

Chapter 8

ARCHITECT/ENGINEER LIABILITY

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§ 8.1 • INTRODUCTION

Necessary to a full appreciation of the material to follow is a basic understanding of construction projects and the role of the participants. The traditional construction project is a tripartite arrangement comprised of owner, designer, and contractor. The owner provides the capital and assumes the entrepreneurial risk in exchange for long-term return; the design professionals provide design services and expect a short-term profit; the contractors provide construction expertise and likewise anticipate a short-term return.

Modern demands of time, finance, and technology have created mutations of the traditional approach. These mutations are in part responsible for the increasing complexity of the law pertaining to the design/construction process.

Throughout this chapter the abbreviation “A/E” (architect/engineer) and the phrase “design professional” will be used interchangeably to refer to the architect as well as surveyors and consulting engineers in all disciplines including civil, mechanical, electrical, structural, and geotechnical.

While not players on the basic design-construction team, several additional parties, including insurers, sureties, material suppliers, governmental agencies, lower-tier contractors, and employees of contractors, all have involvement in the process. Their involvement gives rise to an entire subset of contracts, agreements, and potential liability.

§ 8.2 • THEORIES OF LIABILITY

§ 8.2.1—Negligence

The law of liability as applied to architects and engineers has developed along lines not dissimilar to the development of tort law in general. Despite efforts to graft emerging theories of law onto the structure of A/E malpractice, the gravamen of most suits against the A/E remains negligence.

Negligence does not form the basis for a claim, “unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care.”¹ As stated by Lord Esher, “A man is entitled to be as negligent as he pleases toward the whole world if he owes no duty to them.”² Thus, it is only when the negligence is committed against one to whom the actor owes a duty that a viable claim exists.

According to *BRW, Inc. v. Dufficy & Sons, Inc.*, the claims of project owners, contractors, subcontractors, architects, and engineers against other members of the project team will most often be limited to actions in contract against the party with whom the project participant contracted.³ This rule in no way alters the following discussion regarding the determination of negligent conduct or liability on the part of architects and engineers. This is because in most instances one will determine whether an architect or engineer breached the contract by determining whether or not the contract was performed in a non-negligent manner. See § 8.2.2 *infra*. Further, as is discussed in detail in § 8.4.9, *infra*, while a construction subcontractor may not be permitted to bring a direct negligence action against the architect for the increased cost of performance arising out of negligently prepared plans, claims brought within the limits of the project contracts will impose ultimate responsibility on the party or parties who — through negligent performance — breached their contract and thereby caused the loss. It should also be noted that the Court’s decision in *Dufficy* is limited to members of the project team and in no way affects the ability of strangers to the project such as patrons, passers-by, or adjoining property owners to bring actions in tort.

Foreseeable Plaintiffs

It is generally accepted that the A/E owes a duty of reasonable care to all who may foreseeably suffer damages as a result of the A/E’s negligence.⁴ Those claimed to be included as reasonably foreseeable plaintiffs include:

- *Initial Project Owner*. Skylights designed by the project architect leaked;⁵ surveyor staked home for construction on government land;⁶
- *Subsequent Owners*. Condo owners who purchased from the original owner/developer sued architect who designed project;⁷
- *Tenants and Their Guests*. Apartment tenant’s guest’s child fell from balcony of project designed by architect;⁸
- *Employee of Owner*. Racetrack employee was injured when heating duct designed by A/E fell;⁹
- *Adjoining Property Owners*. Adjoining property was damaged during excavation of project designed by A/E;¹⁰ engineer that designed bridge over a river that subsequently flooded due to bridge design was liable to adjoining landowner since increased likelihood of flooding was foreseeable;¹¹
- *Project Lender*. A/E’s negligent inspection of construction induced improper loan payments to developer;¹²
- *Construction Workers*. Construction worker fell through hole in roof of project designed by architect;¹³
- *Contractor*. Contractor claimed increased cost due to improper foundation design;¹⁴

- *Subcontractors*. Prime contractor went broke; rather than sue the bankrupt contractor, subcontractors alleged A/E was responsible due to improper approval of pay requests;¹⁵
- *Contractor's Surety*. Electrical subcontractor's surety claimed A/E was negligent in failing to discover subcontractor's defective work;¹⁶ and
- *Material Supplier*. Tile supplier sued A/E when tile failed on the basis of negligent testing by the A/E.¹⁷

Thus, the practice and potential malpractice of the A/E may be said to create a duty toward, and potential liability with respect to, virtually everyone who comes into contact with the construction project during or after completion. Having determined that the A/E's negligent performance may create liability to a wide variety of plaintiffs, it remains to analyze that negligence.

Client

In *Lyon v. Belosky Construction, Inc.*,¹⁸ the owners contracted for a custom residence at a cost of \$247,000. Extras in the amount of \$42,000 were added. After construction was completed, the owners found the house to be aesthetically displeasing in proportion and appearance. Correction was priced at \$73,000. The contractor and engineer argued that the proposed damages constituted economic waste and that the proper measure of damages was the reduction in market value (presumably zero). The court noted that it was clear from the record that the aesthetic appearance of the home was of utmost importance to the plaintiffs, that they were entitled to the benefit of their bargain, and that requiring the defendants to remedy the problem was not economic waste. (No pictures of the house were available to allow an independent observer to determine the actual appearance.)

In *Jaime Schapiro AIA & Associates Architects and Planners v. Rubinson*,¹⁹ the architect stated the probable cost of construction to be \$5,020,025. The bids came in at over \$7,000,000. The owner commenced construction and sued the architect claiming negligence and breach of contract. The court held that by proceeding with the work with full knowledge of the difference between the architect's figure and the bid, the owner had rendered moot any negligence by the architect and that any negligence on the architect's part could not have been the proximate cause of any claimed damages.

Patrons

In *Greenhouse v. C.F. Kenner Associates, Ltd.*,²⁰ a plaintiff involved in an automobile accident in a parking lot sued the designer. The court held that the architect was not liable despite the fact the lot could have been designed to be "safer." In *Murphy v. Conner*,²¹ a patron of a shopping mall sued the engineer as a result of injuries sustained in a fall on a floor alleged to be "too slippery." The court held that the experts affidavit that floor was "too slippery" was insufficient to raise triable issue of fact. *Foster v. Chung*²² presented a novel claim against engineers involved in highway design. Foster was killed in a highway accident after he hit a puddle of standing water on the highway and lost control of his car. According to the complaint, improper compaction of the subgrade base material led to settlement of the pavement, allowing water from the median irrigation system to pond on the road. Summary judgment in favor of the engineers was reversed.

