is present is confined to that measure of damages defined in the contract. [49] A cause of action in tort is thus disallowed for economic loss, privity or not.

Although its genesis lay in California, this conception of the economic loss doctrine has developed most notably in Illinois to include the construction context. The first case to adopt the *Seely* rationale in Illinois was *Moorman Manufacturing Co. v. National Tank Co.*[50] This decision made clear the fundamental difference between tort and contract, the latter being the only method by which to recover economic losses.[51] The *Moorman* rule, as it became known, was later applied to a subsequent

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[45] Wise, *supra* note 12, at 3.

[46] Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 450 (Ill. 1982).

[47] Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982) (citation omitted).

[48] *Id.* at 326.

[49] *See, e.g.,* Matthew S. Steffey, *Negligence, Contract, and Architects' Liability for Economic Loss*, 82 KY. L.J. 659 (1994) (positing that contractors should not be able to sue architects in tort because they have a contract remedy with the owner). *Cf.* Jeff Sobel, Comment, *Architect Tort Liability in Preparation of Plans and Specifications,* 55 CAL. L. REV. 1361 (1967) (arguing that tort law should be extended in order to hold architects strictly liable for the economic losses of contractors).

[50] 435 N.E.2d 443 (Ill. 1982). In *Moorman,* a plaintiff who suffered damages when a bolted steel grain storage tank he purchased from defendant developed a crack could not recover in tort. *Id.* at 453. The only damages recoverable were those in contract. *Id.* at 450. Allowing a cause of action in that case would have undermined state law:

> [T]he law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. . . . These rules determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver. . . . Thus, adopting a strict liability in tort for economic loss would effectively eviscerate section 2-316 of the UCC.

*Id.* at 447. The court also felt that allowing such recovery would have blurred the line between contract and tort law:

> [Denying tort recovery for economic losses] comports with the notion that the essence of a product liability tort case is not that the plaintiff failed to receive the quality of the product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property. On the other hand, contract law, which protects expectation interests, provides the proper standard when a qualitative defect is involved, *i.e.,* when a product is unfit for its intended use.

*Id.* at 448.

[51] *Id.* at 453.

purchaser of a home in *Redarowicz v. Ohlendorf*.[52] The court denied recovery of economic loss by the remote purchaser from the builder under a tort theory.[53] Other contractual remedies were available which would define the builder's liability.[54]

After *Moorman* and *Redarowicz*, a dispute arose among Illinois circuits about how to apply the Moorman rule to architects,[55] because *Moorman* would have allowed recovery in product liability cases where negligent misrepresentation was proved. [56] The Illinois Supreme Court put this issue to rest when it decided *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*[57] The court rejected the argument that liability should lie based on the fact that *Moorman* made an exception for negligent misrepresentation because the information provided in the contract documents was merely incidental.[58] The end and aim of the transaction was the physical building itself, and buildings are not information within the meaning of the Restatement.[59] The court also rejected the argument that the application of *Moorman* to the professional context would upset established principles of liability for malpractice in other professions,[60] simply because no duty existed even under negligence theory to protect the commercial expectations of third parties.[61] Thus, duty in negligence does not exist in this conception of the rule.

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[52] 441 N.E.2d 324 (Ill. 1982). In *Redarowzcz,* the court extended the Moorman rule and denied recovery of economic losses of a subsequent purchaser against a builder. *Id.* at 331.

[53] *Id.* at 327.

[54] *Id.* at 331.

[55] *Compare* Rosos Litho Supply Corp. v. Hansen, 462 N.E.2d 566 (Ill. App. Ct. 1984) (allowing recovery against architect), with Fence Rail Dev. Corp. v. Nelson & Assocs., 528 N.E.2d 344 (Ill. App. Ct. 1984) (denying recovery).

[56] Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452 (Ill. 1982).

[57] 555 N.E.2d 346 (Ill. 1990). In *2314 Lincoln Park W.,* the court applied the *Moorman* rule to architects. *Id.* at 353. Condo owners (who had no privity with the architect) could not recover economic loss from an architect. *Id.* The court felt that the owners could have their commercial expectations met through their contract with the developer: "Contracting parties are free to bargain over the terms of their warranties." *Id.* at 348 (citing *Moorman,* 435 N.E.2d at 447-48).

[58] *Id.* at 351 (citation omitted).

[59] *Id.*

[60] *Id.* at 353.

[61] *Id.* at 351-53. *See also* Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206 (Ohio 1990), in which the plaintiff, a flooring subcontractor, installed vinyl flooring for the owner, a hospital, in a manner prescribed by instructions in the plans and specifications prepared by the defendant architect. *Id.* at 206-07. After installation, bubbles began to appear and the plaintiff had to replace the flooring at a significant cost. *Id.* The allegation was that the architect negligently specified the flooring and sealant which caused the plaintiffs damages. Id. Recovery was denied on the theory that such recovery for economic losses is strictly a subject for contract negotiation and assignment. *Id.* at 212.

The rationale for the rule limiting economic loss to contract recovery is that the owner, who has a contract with the contractor, is better equipped to assess the risks of doing business together on a project than an architect who has no such contract with the contractor.[62] The owner and contractor can decide on many different ways in which to handle claims for economic loss.[63] The owner's insurer can, therefore, adequately gauge the risks involved by looking at the contract between the parties and affixing the owner's premiums accordingly.[64] Conversely, insurers of architects have no such luxury.[65]

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[62] The economic loss rule was developed to prevent disproportionate liability and allow parties to allocate risk by contract. Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase,* 66 WASH. L. REV. 937, 940-41 (1991). *See also* Floor Craft Floor Covering, 560 N.E.2d at 211. The court stated, in relevant part: The controlling policy consideration underlying tort law is the safety of persons and property-the protection of persons and property from losses resulting from injury.

> The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on the one hand and economic losses on the other.

*Id.* (internal citations omitted).

[63] These methods include a "no-damage-for-delay" clause for breach. Steffey, *supra* note 49, at 702. *See also* Williams & Sons Erectors, Inc. v. South Carolina Steel Corp. 983 F.2d 1176 (2d Cir. 1993). In *Williams*, the contractor sued the architect for negligent misrepresentation of plans and specifications which caused delay. *Id.* at 1179-80. The contractor, pursuant to its contract with the owner, had a "no-damages-for-delay" clause, providing:

> No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner for any delays or hindrances from any cause whatsoever; provided that the Owner, in the Owner's discretion, may compensate the Contractor for any said delays by extending the time for completion of the work as specified in the Contract.

*Id.* Thus, the contractor was given additional time to complete the project such that the contractor would not be in breach by completing the project later than the date contractor for, but the contract would not compensate the contractor monetarily for the delay. So, the contractor sued the architect in tort for damages. The court denied recovery because the relationship between the architect and the contractor did not "approach privity." *Id.* at 1182. The pre-bid meeting, at which the architect answered questions from the prospective bidders including the plaintiff, was not enough to establish the required relationship. *Id.* at 1183.

*See also* Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206, 212 (Ohio 1990). The contractor may try to avoid a "no-damages-for-delay" clause in its contract with the owner by suing the architect in tort, thereby avoiding the contract terms in order to recover economic losses. *Id. See also* A201, *supra* note 26, at ¶¶ 2.3.5, 2.3.16.

[64] Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986 (Wash. 1994). In *Berschauer*, a contractor was denied recovery against an architect with whom it had no privity. *Id.* at 993. The court felt that it "must exercise caution . . . that [it does] not unduly upset the law upon which expectations are built and business is conducted." *Id.* at 991. The court also felt that:

> If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

*Id.* at 992. In light of these concerns, the court held that contract principles should override tort principles and prevent third parties from suing in tort for economic losses. *Id.* at 993.

[65] *See* Lieder, *supra* note 62, at 940.

Without a contract telling insurers the limit of the architect's liability, a considerable ambiguity exists.[66] In order to protect itself from the ill effects of such an ambiguity, insurers would have to charge architects exorbitant amounts in premiums.[67] As a result, many architects may be forced out of business.[68] Thus, the very system many owners would like to choose because of its unique advantages would no longer be a viable option to them.

Another rationale for restricting recovery of economic loss of contractors to those defined by their contracts with the owners focuses on the contractors' motivations for suing an architect for such losses in the first place. Many times the contract between the owner and architect contains a "no-damages-for-delay" clause.[69] Recovery for the contractor of economic loss under the contract would therefore be barred.[70] In order to avoid this result, the contractor would seek to sue the architect in tort.[71] The rationale behind many courts' rejection of the Virginia model is appropriate here because a contractor should not be able to recover in tort that which it failed to bargain for in contract.

### 3. All Recoverable Damages Defined by a Duty in Tort

In this conception, the court engages in a preliminary analysis to determine on a case-by-case basis whether or not to impute a duty on the part of an architect to protect third parties from economic

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[66] *Id. See also* Wise, *supra* note 12, at 4; Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993), *overruled by* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

[67] Casa Clara, 620 So. 2d at 1247, *overruled by* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

[68] *See also* Wise, *supra* note 12, at 4.