Subsequent Owners

The purchasers of an apartment complex sued the seller and architect. The architect had signed a letter stating, “to the best of his knowledge, the construction . . . was substantially completed in a first class, workmanlike manner and in accordance with the architectural plans and applicable laws.” The court in *Tahoe-Vinings v. Vinings Partners*²³ held that the architect had no duty to purchasers who had not hired him and with whom he had no relationship.

In 1995, an individual named Krusi purchased a building that had been constructed nearly 10 years before. Krusi was the fourth owner and sued the original architect and contractor. The original owner had arbitrated with the architect over the same defects. In *Krusi v. S.M. Amoroso Construction Co., Inc.*,²⁴ the court held that an original owner may choose to transfer a cause of action to a subsequent purchaser but the intent to do so must be clear. Once a claim accrued to the original owner, another cause of action on the same issues could not accrue to a subsequent owner.

In *Piantidosi v. Dragone*,²⁵ the MacGarveys hired Brooks Laboratories to evaluate the condition of an underground petroleum storage tank on their property. The MacGarveys later sold the property to the Dragones, who subsequently sold it to Piantidosi. Piantidosi sued Brooks for alleged negligence in determining the condition of the tank. Brooks sought dismissal on the basis that Piantidosi was not a foreseeable plaintiff. According to Brooks, the testing was done exclusively for MacGarvey, and Piantidosi had failed to allege any statutory or contractual duty owed by Brooks. According to the court, privity was not required. The test for existence of a legal duty was (1) whether an ordinary person would anticipate harm of the general nature that occurred and (2) a public policy determination as to whether the defendant’s responsibility should extend to this plaintiff under these facts. However, Brook’s motion to strike was granted because Piantidosi had not alleged facts sufficient to establish that they were likely to be harmed in the manner they claimed Brook’s negligence had harmed them.

Tenants

In *Bruzga v. PMR Architects, P.C.*,²⁶ the estate of a suicide victim who hanged himself from a fire sprinkler pipe while in a state prison sued the prison’s architect. The court held that the suicide was an intentional, independent intervening act and the architect had no specific duty of care to prevent the suicide.

Adjoining Property Owners

The defendant car dealership excavated part of a slope in order to expand. The defendant engineer assisted in the excavation. The plaintiff purchased an apartment complex uphill from the dealership. When distress was observed in some of the buildings, the plaintiff filed on theories including strict liability and breach of fiduciary duty. The court held that dismissal of the fiduciary duty claim was appropriate and that in order for strict liability to apply in a lateral support case, it must be found that the weight of the buildings, artificial additions, and fill on the plaintiff’s land did not materially increase the lateral pressure. “[A] landowner cannot, by placing improvements on its land, increase its neighbor’s duty to support the land laterally.”²⁷

An engineer was retained by a county to design a replacement bridge. Following the completion of construction, the river flooded, damaging the plaintiff Johnson's property. The court held that the engineer was liable where its failure to exercise reasonable care increased the risk of harm to a third party.²⁸

Subcontractors

An architect continued approving the contractor's pay applications, even after becoming aware that the contractor was not paying its subcontractors. The court held that the architect had no duty to the subcontractors. Complaints regarding payment problems were insufficient to give rise to an independent legal duty, and the architect had no duty to the contractor and certainly not to the subcontractors.²⁹

In *Boren v. Thompson & Associates*,³⁰ the architect on a school project (where a payment bond was required by state statute) continued approving the contractor's pay requests after becoming aware that the required payment bond was not in place. Unpaid subcontractors sued the architect alleging negligence in approving pay requests without the statutory bond in place. The court held that the public has a duty to withhold payment where the required bond is not in place. When the public assigns the responsibility for certifying pay applications to the architect, the architect's failure to assure the payment bond is in place is actionable negligence and the subcontractors' claims arose from that negligence.

In *Nota Construction Corp. v. Keyes Associates, Inc.*,³¹ a subcontractor sued the architect, alleging misrepresentation regarding soils conditions. The architect's motion for summary judgment was granted on the economic loss doctrine. The appellate court followed the rule that misrepresentation was an exception to the economic loss rule. The opinion, however, also included "duty" language. The court stated: ". . . liability will be imposed . . . for the negligent furnishing of services to one not a party to the contract where the defendant knows that the party will rely on his services."³²

Contractors

A contractor alleged that defective plans increased the cost of performance and sought recovery against the engineer. The court held that the claim was barred by the statute of limitations, which began running when contractor's bid was accepted, even though the contractor was not aware of the injury at that time. Further, in light of a contractual requirement for pre-bid site inspection, reliance on the engineer's representations as to site conditions was not reasonable.³³

In *Fleischer v. Hellmuth, Obata & Kassabaum*,³⁴ the project construction manager sued the architect. The court held that the architect owed no duty to the contractor or construction manager for damages arising out of the architect's performance of its contract with the owner. However, in *Jim's Excavating Service, Inc. v. HKM Associates*,³⁵ since it was foreseeable that the contractor would rely on the engineer's plans for construction, the court found that the engineer was liable for the contractor's \$400,000 cost overrun on a pipeline project.

In *17 Vista Fee Associates v. Teachers Insurance and Annuity Association of America*,³⁶ the contractor retained the engineer to fulfill the contractor's responsibility to provide the design of a smoke purge system. The system failed its test, and the owner required the contractor to modify the system at a cost of \$452,000. The court held that in order to recover for indemnity, the contractor must have assigned exclusive responsibility to the engineer. In addition, the court held that the trial court erred in granting summary judgment for the engineer since the contractor's project deficiencies were in areas other than the smoke purge system, and the contractor was not seeking damages for other areas of the project.

Members of the General Public

A deceased motorist's estate sued the engineer, alleging negligent bridge design such that the short span and high "vertical curve" limited site distance. The engineer originally had designed the bridge at 150 feet long. The Wisconsin Department of Transportation shortened the bridge to 70 feet to save money. The claim against the engineer was dismissed on basis of governmental immunity.³⁷

Contractor's Surety

The contractor's subrogee alleged negligent design had resulted in higher than expected costs of construction. The denial of the motion to dismiss was affirmed. Although there was no contract, the relationship was so close as to "approach privity."³⁸

Determining Negligence

Basic to the determination of negligence is the yardstick by which that negligence is to be measured. In run-of-the-mill cases, the judgment of the reasonably careful man is utilized.³⁹ Claims of negligence against an A/E, however, require a different standard of measurement.

In a suit brought to impose liability upon a professional for an alleged failure to perform professional services in a proper manner, Colorado defines the standard of care to which the professional is held as the standard of ordinary and reasonable skill usually exercised by one in that profession.⁴⁰ This basic principle of the law of professional liability has been widely accepted.⁴¹ A number of cases have dealt with the question of the scope of the duty owed by a design professional. Those cases consistently hold that:

The law imposes upon persons performing architectural, engineering, and other professional and skilled services the obligation to exercise a reasonable degree of care, skill and ability, which generally is taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by their respective professions.⁴²

A California court, in a frequently cited case, approved an instruction containing the following statements:

By undertaking professional service to a client, an architect impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordi-

narly possessed by architects of good standing, practicing in the same locality. It is his further duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality; to use reasonable diligence and his best judgment in the exercise of his skill and the application of his learning, in an effort to accomplish the purposes for which he is employed.⁴³

Many decisions have compared the standard of care applicable in an architect's professional liability case to that employed in suits against physicians:

In determining the liability of Godat, the same standard of care applied in the case of architects, physicians, attorneys, and others engaged in professions requiring the exercise of technical skill should be applied. The test is whether he performed his service in accordance with the skill usually exercised by others of his profession in the same general area.⁴⁴

Colorado case law reflects several positions concerning the compass of the professional community by which a professional standard of care is to be established for health care professionals.⁴⁵ With respect to A/E liability, a statewide standard, as opposed to a local standard, applies.⁴⁶

The jury instruction approved for use in Colorado in cases involving the professional liability of an architect (or other design professionals) provides as follows:

An architect is negligent when he or she does an act which a reasonably careful architect would not do or fails to do an act which a reasonably careful architect would do.

To determine whether an architect's conduct is reasonably careful, that conduct must be measured against what an architect having and using that knowledge and skill of architects practicing architecture at the same time, would or would not have done under the same or similar circumstances.⁴⁷

Perfection Not Required

The professional standard of care does not require the A/E to be infallible or to guarantee or insure the results of his or her professional services. In *530 East 89 Corp. v. Unger*,⁴⁸ the owner sued the architect as a result of the rejection of the plans by the building department. The contract required the architect to "make every effort" to prepare acceptable plans, but the architect never guaranteed to prepare acceptable plans, and hence was not liable.

A design professional does not guarantee, insure, or warrant that a satisfactory result will be achieved. In *Major v. Leary*,⁴⁹ the court stated:

The law does not expect or require absolute perfection, but tests the efficiency of the architect by the rule of ordinary and reasonable skill usually exercised by one of that profession.⁵⁰

In another case, *Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc.*,⁵¹ the court stated:

An architect is not a guarantor or an insurer but as a member of a learned and skilled profession he is under the duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation⁵²

The general rule that A/E's do not insure perfection is premised upon the notion that architecture and engineering are not precise sciences.⁵³ At least one court has disagreed with this concept, stating:

The work performed by architects and engineers is an exact science . . . A person who contracts with an architect or engineer . . . has a right to expect an exact result.⁵⁴

Significantly more will be presented on the subject of warranties of A/Es later in this chapter in the discussion regarding implied warranty and strict liability.

The court in *Firestone Steel Products Co. v. Barajas*⁵⁵ confirmed that A/Es are not insurers and are not liable on theories of strict liability. The court held that strict liability was not a viable cause of action against a designer who provided innovative, prototype design.

Proving Negligence

Not only does the law dictate what standard must be employed in measuring the performance of the A/E, it also states how that standard must be established. Courts have almost universally held that the applicable standard of care, and any failure to perform services in conformance with that standard of care, must be established by the expert testimony of other A/E's. An instruction approved by a California court included the following statement:

In determining whether the defendant architects' learning, skill and conduct fulfilled the duties imposed by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard is that set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in the same locality, at the same time. It follows, therefore, that the only way you may properly learn that standard is through evidence presented in this trial by other persons in the field of architecture, called as expert witnesses.⁵⁶

The Utah Supreme Court has ruled that:

The liability of architects is based upon professional negligence with respect to which only those qualified in the field can testify as to the standard of competence and care possessed by professional men in the locality and whether there has been a breach of that standard of care.⁵⁷

In Colorado, the court of appeals approved the following instruction in a medical professional liability case.

In considering whether the defendants . . . exercised ordinary and reasonable care, skill and diligence . . . you cannot set up a standard of your own, but must be guided in that regard solely by the testimony of the physicians who have appeared in this action, in accordance with the instructions of the standard of care of physicians contained herein.⁵⁸

Numerous other cases have applied the rules discussed above concerning the standard of care in a design professional liability case and the manner in which that standard is to be established.⁵⁹

In certain circumstances, the testimony of a professional practicing in the same field may not be required in judging the performance of the A/E. In other instances, expert testimony may not be required at all. For example, an Eighth Circuit court held that expert testimony was not required to establish the architect's negligence in "supervision" of construction.⁶⁰ The fact that costs exceeded the estimate "substantially" was held sufficient to establish evidence of the breach of the architect's contractual duty without the need for expert testimony.⁶¹

In other instances, expert testimony may be required but may be offered by a member of a different profession.⁶² By way of example, in *Perlmutter v. Flickinger*,⁶³ a contractor and a chemical engineer were permitted to testify as experts regarding the standard of care applicable to the design of skylights.

Similarly, a foundation specialist who was not an engineer but who regularly evaluated and repaired residential foundations was found to be qualified to establish the applicable standard of care for a professional engineer.⁶⁴

In a somewhat confusing decision, the court in *Town of Breckenridge v. Golfcourse, Inc.*,⁶⁵ held that expert testimony was not required to establish a breach of contract where the contract established the parties' obligations and that golf course greens that had percolation problems did not satisfy the contractually established standard of performance.