[69] Steffey, *supra* note 49, at 702. *See also* Williams & Sons Erectors, Inc. v. South Carolina Steel Corp., 983 F.2d 1176 (2d Cir. 1993). In *Williams,* the contractor sued the architect for negligent misrepresentation of plans and specifications which caused delay. *Id.* at 1179-80. The contractor, pursuant to its contract with the owner, had a "no-damages-for-delay" clause, providing:

> No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner for any delays or hindrances from any cause whatsoever; provided that the Owner, in the Owner's discretion, may compensate the Contractor for any said delays by extending the time for completion of the work as specified in the Contract.

*Id.* Thus, the contractor was given additional time to complete the project such that the contractor would not be in breach by completing the project later than the date contracted for, but the contract would not compensate the contractor monetarily for the delay. The contractor thus sued the architect in tort to be compensated. The court denied recovery because the relationship between the architect and the contractor did not "approach privity." *Id.* at 1182. The pre-bid meeting, at which the architect answered questions from prospective bidders including the plaintiff, was not enough to establish the required relationship. *Id.* at 1183. *See also* Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206, 212 (Ohio 1990). The contractor may try to avoid a "no-damages-for-delay" clause in its contract with the owner by suing the architect in tort, thereby avoiding the contract terms in order to recover economic losses. *Id. See also* A201, *supra* note 26, at ¶¶ 2.3.5, 2.3.16.

[70] *Floor Craft,* 560 N.E.2d at 212.

[71] *Id.*

loss.[72] For instance, Florida has denied recovery even when foreseeability existed.[73] Whether a duty will be imputed in that state depends upon whether the court thinks that, as a matter of policy, the public as a whole should bear the brunt of the economic loss sustained by those who neglect to contract for such losses in the first place.[74] The economic loss doctrine has been enforced as a per se rule to deny recovery when other statutory and common law remedies are available to the plaintiff,[75] and when the supervising architect has no direct control over the work.[76] Mere foreseeability, then, will not always

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[72] *See, e.g.,* Wisconsin law, which adheres to the view that facts and circumstances will determine whether a duty will be imputed or not. C*ompare* A.E. Inv. Corp. v. Link Builders, Inc., 214 N.W.2d 764 (Wis. 1974) (finding liability), *with* Vonasek v. Hirsch & Stevens, Inc., 221 N.W.2d 815 (Wis. 1974) (denying liability).

[73] City of Tampa v. Thornton-Tomasetti, 646 So. 2d 279, 282 (Fla. Dist. Ct. App. 1994).

[74] Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1353 (Fla. Dist. Ct. App. 1992). In *Sandarac,* a condominium association could not recover economic losses from an architect sustained through allegedly negligent preparation of plans and specifications because no privity existed. *Id.* at 1352. "Historically, the judiciary has limited the protected interests in negligence to interests concerning the safety of one's person and property. . . . [These interests are ones that people usually have no opportunity to protect in private contracts." *Id.* at 1352-53. For another argument of public policy favoring the application of the economic loss doctrine consult Sidney R. Barret, Jr., *A Critical Analysis,* 40 S.C. L. REV. 891,933 (1989) (arguing that when only economic harm is involved, the question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies."). *See also* City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279 (Fla. Dist. Ct. App. 1994). In *Tampa,* an owner could not sue an engineer who was a subcontractor of the architect. *Id.* at 283. The court reasoned: "To expose a consultant not in privity with the owner to the same liability as the professional in privity would diminish the willingness of persons or entities not a part of the central bargain to provide services at the risk of having vicariously to participate in unanticipated losses." *Id.*

[75] Sandarac, 609 So. 2d at 1352. In Sandarac, several reasons were advanced for the endorsement of the economic loss doctrine: (1) it is largely a restatement of the traditional common law rule that negligence law is intended primarily to protect interests concerning the safety of one's person and property; (2) it is a limitation on recovery in negligence when the parties have elected to an alternative remedy under contract law; and (3) it bars an otherwise viable negligence cause of action because the damages are only economic. Id. The court stated that:

> [Not following the economic loss doctrine] creates a new relationship of duty and a corresponding standard of care to protect a purely economic interest in the absence of bodily injury or property damage . . . . [The judiciary] should be aware that it is not merely creating an exception to an existing common law rule of damages. It should be convinced that the problem justifies a judicial allocation of the relevant risks among the members of society, and that an adequate remedy cannot realistically exist through private contracts and statutory remedies.

*Id.* at 1353. An earlier case, A.R. Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973), was thus limited to situations in which an architect has direct supervision over the plaintiff so that the plaintiff is a known, intended beneficiary of the architect's contract at the time it is performed. *Id.* at 1354. Here, the condominium association could not base its theory of recovery on negligence because: (1) a common law implied warranty for homeowners was available; (2) statutory warranties were available; and (3) an express third party beneficiary in the contract was available. *Id.* at 1352.

[76] Southland Constr., Inc. v. Richeson Corp., 642 So. 2d 5, 8 (Fla. Dist. Ct. App. 1994). *Cf.* Spancrete, Inc. v. Ronald E. Frazier & Assocs., P.A., 630 So. 2d 1197 (Fla. Dist. Ct. App. 1994). In *Spancrete*, a subcontractor was prevented from suing the architect for economic losses. Id. at 1198. Moyer was limited to its facts, because the court in that case made much of the fact that the architect had the authority to stop the work. *Id.* Under the A201 that power is vested solely in the owner. *Id.* The power to supervise the contractor is expressly denied. *Id.* The architect merely retains administrative powers as the agent of the owner (*i.e.* the power to reject the work). *Id.* "Supervising architect" thus did not apply here. *Id.*

lead to the imputation of a duty on the part of the architect to protect the commercial expectations of contractors.[77] Similarly, New York has denied recovery when the relationship between the parties has not "approached" privity.[78] However, this factor is based on foreseeability and has sometimes been found in the construction context allowing a cause of action.[79]

### *B. Instances in Which the Economic Loss Doctrine Does Not Apply*

One conception of the economic loss doctrine states that, when damages other than property damage or personal injury are suffered, contract will define the remedy, if any.[80] Thus, only personal injury and property damage are compensable in tort.[81] Plaintiffs in jurisdictions that enforce the economic loss doctrine, rather than attacking the doctrine directly, often elect to argue that their losses

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[77] *Spancrete,* 630 So. 2d at 1198.

[78] Ultramares Corp. v. Touche, 174 N.E. 441, 446 (N.Y. 1931). *See also* R.H. Macy & Co. v. Williams Tile & Terrazzo Co., 585 F. Supp. 175 (N.D. Ga. 1984). In *R.H. Macy,* the architect specified ceramic tile, which, after installed, was discovered to be defective. *Id.* at 175-77. The supplier, after being sued by the owner (with whom the supplier had a contract), cross-claimed against the architect for negligence in failing to have the tile tested. *Id.* at 176. The court held that there was no duty on the part of the architect because the relationship did not "approach privity." *Id.* at 180. The architect's determination of the suitability of the tile was based neither on a contract nor a commitment to the plaintiff, but merely on the plaintiff's assumptions regarding the architect's responsibilities. *Id.* at 179.

[79] Strategem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535 (S.D.N.Y. 1994). In *Strategem,* a construction manager, as a representative of the owner, was allowed to sue the architect for contribution/indemnity in its defense of a suit against it by the owner for economic losses because the relationship between them had approached privity. *Id.* at 548. An owner corporation had hired a developer to act as its representative in building two office buildings in Manhattan. *Id.* at 538. The owner then hired an architect for architectural services. *Id.* The agreement between the owner and the architect stated that, with respect to any negligence caused by it, the architect would indemnify the owner and the owner's representative. *Id.* The owner became dissatisfied with its representative and terminated their joint venture, and the representative commenced an action to recoup funds owed it under the contract. *Id.* at 538-39. The owner counterclaimed against the representative, charging it with various tort and contract theories. *Id.* at 539. The representative then filed a third party action against the architect for indemnification. *Id.* at 539-40. The owner's contention was that the representative failed to adequately supervise the construction project in which not enough rentable square footage had been provided for in the plans. Id. The representative contended that the architect resisted its efforts to make necessary changes, and that the architect made the incorrect calculations. *Id.* at 540. The architect contended that it had no duty to the representative, so no recovery could be had in tort. Id. The court held that the architect owed a duty to the representative because their relationship approached privity. *Id.* at 548. The court based its conclusion on the specific facts of the case: (1) the architect and the representative ran weekly meetings and the architect knew that the representative relied on the architect's figures and used them in calculations presented to the owner; (2) the owner/architect agreement specified that the owner's representative was a third party beneficiary; and (3) the relationship approached privity. *Id.* For the factors which New York courts look to in order to determine whether a relationship approaches privity, *see* Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 118 (N.Y. 1985).

[80] Moorman Mfg. Co. v. National tank Co., 435 N.E.2d 443, 453 (Ill. 1982).