The Wyoming appellate court in *Kemper Architects v. McFall, Konkel, Kimball Consulting Engineers* approved the following jury instruction:

Instruction #7 . . . You are instructed that [in] performing professional services for a client, an engineer has the duty to have that degree of learning and skill ordinarily possessed by reputable engineers.

It is his further duty to use reasonable diligence and his best judgment, in the exercise of his professional skill and in the application of his learning, in an effort to accomplish the purpose for which he was employed.

A failure to perform any such duty is negligence.

The degree of care, skill and judgment which is usually exercised by an engineer is not a matter within the common knowledge of jurors or lay persons. These standards are within the special knowledge of experts in the field of engineering and can only be established by their testimony. You may not speculate or guess what those standards of care, skill and judgment are, but must attempt to determine this, from the testimony of legal experts called for that purpose.⁶⁶

According to the court, the instruction accurately stated both the professional standard and the method of proof required, *i.e.*, expert testimony.

The *Kemper* court further addressed the issue of the qualifications required by an expert. The court's guidance should be particularly useful in cases where an expert from one discipline is called to testify against (or for) a member of a different professional discipline. In *Kemper*, the defendant mechanical engineer successfully precluded the plaintiff's expert from testifying. The mechanical system at issue was a variable air volume variable temperature (VAVVT) system. On *voir dire*, the plaintiff's expert admitted that VAVVT systems were unique, complex, and difficult; that he had never designed a similar system; and that given the complexity, he doubted that anyone could be considered truly expert in the design at issue. In rejecting his testimony the court stated:

For a witness to qualify as an expert, a determination must be made [that] the witness has adequate knowledge, whether acquired by formal education or otherwise, and the appropriate experience in any area in which he proposes to state an opinion.⁶⁷

In *Walker v. Bluffs Apartments*,⁶⁸ the plaintiff's expert was a licensed contractor and licensed building inspector who taught courses in the building code but was held not qualified to testify as to the standard of care for an architect. In two other cases, the fact that an expert from a different discipline from the defendant had solved the alleged problem appears to have influenced the court. In *Edgewater Apartments v. Flynn*,⁶⁹ an architect was allowed to testify against an engineer where he was familiar with the problem and had corrected it after the engineer had failed to do so. Likewise, in *Yantzi v. Norton*,⁷⁰ the testimony of a foundation repair specialist was allowed against an engineer where such specialists were allowed to engage in foundation evaluation and repair and had in fact corrected the foundation problem after the engineer's recommendations had failed.

In *Garaman, Inc. v. Williams*,⁷¹ the plaintiff failed to offer an architectural expert but argued that a directed verdict for the architect was improper because the architect acknowledged a duty to know the building code and admitted that aspects of his design did not comply with code. The court held that such testimony from the architect fell short of establishing the standard and breach. The owner's argument that the architect's performance was so negligent that it was within the ken of a layperson also failed.

It is, however, clear in Colorado that a qualified expert need not be of the same discipline as the defendant. According to *Corcoran v. Sanner*,⁷² an expert who is neither qualified nor licensed in Colorado is not automatically disqualified. The test is whether the expert has special knowledge concerning architectural standards, including statewide standards applicable to Colorado practitioners, that will aid the trier of fact. The *Corcoran* decision also distinguishes the locality standard of the medical profession from the statewide standard applicable to the A/E.

In *City of York v. Turner-Murphy Co.*,⁷³ the city hired Mayes, Sudderth and Etheredge, Inc. (MSE) to design and inspect the construction of a waste treatment plant. During construction, leakage was noticed in a concrete wall and honeycombing of the concrete was discovered. The contractor repaired the wall and the city accepted the plant. A year later a hole developed, and a second engineer recommended replacement of the wall. It was established at trial that MSE had a duty to notify the city of defective work. However, since the defects that later resulted in the recommendation for replacement required destructive testing and since the decision to conduct such testing involved many subjective factors, the question of whether MSE's failure to require replacement of the wall fell below the standard of care required expert testimony.

In *Kumho Tire v. Carmichael*,⁷⁴ the plaintiff's expert, Dennis Carlson, testified regarding whether a tire that blew out and caused an accident was defective. Carlson was a mechanical engineer, worked at Michelin for 10 years, and had testified as a tire failure expert on previous occasions. Despite the fact that the tire was five years old, had no tread remaining in some areas, and had been subjected to prior defective repairs, Carlson testified that a manufacturing defect caused the blowout. His reasoning was that the separation of the tread from the tire carcass, if not caused by under-inflation, is normally caused by a design or manufacturing defect. Since typical signs of under-inflation were missing or, where present, were considered by Carlson to be "insignificant," he concluded that separation was attributable to design or manufacturing defects. The trial court "tested" Carlson's theories by (1) whether they had been subject to peer review or publication, (2) the potential rate of error, and (3) the extent of acceptance in the engineering community. After applying these factors, the court excluded Carlson's testimony. This ruling is consistent with the court's expert witness "gate keeping" function as established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁷⁵

Individual Liability

As a concession for permitting architects to practice in the corporate form, Colorado statutory law has long provided that the architect would remain professionally responsible. C.R.S. § 12-4-110(2)(b) provides that while architects may practice in a corporate form, such architects remain individually responsible to the board and the public. Most who have considered this provision have long believed that "professional responsibility" equated to "personal liability." A Florida court, in *Moransais v. Heathman*,⁷⁶ confirmed that, at least in Florida, such was the case. Moransais retained the engineering firm of Bromwell & Carrier, Inc (BCI) to conduct a pre-purchase inspection of a home. BCI engineers Jordan and Sauls provided the services. Moransais sued BCI and Jordan and Sauls individually. The trial court dismissed the claim against the individual engineers. The supreme court held that the fact neither Jordan nor Sauls were parties to the contract was not relevant, since they were professionally responsible for the work.