[81] *Id.* at 450. *See also* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION Process 284-96 (5th ed. 1994).

fit into one or both of the categories of exceptions to the doctrine which are compensable in tort.[82] Courts have developed limitations on what is compensable under these two exceptions. First, courts have been reluctant to extend liability to include negligence resulting in merely the threat to personal safety.[83] Second, as to property damage, the defective building must damage "other property" in order to be compensable.[84] When a building merely "injures . . . itself," no recovery will lie.[85]

**1. "Physical Harm"**

Justice Roger Traynor, writing for the California Supreme Court in *Seely v. White Motor Co.*,[86] dealt with the issue of physical harm as being compensable, and concluded that the only actionable conduct is that which creates an unreasonable risk of harm.[87] This language was repeated throughout the country as the rationale behind denying compensation for economic loss when "unreasonable risks of harm" did not occur.[88] Most courts began making a distinction between "sudden, calamitous" events which created an immediate threat to personal safety and those which occurred over time due to "deterioration, internal breakdown, or nonaccidental use."[89] Those in the former category were thought

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[82] Cases in which plaintiffs alleged personal injury (*i.e.* the "threat" of personal injury) or property damage include Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55, 57 (Va. 1988).

[83] Seely v. White Motor Co., 403 P.2d 145, 151-52 (Cal. 1965).

[84] Casa Clara, 620 So. 2d at 1247, *overruled by* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

[85] East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 871 (1986).

[86] 403 P.2d 145, 151 (Cal. 1965).

[87] *Id.* Justice Traynor stated, in relevant part:

> The distinction . . . between tort recovery for physical injuries and warranty recovery for economic loss . . . rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

*Id.* (emphasis supplied).

[88] Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 448-49 (Ill. 1982).

[89] Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977); Moorman, 435 N.E.2d at 449; 2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 352-53 (Ill. 1990).

to be compensable because of the extreme threat to life and limb. [90] Those in the second category were not compensable in tort because such occurrences were properly covered by contract law in the form of warranties.[91]

Compensating for such "sudden occurrences" which cause an immediate threat to personal injury seems logical in light of the concerns expressed by the Indiana Supreme Court in *Barnes v. MacBrown & Co*.:

> If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?[92]

But these concerns did not sway the United States Supreme Court in *East River S.S. Corp. v. Transamerica Delaval*.[93] The Court rejected recovery even when the defect occurred as a result of a sudden, calamitous event.[94]

The Indiana court's concern about the welfare of those threatened by the negligence of architects is well founded.[95] But, under modem tort principles, the only threats which are actionable are

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[90] *See* Russell v. Ford Motor Co., 575 P.2d 1383, 1385-86 (Or. 1978). In *Russell*, the court felt that a distinction should be drawn between disappointed users and endangered users, with only the latter being able to recover in tort. *Id.*

*See also Moorman,* 435 N.E.2d at 448. In *Moorman,* the argument that economic losses should be compensable because it was only by happy accident that personal injury was prevented from occurring (i.e. catching the defective condition before causing personal injury) was rejected. *Id.* at 449-50. Putting persons at risk should be compensable only if an "extreme threat to life and limb" occurred. *Id.* at 449. Thus, to be compensable property damage there must be a "sudden . . . occurrence." *Id.* at 450. Economic losses are those which occur over time due to deterioration, internal breakdown, or non-accidental cause. *Id.* These losses are what warranties were designed to cover *Id.*

*See also 2314 Lincoln Park W.,* 555 N.E.2d at 352. The existence of a duty is dependent upon the type of property damage suffered: (1) if it is damaged over time, then no liability attaches; (2) if it is sudden, then liability attaches. *Id.* at 352-53. Unlike injuries or property damage to others in which a duty arises independent of the contract (based on policy considerations, etc.), there is no duty under negligence or strict liability to prevent a product from injuring itself. *Id.* at 352. Such a concern relates to the quality, rather than to the safety of the structure and thus is a matter better resolved under contract law. *Id.* at 353. The unit owners received express warranties from the developer and so they had a potential source of recovery for their losses. *Id.* at 352.

[91] *Moorman,* 435 N.E.2d at 453.

[92] 342 N.E.2d 619, 621 (Ind. 1976).

[93] 476 U.S. 858, 870 (1986).

[94] *Id.*

[95] Other courts have expressed similar concern about the threat to personal safety. *See, e.g., supra* note 92 and accompanying text.

those constituting assault, the proof of which requires a showing of intent.[96] Thus far no cause of action exists for threats of physical harm produced by negligence without actual damages sustained.[97] Creating such an action would have grave consequences. Under such a cause of action, theoretically, every driver that passed another driver who was drunk would have a cause of action against that drunk driver because, through his negligence, the drunk driver had threatened the safety of the other drivers. The "drowning" metaphor alluded to by the United States Supreme Court in *East River*[98] is therefore worthy of consideration in this context. Thus, rather than claiming threat to personal safety, some plaintiffs elect to plead that their economic losses constitute property damage.

**2. "Property Damage"**

Again, compensable property damage is that which, through negligent design, causes damage to other property besides the building itself. Courts have struggled with the meaning behind phrases like "other property,"[99] and that property which does not "injure itself."[100] In Virginia, *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*,[101] involved damage to a house caused by water leaking from an indoor pool.[102] The pool was in a structure that was separate from the rest of the house.[103] The plaintiff's theory was that because the pool structure was outside the home's foundation, injury to property could be claimed.[104] The plaintiff sought to recover the cost of repairing damage done to the home caused by the pool as well as the cost of repairing the pool so that it would cause no further damage to the home.[105] The court held that the plaintiff contracted for a package, including a pool, and the loss the plaintiff suffered was with part of that package.[106] Thus, only economic losses were suffered and no

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[96] RESTATEMENT (SECOND) OF TORTS § 331 (1979).

[97] *See* Palsgraf v. Long Island R. Co., 162 N.E. 99, 99 (N.Y. 1928) (observing that "negligence in the air . . . will not do." (internal citations omitted)).

[98] 476 U.S. 858, 866 (1986).

[99] *See, e.g.,* Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993), *overruled by* Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399, 407 (Fla. 2013).

[100] East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 867, 871 (1986).

[101] 374 S.E.2d 55 (Va. 1988).

[102] *Id.* at 56.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 57.

[106] *Id.* at 58.

recovery could be had.[107] Even if the pool was unattached and located on some other spot on the property, the result would not change.[108]

Another contractor-plaintiff attempted to rely on how the court in its jurisdiction had defined property interests in the past and argued that such a definition should apply in the economic loss context.[109] Virginia law had characterized lost profits or loss of value as injuries to property interests for purposes of determining the applicable statute of limitations.[110] This definition was rejected when it was used by the plaintiff to describe his losses.[111] A restrictive view was therefore taken as to actions involving mere threats to personal safety as well as property damage. Most plaintiffs who suffer economic loss in jurisdictions which enforce the economic loss doctrine will thus not be able to plead their cases within the narrow exceptions to the rule.

## IV. THIRD PARTY ACTIONS FOR RECOVERY OF ECONOMIC LOSS

Application of the economic loss doctrine is the minority view where the professional liability of architects to contractors is concerned.[112] In the words of one state court, "[t]he economic loss rule is stated with ease but applied with great difficulty."[113] The propensity to allow actions by contractors against architects arises from several factors. First, the plans and specifications are to be used by a

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[107] Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55, 58 (Va. 1988).

[108] *Id.*

[109] Blake Constr. Co. v. Alley, 353 S.E.2d 724, 725-26 (Va. 1987).

[110] *Id.* at 726 n.3.

[111] *Id.* "[The] cases [interpreting the statute] are not controlling, however, as the determinations of the nature of the injuries were made in an entirely different context; the cases did not purport to interpret [the] Code . . . ." *Id.*

[112] Quatman, *supra* note 4, at 561. "At least five jurisdictions recognize the economic loss doctrine as a defense to third party claims against design professionals." *Id.* at 568. However, "most jurisdictions do not distinguish between personal injury or property damage and the risk of economic loss." *Id.* at 572. "The majority . . . [of jurisdictions] hol[d] that when the traditional elements of a negligence or negligent misrepresentation action are satisfied, the design professional may be held liable for economic losses." *Id. See* APPENDIX below, which identifies 31 states (62%) that allow third party recovery against a design professional for economic losses.

[113] Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. Dist. Ct. App. 1992). The Illinois Supreme Court has denied recovery of economic losses in the construction industry by extending the economic loss doctrine of products liability cases. 2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990). However, even Illinois courts have struggled with this transition. 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) (discussing the conflict in lower Illinois courts after *Moorman*). Because this setting includes parties who are known by the architect at the time the architect begins work on the contract documents, courts have not applied the economic loss doctrine very readily as in other areas such as admiralty where the parties likely are not known to each other. *Compare* Rosos Litho Supply Corp. v. Hansen, 462 N.E.2d 566 (Ill. App. Ct. 1984) (allowing recovery in the construction context), *with* East River S.S. Corp v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) (denying recovery in the admiralty context), and Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (denying recovery in the admiralty context).

limited number of users who are well known as such by the architect.[114] These users, namely contractors, rely solely on the plans and specifications in carrying out their contract with the owner.[115] Thus, because the class who could recover in tort is determinate, concerns about contract "drowning in a sea of tort" seem unfounded. Second, because the potential users are foreseeable to the architect, the relationship between the architect and contractor may sometimes be said to "approach privity."[116] Third, modem authority is simply in favor of extending rather than restricting liability.[117]

Liability, then, has been extended to architects to protect the commercial expectations of contractors. Theories based on contract as well as tort have been advanced in finding liability. Contract recovery is based on a third party beneficiary theory.[118] Theories of tort recovery are based on negligence or negligent misrepresentation[119] and involve allegations such as negligent supervision, design errors or omissions, or negligent approval of shop drawings.[120]

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[114] A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 400 (Fla. 1973).

[115] *Id.* at 401-02.

[116] Ultramares Corp. v. Touche, 174 N.E. 441, 446 (N.Y. 1931). This theory was further articulated by criteria set out in Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 118 (N.Y. 1985): (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendant linking it to the party or parties and evincing the defendant's understanding of their reliance. *Id.*

[117] *A.R. Moyer,* 285 So. 2d at 399. "Privity is a theoretical device of the common law that recognizes limitations of liability commensurate with compensation for contractual acceptance of risk. The sharpness of its contours blurs when brought into contact with modem concepts of tort liability." *Id.* Modem authority is moving in the direction of measuring tort liability by the scope of the duty owed, rather than on artificial concepts of privity. 74 AM. JUR. 2D Torts § 52 (1974); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1385 (Del. Super. Ct. 1990).

[118] *Guardian*, 583 A.2d at 1386. This theory allows a prime contractor to recover based on a claim that the contractor was the intended beneficiary of the contract between the architect and owner. *Id.* In Guardian, a third party beneficiary theory was held to be inapplicable. *Id.* at 1387. The court reiterated the majority rule that the only third parties who have legal rights under a third party beneficiary theory are donees and creditors of the promisee. *Id.* at 1386. As between architects and contractors, contractors are neither creditors nor are they the subject of an architect's generosity. *Id.* at 1387. "Using the plans during bid preparation is not tantamount to saying that the contract giving rise to those plans and specs was intended in any legal sense to benefit [the contractor]." *Id.*

[119] *Id.* at 1381. These damages are prohibited under the economic loss doctrine. *Id.* at 1383. Again, this article is concerned with negligence actions only, not with intentional torts. For such an analysis, see *Quatman, supra* note 4, at 588-89.

[120] *Quatman, supra* note 4, at 583-86. Negligence theory is based on: (1) defective design; (2) project delays; (3) negligent site selection; (4) negligent selection of materials; (5) ambiguous specifications; (6) failure to act. Id. Negligent misrepresentation theory is based on: (1) supplying false information on plans or specs; (2) failing to exercise reasonable care. *Id.*

### *A. Contract: Third Party Beneficiary Theory*

Contractors have often raised a theory of third party beneficiary upon which to recover economic losses from architects.[121] Under this theory, the party not in privity claims that it is the intended beneficiary of the contracting parties' contract. [122] Some courts have been receptive to this approach. For example, a New York court allowed an owner of a construction project, whose wholly owned subsidiary entered into contracts with an architect and a contractor, to recover from them for economic loss despite the lack of privity.[123] The owner was able to show that it was merely the alter-ego of the subsidiary because the contract expressly stated that the contract was for its benefit.[124] A federal court applying New York law also held that, where the contract expressly stated that the architect would indemnify the owner or the owner's representative with respect to any negligence caused by it, the owner's representative could recover in tort for economic losses.[125] Liability is thus determined by the construction of the contract.[126]

However, where the contract is silent as to third party beneficiaries or expressly rejects such status, courts have almost universally denied recovery.[127] One court has expressed the opinion that an incidental benefit, conferred upon contractors by the existence of a contract between architect and owner, is not enough for third party beneficiary status to be conferred upon the contractor.[128] In order for such status to be conferred, the contract between architect and owner must have been made with

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[121] *Id.* at 563-64. Under RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981), third party beneficiaries are allowed to sue in tort. *See also* Bernard Johnson, Inc. v. Continental Constructors, Inc., 630 S.W.2d 365 (Tex. Ct. App. 1982). In *Johnson,* the plaintiff-contractor sued the architect for economic loss of delays and increased costa after allegedly failing to properly administer and process change orders for the construction project. *Id.* at 367. The contractor sued, *inter alia*, on a third party beneficiary theory. *Id.* at 368.

[122] *Quatman, supra* note 4, at 561, 563.

[123] Key Int'l. Mfg. Inc. v. Morse/Diesel, Inc., 536 N.Y.S.2d 792, 795-96 (N.Y. App. Div. 1988).

[124] *Id.*

[125] Strategem Dev. Corp. v. Heron Int'l. N.V., 153 F.R.D. 535, 548-49 (S.D.N.Y. 1994).

[126] A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 402 (Fla. 1973). The court stated: The question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish. *Id.* (following 17 AM. JUR. 2D Contracts § 304 (1964)).

[127] Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc., 521 N.Y.S.2d 165, 166 (N.Y. App. Div. 1987). In *Lake Placid Club*, condo owners could not sue the builder and architect for structural defects in units because no privity of contract existed. *Id.* Owners were not third party beneficiaries of the contract between the builder and architect and the developer because nothing in the contract suggested that the developer intended to give rights to the owners. *Id.* The developer's only motive was to obtain a sufficient construction product to sell to potential customers. *Id. See also* Rieder Communities, Inc. v. Township of N. Brunswick, 546 A.2d 563, 567 (N.J. Super. 1988); Ward v. Ernst & Young, 435 S.E.2d 628, 631 (Va. 1993); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1387 (Del. Super. Ct. 1990).

[128] *Rieder Communities*, 546 A.2d at 567.

the intent to confer an actual benefit on the contractor.[129] Therefore, where such intent is not expressly stated in the contract, most courts have not found third party beneficiary status.[130] Another court has limited those who could recover under a third party beneficiary theory without express language in the contract to situations involving creditors of a promisee or donees.[131] This same court, when applying this test in the construction context, held that contractors did not fit within either the creditor or donee exception.[132] Without express language in the contract between architect and owner, then, contractors could not recover on a theory of third party beneficiary. Although it is plainly foreseeable to an architect that a contractor will rely on the plans and specifications, the use by the contractor is not tantamount to saying that the contract giving rise to those documents was intended in any legal sense to benefit the contractor.[133] The agency relationship between architect and owner is another factor disfavoring the theory that contractors are third party beneficiaries of the contract between architect and owner.[134] For all these reasons, contracts which do not expressly grant third party beneficiary status to the contractor are not likely to succeed.

Interestingly, there is nothing about the economic loss doctrine which would prohibit recovery of economic losses under a theory of third party beneficiary. Since such losses are contemplated by the contracting parties and the third party is the intended beneficiary of the contract, recovery could be had in the face of the doctrine. Thus, if a warranty is given to a third party, liability would attach for economic losses despite the lack of privity.[135] In the absence of such express language, however, most contractors must rely on tort theory in order to recover economic losses from an architect.

### *B. Tort*

Architects, like manufacturers of products, are strictly liable[136] for torts involving personal injury or property damage.[137] However, they have not been held to strict liability where pure economic losses

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[129] *Id.*

[130] *Ward*, 435 S.E.2d at 630-36.

[131] *Guardian,* 583 A.2d at 1387 (citing RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (1979)).

[132] *Id.*

[133] Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1387 (Del. Super. Ct. 1990).

[134] A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 403 (Fla. 1973).

[135] Seely v. White Motor Co., 403 P.2d 145, 148 (Cal. 1965).

[136] Strict liability is liability without intention or negligence on the part of the defendant. Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452 (Ill. 1982); *Seely,* 403 P.2d at 149-50. Strict liability in tort was designed to govern the distinct problem of physical injuries. *Id.* at 149. The "recognition that the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales caused this court to abandon the fiction of warranty in favor of strict liability . . . ." *Id.* at 149-50 (citations omitted).

[137] Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 313 (N.J. 1965). The "strict liability in tort formulation of the nature of the manufacturer's burden to expected consumers of his product represents a sound solution to an evergrowing problem . . . ." *Id.* at 312. At the time *Santor* was decided, privity was not necessary to recover economic losses in the commercial context in other jurisdictions as well: Randy Knitwear, Inc. v. American

have been claimed.[138] In these cases, courts have struggled with finding a duty[139] on the part of the architect to protect the commercial expectations of third parties, such as contractors. The breach of this duty which causes harm to third parties has led to two theories of recovery -- negligence and negligent misrepresentation.[140]

### 1. Negligence Theory

The plaintiff suing a third party for recovery of economic losses has the burden of proof of establishing a duty which the third party breached and that this breach proximately caused his or her damages.[141] Proximate cause helps stem unlimited liability for economic loss.[142] Although privity is not necessary to bring a tort action, some courts have held that proximate cause can only exist when the parties' relationship is so close as to "approach . . . privity."[143] Contributory or comparative negligence

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Cyanamid Co., 181 N.E.2d 399 (N.Y. 1962); Jamot v. Ford Motor Co., 156 A.2d 568 (Pa. Super. Ct. 1959); Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. Dist. Ct. App. 1958); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449 (Iowa 1961); Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. 1962); General Motors Corp. v. Dodson, 338 S.W.2d 655 (Tenn. Ct. App. 1960).