§ 8.2.2—Contract

The vast majority of professional services rendered by architects and engineers are provided pursuant to written contracts. To the extent the written contract defines the scope of the A/E's (architect/engineer) services, disputes with respect to these services require reference to the written agreement. Since the ruling of the Supreme Court in *BRW, Inc. v. Dufficy & Sons, Inc.*, most cases against the A/E will be initiated by those with whom the A/E is in contractual privity and will be limited to actions in the contract.⁷⁷ In the absence of a total lack of performance, most breach of contract claims against A/Es will be based upon negligent performance of the contract.⁷⁸ An owner can generally establish the designer's breach of contract by introducing evidence showing that the architect failed to use reasonable care in the performance of his or her contractual obligations or that the architect's performance fell short of applicable professional standards.⁷⁹ Accordingly, *Dufficy* notwithstanding, most attempts to segregate negligence and breach of contract into separate discussion topics for purposes of substantive analysis are somewhat artificial. Nonetheless, this section will focus on breach of contract claims and will attempt to distinguish such claims from claims founded purely upon negligence theories. While many courts in other jurisdictions continue the practice of allowing claims for damages arising out of the performance of a contract to be brought in either contract or tort, Colorado, at least with respect to construction projects, has acted to limit claims for such damages to actions in contract.⁸⁰

Obligations Under the Contract

The contract between the A/E and his or her client defines the professional service obligations assumed by the A/E. It establishes the scope and extent of the services to be performed. Generally, however, the contract, while defining what will be done, does not address the standards applicable to performance. The quality of performance is, instead, determined by reference to negligence principles. Thus, an A/E who performs his or her contract in a negligent manner may be found both negligent and in breach of contract.

Modifying the Standard of Care by Contract

The yardstick by which the performance of the A/E's contract will be determined is generally the standard of reasonable care. As previously noted, this standard does not demand perfection and is not accompanied by an implied warranty.⁸¹ In the absence of any contractual reference to the standards by which the A/E's performance will be judged, the law will imply performance in accordance with generally accepted professional standards.

With increasing frequency, owners are insisting upon contract language that alters the yardstick by which the A/E's performance will be judged. Such language takes a wide variety of forms. It may require the A/E to perform consistent with the "highest" professional standards, perform in a manner "consistent with nationally recognized firms with specialized expertise," or in some other manner attempt to elevate the required standard of care. Where such language is employed, the A/E may be liable for breach of contract, despite having complied with the standard of care imposed by the law, absent a contractual modification.⁸² It should be noted that coverage under the A/E's professional liability insurance may be jeopardized by a contractually elevated standard of care. In insurance terms, this increased exposure is "liability assumed by contract" and is generally uninsurable absent a specific policy endorsement.

The customary standard of care may also be modified by contract language requiring that a specific result be achieved. As stated, the majority rule in the United States is that professional services are not accompanied by an implied warranty.⁸³ Contracts which employ such words as “ensure,” “guarantee,” “warrant,” “achieve,” and similar variants may be held to elevate the standard of care and create an express warranty.⁸⁴

In response to owners' attempts to elevate the standard of care and include warranty type language, A/Es are endeavoring to incorporate contract provisions that define the ordinary standard of care and specifically exclude express or implied warranties. The A/E may insist upon language such as “the A/E's services will be performed in a manner consistent with that level of care, skill and judgment ordinarily exercised by other A/Es” and “no warranty, express or implied, is made.”

As is discussed in more detail under “Proving Negligence,” above, compliance with the standard of care is customarily determined by the expert testimony of other competent A/Es. Where the A/E has contractually agreed to a higher standard of care, questions may arise as to the manner in which compliance with or breach of that higher standard is to be determined. Will an architect who designs a high school auditorium in Fruita, Colorado under a contract requiring performance “consistent with nationally recognized firms specializing in the design of similar facilities” be judged by the standard of practice of the New York City architect who designed the New Jersey Center for the Performing Arts, remodeled the Kennedy Center, designed the Letterman Studio and other similar projects? It can readily be seen that such contractually agreed upon alterations to the standard of care present difficult proof issues.⁸⁵

In *Arkansas Rice Grower's Cooperative Association v. Alchemy Industries, Inc.*,⁸⁶ the engineer contractually agreed to provide all engineering services necessary to burn rice hulls so as to reduce 7-1/2 tons of hulls per hour to ash at 48 million BTU per hour of steam at 200 lbs. pressure. This constituted an express warranty, and proof of professional negligence was not required. Where the A/E has by contract agreed to the higher standard, that obligation runs only to the party with whom the A/E is in privity and not to third-party plaintiffs.⁸⁷ In *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*,⁸⁸ Stone & Webster submitted a contract committing to perform consistent with “good engineering practices.” The contract was never signed. Chesapeake, subsequent to receiving Stone & Webster's contract sent a purchase order form stating, “all materials and articles . . . will be free from defects . . .” Predictably, a dispute arose as to the standard of care to be applied.

In the case of *In re John Grace and Co., Inc.*,⁸⁹ the contractor was required by contract to conform the HVAC system to the latest edition of SMACNA. The city was dissatisfied and argued that the contractual reference to the “latest edition” included a later revision. The court ruled that an “edition” was an “edition” and a “revision” was a “revision.” If the city wanted the contractor to follow the latest SMACNA edition *with revisions*, the contract could have specifically so required.

These cases illustrate the importance of contractual language regarding the standard of care. It appears certain that where the A/E contractually agrees to an elevated standard of performance, the courts will hold the A/E to the agreed-upon standard. Owners who contractually mandate a higher standard of care may find their bargain not an entirely successful one, as professional liability insurance carriers may deny coverage for the elevated standard of care. An owner seeking to elevate the standard of performance above that required by the common law would be well advised to seek an endorsement covering the increased performance standard.

Demise of Privity

For many years, the liability of the A/E derived principally from contract law. The general emergence of the “tort of malpractice” and the demise of the privity concept have shifted the emphasis to negligence. Much has been written about the demise of the privity concept, which permits a cause of action in a situation where a negligent party acting pursuant to a contract injures a stranger to the contract to whom he or she owes no contractual duty. Carried to extremes, the total elimination of privity results in a significant extension of professional liability for the A/E.