Increasingly, courts have found that architects under the traditional construction arrangement bear responsibility to act in situations where they are the only party in a position to prevent a loss. Justin Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?,* 28 EMORY L.J. 291 (1979) (discussing physical harm to construction workers caused by the negligence of architects). Architectural services are not "products" under the UCC. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 990 (Wash. 1994). Therefore, the common law must be looked to in order to determine whether a contractor may recover economic loss in tort. *Id. But see* Spivak v. Berks Ridge Corp., 586 A.2d 402, 405 (Pa. Super. Ct. 1990). In *Spivak,* homeowners sued the builder with whom the homeowner had no privity for the construction of a defective condominium. *Id.* at 404. The court found that the builder impliedly warranted that the house built by it was constructed in a reasonable workmanlike manner and was fit for habitation. *Id.* at 405. Such warranties arise by operation of law, independent of any contractual representations. *Id.*

[138] *Seely,* 403 P.2d at 149. Torts involving personal injury are seen as products liability and are distinguishable from economic losses (strict liability versus negligence theory). A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 399 (Fla. 1973). Although most jurisdictions reject the economic loss doctrine for professionals, most also do not apply a strict liability approach with respect to economic losses. *See, e.g.,* Conforti & Eisele, Inc. v. John C. Morris Assocs., 418 A.2d 1290, 1292 (N.J. Super. Ct. Law Div. 1980).

[139] Redarowicz v. Ohlendorf, 441 N.E.2d 324, 326 (Ill. 1982). "The measure of liability in a tort action is based rather on the scope of duty owed to the plaintiff." *Id.* (internal citations omitted).

[140] Intentional torts are not analyzed in this article. For such an analysis consult Quatman, *supra* note 4, at 588-89.

[141] *See Wise, supra* note 12, at 5.

[142] *Id.*

[143] Ultramares Corp. v. Touche, 174 N.E. 441, 446 (N.Y. 1931); Ossining Union Free Sch. Dist. v. Anderson, 539 N.E.2d 91, 95 (N.Y. 1989). In *Ossining,* the defendant-engineer had been retained by a school district's architect to evaluate the structural soundness of one of the school district's buildings. *Id.* at 92. The court found the "functional equivalent" of privity to exist where the engineers allegedly "undertook their work in the knowledge that it was for the school district alone . . . . land] rendered their reports with the objective of thereby shaping this plaintiffs conduct." *Id.* at 91, 95-96. The engineer had direct contact with the school district and sent a bill directly to the school district. *Id.* The concept of duty in tort has thus been construed narrowly by New York courts. *See, e.g.,*

may also limit or bar recovery.[144] The imputation of duty, more than causation, is the facet of negligence with which courts have struggled.[145] Those jurisdictions which do not require strict privity in order to recover losses have imputed a duty where the architect has actual knowledge that the third party will suffer economic losses if the architect is negligent.[146] The actual knowledge requirement, though, has since been abandoned.[147] Most courts now hold that if harm is reasonably foreseeable to a third party,

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Security Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co., 597 N.E.2d 1080 (N.Y. App. Div. 1992); Prudential-Bache Sec., Inc. v. Resnick Water St. Dev. Co., 555 N.Y.S.2d 367 (N.Y. App. Div. 1990); Briar Contracting Corp. v. City of N.Y., 550 N.Y.S.2d 717 (N.Y. App. Div. 1989). The relationship between an architect and contractor may approach privity if there was direct communication, a client relationship, or other special circumstances linking them. Morse/Diesel, Inc. v. Trinity Indus., Inc., 859 F.2d 242, 247 n.5 (2d Cir. 1988). Under certain circumstances, accountants may be held liable to third parties for economic loss. *See* Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 118 (N.Y. 1985).

[144] Wise, *supra* note 12, at 5. *See also* Lutz Eng'g Co. v. Industrial Louvers, Inc., 585 A.2d 631, 636-37 (R.I. 1991).

[145] Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352-53 (Fla. Dist. Ct. App. 1992). "Duty in negligence requires a relationship in which one person is determined to have a responsibility to protect some interest of another person." *Id.* at 1352. "The actor is liable for an invasion of an interest of another, if . . . the interest invaded is protected against unintentional invasion. . . ." RESTATEMENT (SECOND) OF TORTS § 281 (1965). A defendant's duty may arise from a social relationship as well as from a contractual relationship. Williams v. Jackson Co., 359 So. 2d 798, 801 (Ala. Civ. App. 1978). Although plaintiff may be barred from recovering from defendant as a third party beneficiary to defendant's contract with another, plaintiff may nevertheless recover in negligence for defendant's breach of duty where defendant negligently performs his contract with knowledge that others are relying on proper performance and the resulting harm is reasonably foreseeable. *Id. See also* E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977) (holding that under Alabama law an electrical subcontractor on a construction project may proceed on a negligence theory in an action against an architect absent contractual privity between them); Zeigler v. Blount Bros. Constr. Co., 364 So. 2d 1163 (Ala. 1978) (holding that recovery would be allowed absent privity if damages are foreseeable). The rationale behind the rejection of the privity requirement was stated by Prosser:

> [B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 93 at 622 (4th ed. 1971). Applying this rationale to the construction context, some courts rely on the presence of six factors to determine whether or not to impose a duty:

> (1) [t]he extent to which the transaction was intended to affect the plaintiftl;l (2) [t]he foreseeability of harm to him[;] (3) [t]he degree of certainty that the plaintiff suffered injury[;] (4) [t]he closeness of the connection between the defendant's conduct and the injury suffered[;] (5) [tlhe moral blame attached to defendant's conduct[; and] (6) [t]he policy of preventing future harm.

Conforti & Eisele, Inc. v. John C. Morris Assocs., 418 A.2d 1290, 1292 (N.J. Super. Ct. Law Div. 1980) (internal citations omitted). *See also generally* Howe v. Bishop, 446 So. 2d 11 (Ala. 1984) (Torbert, C.J., concurring); United Leasing Corp. v. Miller, 263 S.E.2d 313 (N.C. Ct. App. 1980).

[146] Peyronnin Constr. Co. v. Weiss, 208 N.E.2d 489, 494 (Ind. Ct. App. 1965).

[147] Wise, *supra* note 12, at 5-6.

a duty will be imputed to protect the commercial expectations of the third party as part of the architect's standard of care.[148]

Foreseeability has been defined in several different ways by courts in deciding if a duty exists.[149] Many courts have focused on the degree of control the architect has over the contractor's work.[150]

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[148] A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 400 (Fla. 1973) (holding that "the extent of [an architect's] duty may best be defined by reference to the foreseeability of injury consequent upon breach of that duty" (citing Audlane Lbr. & Bldrs. Sup. v. D.E. Britt, 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964))).

Another member of the design professional group, engineers, can be analyzed in a similar fashion. *See* Aliberti, LaRochelle & Hodson Eng'g Corp. v. FDIC, 844 F. Supp. 832 (D. Me. 1994). In *Aliberti,* a bank was allowed to sue a consulting engineer with whom it had no privity for negligence. *Id.* at 846. The engineer, who had a contract with a developer of a housing project, had made affirmative misrepresentations to the bank regarding the development's overall budget and feasibility. *Id.* at 845. The bank relied upon these misrepresentations in approving loans for the project. *Id.* at 846. The project was later abandoned by the developer and the bank suffered economic losses as a result. *Id.* at 838.

*See also* Doran-Maine, Inc. v. American Eng'g & Testing, Inc., 608 F. Supp. 609 (D. Me. 1985). In *Doran-Maine,* a subcontractor was allowed to sue a supervising engineer, with whom it had no contract, for negligence. *Id.* at 615. Pursuant to its contract with the general contractor, the engineer negligently tested concrete pipe fabricated by the subcontractor and reported that the pipe did not meet the specifications, after which the contractor terminated its contract with the subcontractor. *Id.* The court agreed with the notion that, "[i]f an actor 'should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence.'" *Id.* at 615 (quoting RESTATEMENT (SECOND) OF TORTS § 435 cmt. b (1965)).

[149] *See generally* Daniel Witherspoon, *When is an Architect Liable?,* 32 MISS. L.J. 40 (1960). *See also* Mid-Western Elec., Inc. v. DeWild Grant Reckert & Assocs., 500 N.W.2d 250 (S.D. 1993). In *Mid-Western*, an electrical subcontractor was allowed to sue an engineer with whom it had no privity for recovery of economic losses allegedly sustained as a result of negligent approval of equipment. *Id.* at 254. A series of Ultraviolet light (UV) detectors were to be installed for a governmental entity. *Id.* at 252. The equipment was approved by the engineer and installed, but later rejected by the owner. *Id.* The subcontractor had to replace the equipment himself and later sued the engineer for its losses. *Id.* The court held that claims of professional negligence in which damages to a foreseeable third party are suffered will determine whether a duty in tort exists to protect that third party. *Id.* at 254. The court reasoned that to hold otherwise would be "condoning a professional's right to do his or her job negligently with impunity as far as innocent parties who suffer economic loss." *Id.*

[150] *Moyer*, 285 So. 2d at 401. In *Moyer,* a prime contractor was allowed to recover from an architect for negligently stopping the work and preparing plans and specs. *Id.* The court made much of the fact that the architect had direct control over the contractor. *Id.* Other factors were also balanced: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; and (5) the policy of preventing future harm. *Id.* (quoting Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958)).

Similarly, in United States *ex rel.* Los Angeles Testing Lab. v. Rogers & Rogers, 161 F. Supp. 132 (S.D. Cal. 1958) (en banc), under the prime-owner agreement, the architect had the authority of general supervision as well as the authority to stop the work. *Id.* at 134-35. A claim based on negligent supervision/approval of defective work by the architect was allowed. *Id.* at 136. The court held that the architect had altogether

> too much control over the contractor . . . for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.

Other courts have focused on what the "reasonable architect"[151] would deem foreseeable.[152] This focus includes what the architect knew or should have known. In the latter case, such a standard would allow

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*Id. But see* B141, *supra* note 26, at ¶ 2.6.6. Under the B141, the architect no longer has direct control over the work. *Id.* That power is reserved to the owner. The architect can, however, reject the work. *Id.* at ¶ 2.6.11.

The extent of an architect's duty to a contractor on the jobsite has been a particularly fertile area for litigation. *See, e.g.,* Berkel & Co. Contractors v. Providence Hosp., 454 So. 2d 496 (Ala. 1984). In *Berkel,* a contractor was allowed to sue an architect for economic losses associated with the architect's allegedly negligent direction of the installation of concrete piles. *Id.* at 503.

*See also* Magnolia Constr. Co. v. Mississippi Gulf South Eng'rs, Inc., 518 So. 2d 1194 (Miss. 1988). In *Magnolia,* a contractor was able to sue an engineer without privity for economic losses based on a theory of negligence. *Id.* at 1201, 1204. The contractor had been denied final payment by the engineer because it was determined that some sewer sections installed by the contractor were at the wrong depth. *Id.* at 1197. However true that may have been, the engineer had a representative present on the jobsite at all times that had certified payment to the contractor up to that point, giving the impression that the work was being done properly. *Id.* The court held that the contractor could reasonably rely on the representatives to provide any guidance with respect to the progress of the work. *Id.* at 1202.

*See also* Shoffner Indus. v. W.B. Lloyd Constr. Co., 257 S.E.2d 50 (N.C. Ct. App. 1979). In *Shoffner*, a contractor was able to sue an architect in tort for recovery of economic losses allegedly caused by the architect's negligent approval of defective materials. *Id.* at 56. The architect approved trusses for a structure on which the contractor was working; the contractor installed them, and they were later discovered to be defective. *Id.* at 52. This discovery caused the contractor to incur additional labor cost and materials to rectify the situation. *Id.* The court reasoned that "the incidental fact of the existence of the contract between the architect and the property owner should not negative the responsibility of the architect when he enters upon a course of affirmative conduct which may be expected to affect the interest of third parties." *Id.* at 59.

*See also* Forte Bros. v. National Amusements, Inc., 525 A.2d 1301 (R.I. 1987). In *Forte,* a third party contractor was allowed to sue for negligence against an architect/site engineer notwithstanding a lack of privity. *Id.* at 1303. The court held that the architect owed the contractor a duty to render his site inspection services professionally. *Id.*

*See also* Detweiler Bros. v. John Graham & Co., 412 F. Supp. 416 (E.D. Wash. 1976). In *Detweiler,* a federal court applying Washington law allowed a subcontractor to sue an architectural firm in tort for economic losses the subcontractor suffered through alleged misrepresentations by the architect. *Id.* at 418. The architect had approved the subcontractor's submittal for a certain type of grooved piping and later ordered the subcontractor to stop the work and replace the grooved pipe with welded pipe. *Id.* The court held that privity of contract was not a condition precedent to the maintenance of a tort suit by a contractor against an architect. *Id.* at 420. The court found justification for its holding in the "emerging majority of jurisdictions [which] have taken the position that a contractor can maintain a negligence action against an architect without direct privity of contract between the parties." *Id.* at 419.

*See generally,* Jeffrey L. Nischwitz, Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties,* 45 OHIO ST. L.J. 217 (1984) (concluding that architects should be liable for negligent preparation of plans and specs because the architect is in the best position to effectuate duties with respect to design, but not supervision of construction methods because an architect's emphasis is on design, not construction).

[151] An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. 5 AM. JUR. 2D., *Architects* § 10, 632-33 (1995).

[152] Cooper v. Jevne, 128 Cal. Rptr. 724 (Cal. Ct. App. 1976). In *Cooper,* a cause of action by purchasers of a house was allowed against an architect with whom no privity existed. *Id.* at 729. "[The architects were under a duty to exercise ordinary care as architects to avoid reasonably foreseeable injury to purchasers and that the architects knew or should have foreseen with reasonable certainty that [the] purchasers would suffer the specific monetary damages alleged if they failed to perform this professional duty." *Id.* at 727-28. Thus, a cause of action for negligence was allowed. *Accord Mid-Western Elec.,* 500 N.W.2d at 253 (noting that "[t]oday the majority of

a court to find a duty not only to contractors, but to other parties who have a specific pecuniary interest in the project as well.[153]

## 2. Negligent Misrepresentation Theory

A cause of action based on negligent misrepresentation is similar to one based on straight negligence, and they are often asserted together under the same facts.[154] The former theory is distinguishable from the latter because it focuses on the information provided by the maker, rather than solely the duty of care owed by the maker.[155] Although the same breach of the professional standard of

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jurisdictions that have examined this question allow a cause of action against an architect or engineer for economic damage if a party was foreseeably harmed by the professional's negligence").

*See also* Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs., 386 N.W.2d 375 (Minn. Ct. App. 1986). In *Waldor,* a subcontractor was allowed to sue an engineer with whom it had no privity for negligence in drafting and interpreting specifications. *Id.* at 377. The engineer, pursuant to a contract with the city for the updating of a wastewater treatment plant, prepared plans and specifications and supervised the construction of the project. *Id.* at 376. The engineer rejected a pump supplied by the subcontractor which conformed in all material aspects to the specifications. *Id.* The subcontractor was forced to provide a more expensive pump and suffered economic loss as a result. *Id.* The court reasoned:

> Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance . . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

*Id.* at 377 (citation omitted). The court concluded that it was foreseeable to the engineer that subcontractors were bound to follow the specifications and that the engineer's negligence in drafting or interpreting them would cause harm to the subcontractor. *Id. Accord* Associated Architects & Eng'rs v. Lubbock Glass & Mfg. Co., 422 S.W.2d 942, 944-45 (Tex. Civ. App. 1967) (allowing an action by a subcontractor against an architect for negligence in the preparation of plans and specifications and negligence in rejecting skylights furnished according to the architect's defective plans and specifications).

[153] Cooper v. Jevne, 128 Cal. Rptr. 724 (Cal. Ct. App. 1976); National Sand, Inc. v. Nagel Constr., Inc., 451 N.W.2d 618, 620 (Mich. Ct. App. 1990) (allowing a subcontractor to maintain an action in tort against an engineer with whom the subcontractor had no privity).

[154] Ossining Union Free Sch. Dist. v. Anderson, 539 N.E.2d 91 (N.Y. 1989). In *Ossining,* a cause of action for negligent misrepresentation which produced only economic injury was allowed where the underlying relationship between the parties was so close as to be the functional equivalent of privity. *Id.* at 91. The relationship had approached privity because: (1) the defendant was aware that one of the purposes of its design plans was to assist the construction companies in their preparation of bids for the project; (2) the defendant knew that the subcontractor was part of a definable class which would rely on the plans; (3) there was conduct between the defendant and the subcontractor evincing and the defendant's understanding that the subcontractor had, in fact, relied on the plans in preparing the bid. *Id.* at 95.

*Accord* Reliance Ins. Co. v. Morris Assocs., P.C., 607 N.Y.S.2d 106 (N.Y. App. Div. 1994). In *Reliance,* the subrogee of a subcontractor was allowed to sue an engineer, who negligently prepared sewer plans, for economic losses. *Id.* at 107. The subcontractor relied on these plans in preparing a bid, and as a result, the cost to complete the project was higher than what the subcontractor was paid (*i.e.* the bid price). *Id.*

[155] Glanzer v. Shepard, 135 N.E. 275, 275-76 (N.Y. 1922). *See also* Bernard Johnson, Inc. v. Continental Constructors, Inc., 630 S.W.2d 365, 370 (Tex. App. 1982).

care gives rise to both claims, the negligent misrepresentation is equivalent to a breach of warranty because of the special relationship between those who rely on the information negligently supplied and those who supplied the information to the recipient to conduct their business.[156] Thus, the foreseeability requirement is taken a step further -- the faulty information given on the plans and specifications must be intended by its negligent supplier to be specifically relied upon by a particular party or a settled class of parties before economic damages are recoverable, and this class must reasonably rely on the information negligently supplied.[157]

Like simple negligence, negligent misrepresentation has the requirement of foreseeability, but adds the additional requirement that the contractor reasonably rely on the information.[158] The defenses of comparative and contributory negligence also still apply.[159] The issues of foreseeability and reasonable reliance are demonstrated in two opinions from New York which were both written by Justice (then Judge) Benjamin Cardozo. In the first, *Ultramares Corp. v. Touche,*[160] an accounting firm was sued for economic losses sustained by a creditor of one of the accounting firm's clients.[161] This client, a business, had procured the services of the firm to prepare a financial statement of the business.[162] After receiving the report, which had negligently overstated the business' financial situation, the business used the report to secure a loan from a lender.[163] The lender relied on the information in the report in making the loan.[164] After the business failed and the misstatement was revealed, the lender/creditor sought to recover its losses from the accounting firm.[165] The court held that the creditor did not have a cause of action.[166] The court reasoned that it was foreseeable to the accounting firm that

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[156] Ultramares Corp. v. Touche, 174 N.E. 441, 446 (N.Y. 1931). *See also* Spivak v. Berks Ridge Corp., 586 A.2d 402 (Pa. Super. Ct. 1990). In *Spivak,* homeowners sued the builder (with whom it had no privity) for the construction of a defective condominium. *Id.* at 404. The court found that the builder impliedly warranted that the house built by it was constructed in a reasonable workmanlike manner and was fit for habitation. *Id.* at 405. "Such warranties arise by operation of law, independent of any contractual representations." *Id.*

[157] Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922).