A 1973 Rhode Island case⁹⁰ traced the long history of privity and its demise. As a precursor of things to come the opinion began as follows:

The question raised on this appeal is: How far has the “citadel” fallen? The answer is: “All the way!”⁹¹

True to its introductory comment, the court continued:

The time has come to declare in simple, direct language that in a tort action for negligence against a manufacturer or supplier whether or not privity exists is of no moment. In such circumstances, the liability or non-liability can be determined by the usual principles of tort law regardless of the lack of a contractual relationship between the parties or relationship between the parties or whether damages are sought for injuries to persons or property.⁹²

The following cases indicate the continuing trend toward eliminating the requirement for a contractual relationship in establishing a party’s duties and potential liabilities. Each case involves alleged cause of action resulting from services provided to someone other than the plaintiff.

In one case, an injured pedestrian was allowed to maintain a cause of action against a physician who was allegedly negligent in failing to diagnose his patient’s condition and advise the patient of the dangers of driving an automobile.⁹³

Similarly, a prime contractor on a construction project was allowed to sue another prime contractor over contract obligations, despite the absence of any contract between the two parties.⁹⁴

In 1972, the Michigan Supreme Court extended a 1919 Michigan decision which held that an abstractor was liable to a third party if he *knew* the third party would rely on the abstract. The court found that a cause of action arose from a breach of the abstractor's duty in favor of those persons who the abstractor could *reasonably foresee* as relying upon the accuracy of the abstract.⁹⁵

A designer, contractor, or subcontractor may be liable for negligence which causes injury or damage to persons with whom there is no contractual privity. The cause of action can accrue even though the work is complete and the project has been accepted by the owner; provided it is *foreseeable* that negligent performance may result in damage to the property or injury to persons living on or using the premises.⁹⁶

A cause of action could lie against an architect for liability to tenants of a building damaged due to the architect's alleged negligent design and inspection of construction, despite the absence of privity between the architect and tenants.⁹⁷

A.R. Moyer, Inc. v. Graham,⁹⁸ traced the demise of contractual privity as a prerequisite to liability. The *Moyer* court traced the case law development, stating that privity was a theoretical devise of the common law that recognized liability commensurate with compensation for contractual acceptance of risk. Relying upon decisions in other states and a variety of law review articles, the court was persuaded by the argument that the degree of control over the contractor which the architect possesses requires the law to impose a duty on the architect to perform his functions without negligence as they affect the contractor. The court stated:

. . . we are satisfied that the principle is established that a third party general contractor, who may foreseeably be injured or sustained [*sic*] an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity.⁹⁹

The pointed dissent in *Moyer* is likewise of interest.

It is usually indicative of another departure from *stare decisis* when an opinion starts reciting at length from law reviews, trial courts and the more liberal jurisdictions, each reciting the other's authority for their new found doctrine . . .¹⁰⁰

It is not difficult to rewrite the law if one sets out on a determined course to depart from established precedent; what is difficult is to stand fast in support of the sound principles of fundamental law, against the onslaught of new and novel theories asserted to provide economic relief to the present unfortunate litigant, from some source which appears available to tap.¹⁰¹

While the "citadel" has cracked and crumbled, in at least a few jurisdictions it has not yet fallen. At least within the law of economic loss, vestiges of the privity doctrine remain in

Colorado and elsewhere.¹⁰² However, a general review of cases requiring privity as a prerequisite for recovery discloses a great deal of inconsistency within the area.

Examples include:

- engineer in absence of contract with general contractor had no legal duty to contractor;¹⁰³
- privity required for recovery of economic loss damages;¹⁰⁴
- contractor could not sue architect for breach of contract where he had no contract with architect, nor for negligence because architect owed no duty of ordinary care in favor of contractor;¹⁰⁵
- economic loss of hotel employees who were out of work due to fire created no negligence cause of action against the hotel designer for their economic losses;¹⁰⁶
- original project architect not liable to purchasers who bought building from original owner;¹⁰⁷
- mechanical engineer who contracted with architect not liable for professional negligence to project owner;¹⁰⁸
- subcontractor could not maintain a negligence action against architect in absence of privity;¹⁰⁹
- subcontractor could not recover from architect for faulty shop drawings;¹¹⁰ and
- contractor's claim against architect in absence of privity dismissed as frivolous.¹¹¹

The Colorado Court of Appeals addressed the issue thusly:

As a general rule, no cause of action lies in tort when purely economic damage is caused by negligent breach of a contractual duty. . . . This economic loss rule prevents recovery for negligence when the duty breached is a contractual duty and the harm incurred is the result of failure of the purpose of the contract. . . .¹¹²

“Economic loss” has been defined as “damages for adequate value, costs of repair and replacement of the defective product, or consequent loss of profits — without any claim of personal injury or damage to other property.”¹¹³

The economic loss rule arose out of the recognition of the intrinsic differences between contract law and tort law. As one court stated, “[C]ontract principles resolve issues when the product does not meet the user’s expectations, while tort principles resolve issues when the product is unsafe to person or property.”¹¹⁴

When entering into a contract, parties negotiating at arms length are free to restrict the remedies for breach of the contract. “[I]t is appropriate for sophisticated commercial entities to utilize contract law to protect themselves from economic damages.”¹¹⁵

However, in a negligence action, a party is potentially liable for all of the damages caused by his negligence. The economic loss rule prevents the non-breaching party from bringing its claim in tort in order to escape any restrictions on its recovery imposed by contract.¹¹⁶

The Colorado Court of Appeals adopted the economic loss rule in *Jardel Enterprises v. Triconsultants, Inc.*¹¹⁷ In that case, an owner sued a subcontractor for breach of contract and negligence for lost profits caused by the delayed opening of its restaurant. In concluding that the owner did not have a viable claim against the subcontractor based on negligence, the court focused on the fact that the parties did not have a contractual relationship. In addition, the court recognized that the damages sought were lost profits, which are purely economic losses. “Consequently, owners have no negligence cause of action [against a subcontractor] since no duty independent of the contract was breached.”¹¹⁸

Proving Breach

As is common under modern pleading rules, which allow a plaintiff to plead alternative causes of action, most suits against the design professional by the A/E’s client will allege both breach of contract and negligence. In the absence of contractual language holding the A/E to a standard higher than that imposed by law, the standard of proof for breach of contract will, in most cases, be essentially the same as for negligent violation of a duty. In other words, one proves that the contract was breached by proving performance of that contract in a manner below the standard of care.