[158] Wise, *supra* note 12, at 5. A contractor's reliance on specifications must be reasonable. APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 431 S.E.2d 508, 517 (N.C. Ct. App. 1993). *Accord* Lutz Eng'g v. Industrial Louvers, Inc., 585 A.2d 631, 636-37 (R.I. 1991).

[159] Wise, *supra* note 12, at 5.

[160] 174 N.E. 441 (N.Y. 1931).

[161] *Id.* at 442.

[162] *Id.*

[163] *Id.* at 443.

[164] *Id.*

[165] *Id.*

[166] Ultramares v. Touche, 174 N.E. 441, 448 (N.Y. 1931).

the information would be relied upon by the client, but not by third parties which had not been disclosed to the accounting firm at the time it made its report.[167] The report had been prepared specifically for the client.[168] To expose accountants to liability to an indeterminate class of users who may happen to use the information was too remote to be actionable.[169]

The second case, *Glanzer v. Shepard*,[170] was decided earlier than *Ultramares*. There, the court held that a weigher of beans, who had negligently misstated the weight of the beans to the buyer, was liable for economic losses to the buyer even without privity.[171] Unlike in *Ultramares,* here the two requirements for negligent misrepresentation had been met.[172] First, the weigher had intended the buyer to rely on the information given, and the information was reasonably relied upon by the buyer.[173] Second, it was foreseeable that the buyer would suffer loss if the information was false.[174] Judge Cardozo's opinion in *Glanzer* is echoed by Section 552 of the Restatement (Second) of Torts,[175] which is in line with modem legal authority on the subject of negligent misrepresentation.[176]

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[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] 135 N.E. 275 (N.Y. 1922).

[171] Id. at 277.

[172] *Id.*

[173] *Id.* at 275-76.

[174] *Id.* at 277.

[175] RESTATEMENT (SECOND) OF TORTS § 552 (1979): Information Negligently Supplied for the Guidance of Others.

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) [t]he liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Comment (a) to § 552 provides:

> [l]t does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. A user of commercial information cannot reasonably expect its maker to have undertaken to satisfy this obligation unless the terms of the obligation were known to him. Rather, one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker

Under the Restatement, negligently prepared plans or ambiguous specifications give contractors a cause of action against architects for economic loss.[177] First, the recipient of the information, although

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was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.

*Id.* This model has been widely endorsed by state courts. *See* Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1385-86 (Del. Super. Ct. 1990). Section 552 would abolish the privity requirement in certain cases of negligent misrepresentation. *Id.* In those cases where the privity requirement would be abolished, "the use of the information negligently supplied was not an indirect or collateral consequence [of the transaction] . . . it was the end and aim of the transaction." *Id.* at 1386. As a countervailing view to Section 552, economic damages resulting from a party who negligently makes the performance of a contract more expensive to perform are not recoverable absent physical harm. RESTATEMENT (SECOND) OF TORTS § 766C (1979). *But see* comment e (stating that Section 766C may not apply if Section 552 applies).

[176] *Guardian*, 583 A.2d at 1386.

[177] For an example of a claim of defective specifications, *see* Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985). In *Bryant,* a general contractor sued the project architect (with whom it had no privity) for economic loss of delay and additional expense related to errors in the plans and specifications as well as the failure of the architect to detect the errors before the defective design was built. *Id.* at 1192-93. The court held that the lack of privity prevented the contractor from recovering. *Id.* at 1195.

*Cf.* Carroll-Boone Water Dist. v. M. & P. Equip. Co., 661 S.W.2d 345 (Ark. 1983). In *Carroll-Boone*, a subcontractor was allowed to sue an engineer with whom it had no privity. *Id.* at 354. In order for a water intake structure designed by the engineer to become operational, a rock mass needed to be removed. *Id.* at 347-48. The specifications for the structure required blasting to remove the rock. *Id.* at 348. The intake structure had not been designed to withstand such blasts, and was damaged by the blasting. *Id.* As a result, the subcontractor incurred liability to the owner for repair and was thus able to sue the engineer for negligence. *Id.* at 354.

*See also* Wolther v. Schaarschmidt, 738 P.2d 25 (Colo. Ct. App. 1986). In *Wolther,* a homeowner was allowed to sue an engineer with whom it had no privity based upon a theory of negligent misrepresentation. *Id.* at 28. The homeowner's lender had entered into a contract with the engineer to prepare a report about the structural fitness of the house that the homeowner intended to purchase. *Id.* at 26-27. The engineer approved the structural fitness of the home and the homeowner was given a loan to purchase the home by the lender. *Id.* at 27. Later, it was discovered that some floor joists were termite-infested and had to be replaced. *Id.* The court held that it was foreseeable to the engineer that the homeowner would rely on the engineer's report to the lender as confirmation that the house was structurally sound. *Id.* at 28.

For a theory of liability based on defective plans, *see* Gurtler, Hebert & Co. v. Weyland Mach. Shop, 405 So. 2d 660 (La. Ct. App. 1981). In *Gurter,* a subcontractor was allowed to recover from an architect in tort. *Id.* at 662. The subcontractor had alleged that plans and specifications supplied by the architect failed "to provide a satisfactory and complete set of . . . drawings from which shop drawings could be made resulting in multiple revisions, and eventually, the creation of a new set of shop drawings . . . ." *Id.* at 661. The delay caused by the negligently prepared plans and specifications led to liability for damages on the part of the subcontractor to the general. *Id.* at 662.

*See also* Milton J. Womack, Inc. v. House of Representatives, 509 So. 2d 62 (La. Ct. App. 1987). In *Womack,* a contractor was allowed to recover economic loss damages from an architect with whom it had no privity based on a theory of negligence. *Id.* at 67. The plans and specifications prepared by the architect failed to depict wind-bracing within the existing State Capitol building, resulting in a delay while the architect prepared revised plans. *Id.* at 63-64. The delay resulted in the lost opportunity of the contractor to receive a bonus from the State for finishing the job early. *Id.* at 63. The court held that the architect had not exercised "the degree of skill ordinarily employed, under similar circumstances, by members of [its] profession. . . and to use reasonable care and diligence, along with [its] best judgment, in the application of [its] skill." *Id.* at 64. The court reasoned that a check of the drawings for the original building would have revealed the wind-bracing to the architect. *Id.*

unknown to the architect at the time the plans were prepared, is well known to the architect as a class of persons who will rely on the information provided.[178] Second, in order for the building to be built, the plans must be followed. The architect knows or should know that reliance by the contractor on false information may result in losses to the contractor. But the defenses of comparative and contributory negligence still apply. On this point the issue of whether the contractor's reliance was reasonable becomes important. But reliance on the specifications is sometimes warranted if a discrepancy exists between information on the plans and information in the specifications.[179]

### *C. Current State of the Economic Loss Doctrine in the Construction Context and Practical Considerations for Attorneys Representing Design Professionals*

Most jurisdictions recognize some form of the economic loss doctrine.[180] Most do not, however, extend the economic loss doctrine to the construction context.[181] A reason for this difference is that the duty analysis in the construction context, with respect to both tort and contract, is more focused than that in other commercial contexts.[182] When professionals are rendering a service, the duty of care required is higher than that of manufacturers supplying a product.[183]

As a result, attorneys representing design professionals should ascertain whether their clients have adequate insurance coverage. Professional liability insurance, also known as malpractice insurance or errors and omissions (E & O) insurance, is available to architects for acts requiring specialized

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Engineers have also been subject to liability under this cause of action based upon reports that they prepare. *See* Davidson & Jones, Inc. v. County of New Hanover, 255 S.E.2d 580 (N.C. Ct. App. 1979). In *Davidson,* a general contractor who submitted bids and engaged in construction in reliance on a soil report was allowed to sue the engineers who prepared the report for damages caused by negligence in the report's preparation. *Id.* at 585-86.

*See also* Stanford v. Owens, 265 S.E.2d 617 (N.C. Ct. App. 1980). In *Stanford*, a buyer of property was allowed to sue an engineering firm who had prepared a report of the property for the seller. *Id.* at 624-25. The report detailed the subsurface condition of the property and concluded that the property could support the building that the buyer was proposing to build. *Id.* at 624. Soon after the purchase of the property and construction of the building, the buyer discovered cracks in the building which rendered it useless. *Id.* The court relied on Davidson to hold the engineer liable for the buyer's loss. *Id.* at 625.