In *Lee County v. Southern Water Contractors, Inc.*,¹¹⁹ the court stated:

The gravamen of Lee’s cross-claim against B&B is that B&B failed to adequately supervise and inspect the installation pursuant to its obligation under the contract. Whether this is construed to be a suit for breach of contract or a suit for negligent violation of a duty created by contract, the standard of proof is essentially the same. As in the case of other professionals, an engineer has a responsibility to his client to exercise reasonable care and skill in the performance of his duties.¹²⁰

According to the court in *Navajo Circle, Inc. v. Development Concepts Corp.*,¹²¹ while the duty owed by the designer may have sprung from a contractual promise, the duty sued on is not the contractual promise, but the duty to use reasonable care and affirmatively perform the promise.

While, as stated, a plaintiff may plead both breach of contract and negligence, it should be axiomatic that only one recovery may be had when the damages claimed are identical.¹²²

The common law standard of care may not apply where the A/E has agreed by contract to a higher standard of care. In *Peter Kiewit Sons’ Company v. Iowa Southern Utilities Company*,¹²³ the contract required the A/E to perform his services “in accordance with the highest standards of the engineering profession.” Where the A/E by contract has agreed to a higher standard of care, that standard will govern his performance, and expert testimony should be introduced regarding that higher standard.

Modern pleading rules allowing the pleading of alternative causes of action notwithstanding, it now appears that in most suits against design professionals by the A/E’s client, a contract

action is the preferred if not exclusive claim for relief.¹²⁴ According to the court in *Grynberg v. Agri Tech, Inc.*,¹²⁵ if the duty allegedly breached is created by contract, and the damages sought arise from a breach of those contractual duties, then the cause of action lies in contract, not in tort. Further, the economic loss rule (discussed below at § 8.4.8) barred Grynberg's negligence claim.

Questions as to differing measures of damages may arise in contract versus tort actions. Trial courts also appear to struggle with determining the correct quantum of damages where the plaintiff has been comparatively or contributively negligent but sues only in contract. In *Gateway Western Railway v. Morrison Metalweld Process Corp.*,¹²⁶ the railroad sued in contract over defective track repairs that caused a derailment. The Eighth Circuit held that comparative fault could be used to assess damages in the breach of contract action.

*Pike v. Howell Building Supply Co., Inc.*¹²⁷ reflects the continuing confusion as courts attempt to integrate contract and tort concepts. A contractor, after expressing concern as to the ability of the soils covering an underground tank to support the weight of a planned concrete pour, was instructed by the owner to proceed. The contractor's prediction proved accurate. The owner sued anyway. The trial court instructed the jury that the owner could not recover if it had assumed the risk by proceeding after being warned of a possible failure. The court of appeals reversed since assumption of risk is a tort concept and the proper legal doctrine for use in a contract claim was notice and waiver, not assumption of the risk. The supreme court reversed, ruling that the jury instruction referencing "assumption of risk" instead of "notice and waiver" was harmless error.

§ 8.2.3—Strict Liability (Negligence *Per Se*)

Suits against design professionals frequently allege strict liability based upon the failure of the design to comply with the mandates of local building codes. What appears to be a clear code violation by the time a case gets into litigation may not have been so clear during the design phase. The enforcement of building code provisions is totally dependent upon the particular circumstances, design, and construction of the building in question. Further, the interpretation of building codes is sometimes subjective and often inconsistent. In many cases a code defines certain design requirements that must be met but leaves a variety of ways available for complying with the requirements. A determination of a violation is thus often within the discretion of the local building authority.¹²⁸

In the Colorado case of *Hamilton v. Gravinsky*,¹²⁹ an automobile accident case, the court ruled that where a plaintiff does assert negligence *per se*, he or she must show that the defendant failed to perform a statutory duty designed to protect a class of which the plaintiff is a member and that the failure is a proximate cause of the injury.¹³⁰ In *Huang v. Garner*,¹³¹ the court ruled that a violation of the Uniform Building Code (UBC) created a presumption of negligence.

The policy behind building codes is generally to establish certain minimum standards of design and construction so as to prevent damage or injury to the owner and persons who may foreseeably use the building. Accordingly, when the A/E, by his or her design or negligent construction inspections, creates or allows a condition that violates the local code, the doctrine of negligence *per se* may apply.¹³² However, given the wide range of discretionary interpretation

inherent in certain code provisions, strong arguments exist that a claim of negligence *per se* is inappropriate in such circumstances.

In *Holmes v. Wink*,¹³³ Holmes was injured when she slipped and fell on a galvanized steel plate that Wink had specified for use at a marina. She appealed the trial court's refusal to give a negligence *per se* instruction based on a violation of the Building Code. A boat had rammed Pier G at the marina and created a gap between the concrete pier and the bulkhead. Wink exercised his professional judgment in determining that a galvanized plate was the best repair material. The trial court was affirmed with the reasoning that Holmes had failed to offer any authority that the violation of the Code entitled her to a negligence *per se* instruction and had failed to show that any violation of the Code subjected Wink to negligence *per se*.

The concept of strict liability as applied in products cases will be discussed at some length in a later section of this chapter.

§ 8.2.4—Types Of Litigation

The topics herein addressed might be better categorized under a heading of “Foreseeable Plaintiffs” than “Types of Litigation.” The A/E does not have the luxury generally afforded the lawyer of serving one master and disregarding the interests of third parties, who must protect their own interests. Rather, the modern legal environment is such that the A/E must remain vigilant to the interests and rights of all who foreseeably may be injured by the A/E's practice (or malpractice). A sample listing of foreseeable plaintiffs has been provided, above. This section will provide a further discussion of such cases.

Liability of the A/E to the Owner

The A/E's first responsibility is to his or her client, normally the project owner. The potential liability to the owner runs the gamut of possible A/E errors and omissions, from basic design errors to understating the cost of construction. The owner, of course, has no privity bar to hurdle and may sue the A/E directly where the A/E's performance is below the applicable standard of care.

In *Thomson v. Espey, Hurton & Assocs.*,¹³⁴ the project owner sued an engineer who had provided engineering services as a consultant to and under contract with the architect. The court disallowed the owner's contract claim on the basis that the owner was a mere incidental beneficiary of the contract between the architect and engineer.