[178] Ossining Union Free Sch. Dist. v. Anderson, 539 N.E.2d 91, 95 (N.Y. 1989); U.S. *ex rel.* Los Angeles Testing Lab. v. Rogers & Rogers, 161 F. Supp. 132, 136 (S.D. Cal. 1958). In *Rogers,* an architect negligently interpreted and construed reports, resulting in the prime contractor being able to assert a claim of negligent misrepresentation against the architect. Id. The court reasoned that it was reasonably foreseeable to the architect that reliance on the reports by the contractor would lead to economic losses if those reports were negligently prepared. *Id. See also* Rieder Communities, Inc. v. Township of North Brunswick, 546 A.2d 563 (N.J. Super. Ct. App. Div. 1988).

[179] Unicon Management Corp. v. United States, 375 F.2d 804 (Ct. Cl. 1967). SWEET, *supra* note 81, at 434.

[180] *See, e.g.,* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985).

[181] Quatman, *supra* note 4, at 561.

[182] *Id.*

[183] *See* SWEET, supra note 81, at 310- 14.

knowledge, education or skills and covers liability arising out of the architect's rendering of professional services. For instance, a claim that an architect negligently performed inspections comes within the scope of such insurance.[184]

However, commercial general liability (CGL) insurance will not provide coverage for a contractor's claim for economic loss. CGL policies are typically limited to physical injury or property damage claims and expressly exclude coverage for professional services.[185] It is therefore important to ensure that design professionals carry both CGL and E & O insurance.

[184] *See, e.g.,* First Ins. Co. of Hawaii, Ltd. v. Continental Cas. Co., 466 F.2d 807 (9th Cir. 1972).

[185] Prisco Serena Sturm Architects, Ltd. v. Liberty Mut. Ins. Co., 126 F.3d 886 (7th Cir. 1997) (holding that an architect's CGL policy excluded coverage for an owner's negligent inspection claim).

**APPENDIX**

| No. | State | Recover?[186] | Representative Case(s)/Statute(s) |
|---|---|---|---|
| 1 | Alabama | YES | Berkel & Co. Contractors v. Providence Hosp., 454 So. 2d 496 (Ala. 1984). |
| 2 | Alaska | YES | Department of Natural Resources v. Transamerica Premier Ins. Co., 856 P.2d 766 (Alaska 1993). |
| 3 | Arizona | NO | Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc., 223 P.3d 664 (Ariz. 2010). |
| 4 | Arkansas | YES | Bayer CropScience LP v. Schafer, 385 S.W.3d 822 (Ark. 2011). |
| 5 | California | YES | Cal Civ. Code § 896. |
| 6 | Colorado | NO | A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005); BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66 (Colo. 2004). |
| 7 | Connecticut | YES | Insurance Co. of N. Am. v. Town of Manchester, 17 F. Supp. 2d 81 (D. Conn. 1998). |
| 8 | Delaware | YES | Guardian Const. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378 (Del. Super. Ct. 1990). |
| 9 | Florida | YES | Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399 (Fla. 2013). |
| 10 | Georgia | YES | Robert & Co. Associates v. Rhodes-Haverty Partnership, 300 S.E.2d 503 (Ga. 1983). |
| 11 | Hawaii | YES | State v. U.S. Steel Corp., 919 P.2d 294 (Haw. 1996). |
| 12 | Idaho | YES | Blahd v. Richard B. Smith, Inc., 108 P.3d 996 (Idaho 2005). |
| 13 | Illinois | NO | 2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990). |
| 14 | Indiana | NO | Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722 (Ind. 2010) |
| 15 | Iowa | YES | Kemin Indus., Inc. v. KPMG Peat Marwick LLP, 578 N.W.2d 212 (Iowa 1998). |
| 16 | Kansas | YES | Tamarac Dev. Co. v. Delamater, Freund & Associates, P.A., 675 P.2d 361 (Kan. 1984). |
| 17 | Kentucky | YES | Presnell Constr. Managers, Inc. v. EH Constr., L.L.C., 134 S.W.3d 575 (Ky. 2004). |
| 18 | Louisiana | YES | Farrell Constr. Co. v. Jefferson Parish, 693 F. Supp. 490 (E.D. La. 1988). |
| 19 | Maine | NO | Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc., 659 A.2d 267 (Me. 1995). |
| 20 | Maryland | NO | RLI Ins. Co. v. John H. Hampshire, Inc., 461 F.Supp.2d 364 (D. Md. 2006). |

[186] This column attempts to answer the question whether economic losses are (or, in a few instances, most likely would be) recoverable from a design professional for negligence or negligent misrepresentation in the given state as of the date this article is published. In all, 31 states (62%) allow recovery of such losses against a design professional and 19 states (38%) do not.

| No. | State | Recover? | Representative Case(s)/Statute(s) |
|---|---|---|---|
| 21 | Massachusetts | YES | Nota Constr. Corp. v. Keyes Assocs., Inc., 694 N.E.2d 401 (Mass. Ct. App. 1998). |
| 22 | Michigan | YES | National Sand, Inc. v. Nagel Constr., Inc., 451 N.W.2d 618 (Mich. Ct. App. 1990). |
| 23 | Minnesota | YES | Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Associates, Inc., 386 N.W.2d 375 (Minn. Ct. App. 1986). |
| 24 | Mississippi | YES | Owen v. Dodd, 431 F. Supp. 1239 (N.D. Miss. 1977). |
| 25 | Missouri | NO | Captiva Lake Investments, LLC v. Ameristructure, Inc., 436 S.W.3d 619 (Mo. Ct. App. 2014). |
| 26 | Montana | YES | Jim's Excavating Serv., Inc. v. HKM Assoc., 878 P.2d 248 (Mont. 1994). |
| 27 | Nebraska | NO | Wiekhorst Bros. Excavating & Equipment Co. v. Ludewig, 529 N.W.2d 33 (Neb. 1995). |
| 28 | Nevada | NO | Halcrow, Inc. v. Eighth Judicial Dist. Court of the State, 302 P.3d 1148 (Nev. 2013). |
| 29 | New Hampshire | NO | Plourde Sand & Gravel Co. v. JGI Eastern, Inc., 154 N.H. 791 (N.H. 2007). |
| 30 | New Jersey | YES | Conforti & Eisele v. John C. Morris Assoc., 418 A.2d 1290 (N.J. Super. 1980), *aff'd* 489 A.2d 1233 (N.J. Super 1985). |
| 31 | New Mexico | NO | Spectron Dev. Lab. v. Am. Hollow Boring Co., 936 P.2d 852 (N.M. Ct. App. 1997). |
| 32 | New York | YES | Strategem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535 (S.D.N.Y. 1994). |
| 33 | North Carolina | YES | Davidson and Jones, Inc. v. County of New Hanover, 255 S.E.2d 580 (N.C. Ct. App. 1979). |
| 34 | North Dakota | YES | N.D.C.C. § 28-01-44; Vantage, Inc. v. Carrier Corp., 467 N.W.2d 446 (N.D. 1991). |
| 35 | Ohio | YES | McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Management, 622 N.E.2d 1093 (Ohio Ct. App. 1993). |
| 36 | Oklahoma | YES | Boren v. Thompson & Associates, 999 P.2d 438 (Okla. 2000). |
| 37 | Oregon | NO | Onita Pac. Corp. v. Trustees of Bronson, 843 P.2d 890 (Or. 1992). |
| 38 | Pennsylvania | YES | Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005). |
| 39 | Rhode Island | NO | Boston Inv. Property No. 1 State v. E.W. Burman, 658 A.2d 515 (R.I. 1995). |
| 40 | South Carolina | YES | Gilliland v. Elmwood Properties, 391 S.E.2d 577 (S.C. 1990). |
| 41 | South Dakota | YES | Mid-Western Elec. v. DeWild Grant Reckert & Assocs. Co., 500 N.W.2d 250 (S.D. 1993). |
| 42 | Tennessee | YES | John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991). |
| 43 | Texas | NO | LAN/STV v. Martin K. Eby Const. Co., Inc., 435 S.W.3d 234 (Tex. 2014). |
| 44 | Utah | NO | Utah Code Ann. § 78B-4-513; SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc., 28 P.3d 669 (Utah 2001). |
| 45 | Vermont | NO | *Heath v. Palmer*, 915 A.2d 1290 (Vt. 2006). |

| No. | State | Recover? | Representative Case(s)/Statute(s) |
|---|---|---|---|
| 46 | Virginia | NO | Blake Constr. Co., Inc. v. Alley, 353 S.E.2d 724 (Va. 1987). |
| 47 | Washington | NO | Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986 (Wash. 1994). |
| 48 | West Virginia | YES | Eastern Steel Constructors, Inc. v. City of Salem, 549 S.E.2d 266 (W. Va. 2001). |
| 49 | Wisconsin | YES | Insurance Co. of North America v. Cease Electric Inc., 688 N.W.2d 462 (Wisc. 2004). |
| 50 | Wyoming | NO | Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228 (Wyo. 1996). |

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