In *City of New York v. Black & Veatch*,¹³⁵ Black & Veatch was retained to prepare plans and was also to provide the CPM (critical path method) schedule. The project finished over a year late, and the contractors filed claims against the city. Black & Veatch moved for dismissal of the city's claims against it. The court held that the evidence clearly demonstrated an issue of material fact as to whether Black & Veatch acted tortiously when it assigned the CPM preparation tasks to an engineer with little CPM experience and no formal CPM training.

Defective Plans

It must be remembered that absent a contractual commitment to do so, the A/E does not guarantee a satisfactory result.¹³⁶ The A/E's duty to the client is to exercise and apply his or her skill and ability, judgment, and taste, reasonably and without neglect.¹³⁷ Where the design is particularly novel or complex, the mere fact that the desired result is not achieved does not necessarily render the A/E liable.¹³⁸ Further, the A/E is not held to a standard of perfection in preparing plans and specifications, and his or her liability rests upon negligence or unskillfulness, not upon errors of judgment.¹³⁹ Thus, in a suit by a project owner for defective plans and specifications, the A/E is liable only for a failure to exercise reasonable skill in the preparation of plans, but does not guarantee accuracy or perfection.¹⁴⁰

Supervision, Inspection, Observation

The scope of services that the A/E is to perform at the job site during construction has created considerable confusion and litigation. The confusion has in part arisen out of an incomplete definition and understanding of the role of the A/E during construction. One of the most commonly used architect/owner agreement provides as follows:

The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and Architect in Article 2.8, (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.¹⁴¹

Obviously, each case must stand on its own merits as defined by the contract language and the case's peculiar facts. Most of the older cases refer to the A/E's construction phase services as "supervision." Indeed, the AIA documents formerly required supervision. The 1997 edition refers to the architect's "Evaluations of the Work."¹⁴² The A/E's liability must thus be gauged by cases with contract language comparable to that at issue. In the absence of a contractually assumed duty of supervision, the court will not impose upon the A/E the obligation to supervise construction.¹⁴³ Whatever the level of construction phase services assumed by the A/E pursuant to contract, the A/E must clearly exercise reasonable care in performing those services.¹⁴⁴ Even when the supervision of construction is required, the A/E is not liable for all hazards or every defect in construction, but is only required to use reasonable care and diligence in seeing that the work is properly done.¹⁴⁵ Whether the A/E has properly performed his or her construction phase services is a question for the jury, but by undertaking to supervise, the A/E does not guarantee perfect results.¹⁴⁶

"That exhaustive, continuous on-site inspections were not required [under the AIA agreement] . . . does not allow the architect to close his or her eyes on the construction site, refrain

from any inspection whatsoever, and then disclaim liability for construction defects that even the most perfunctory monitoring would have prevented.”¹⁴⁷ Nor does the AIA contract language requiring only periodic site visits for “observation of construction” necessarily absolve the architect of liability with respect to the architect’s duty to inform the owner of deviations from the plans.¹⁴⁸

The A/E’s duty to “supervise” during construction carries with it an obligation to condemn work that the A/E considers unfit and to reject improper materials.¹⁴⁹ But if the A/E has exercised reasonable care, he or she is not liable if inferior materials have been used by the contractor or the contractor has performed careless work.¹⁵⁰ Thus, while the A/E has a duty of reasonable care, he or she is not responsible for the contractor’s methods of construction and is not required to scrutinize each act done by the contractor’s employees.¹⁵¹

Where the A/E has failed to exercise due care and is negligent in the performance of his or her construction phase services, whatever the contractually assumed level, the A/E is liable to the owner for resulting damages.¹⁵² However, the A/E’s negligent services must be the proximate cause of the owner’s damages.¹⁵³ Further, the A/E is liable only to the extent his or her negligence causes the loss pursuant to Colorado’s pro-rata liability scheme.¹⁵⁴

Contracts requiring the A/E to provide construction phase “observation” or “inspection” routinely state that the A/E’s duty in this regard shall not render the A/E responsible for the failure of the contractor to properly carry out the work. Such language was at issue in *Putman v. The Village of Bensenville*. The engineering firm of James. J. Benes & Associates had been retained to engineer a project for the Village of Bensenville. The plaintiff was severely and permanently injured when he tripped on a ramp intended to provide handicap access to a sidewalk. The engineer sought to avoid responsibility by reference to a provision in the contract that limited the designer’s liability for the failure of a contractor to carry out its responsibilities. The plaintiff maintained that his action was based on the engineer’s independent duty to properly inspect the ramp.¹⁵⁵ In ruling for the engineer, the court reasoned that virtually every defect in construction that ultimately causes an injury could be viewed from the other side of the coin and characterized as caused by the engineer’s failure to properly inspect. However, such recasting of the issue virtually rewrites the contract to render the engineer responsible for the acts of the contractor contrary to the intent of the parties. Thus, the trial court properly granted summary judgment for the engineer.

Construction Cost Estimates

The owner’s ability to pay typically limits the scope of a construction project. As such, most owners establish a budget that they hope will not be exceeded. Frequently, however, the owner’s desire to keep the actual cost of construction within the original budget is frustrated. Because of this, many owners anticipate some unexpected cost increases and include a percentage for contingencies (usually from 5 to 10 percent, depending on the project’s estimated cost and complexity) in their budget. Unexpectedly high construction costs can occur for any number of reasons, including an owner’s unreasonable expectations with respect to construction costs, owner-directed changes, delays in construction, differing site conditions, architect or contractor error, or a faulty cost estimate by the architect. Often, a number of factors combine to push the

actual cost of construction far beyond the previous estimates. Multiple causes complicate the analysis of the architect's potential liability and also may affect the appropriate measure of damages.

This section addresses the architect's liability for providing a construction cost estimate inconsistent with the actual bids received or the actual costs of construction.¹⁵⁶ In this context, the architect's standard of care and the measures of damages are also discussed.

The Problem

When an architect is retained, he or she faces a dilemma.¹⁵⁷ One of the architect's primary concerns is the owner's budget because it will dictate the design choices available. For investment properties, an owner develops a budget based on the anticipated return on capital, usually in the form of lease payments. If the anticipated cost of construction exceeds the potential return, a project may be economically impracticable. While sophisticated owners may have some knowledge of project costs, many do not. The architect must be able to address effectively the owner's expectations in relation to the budget so that they can develop a realistic program to avoid later problems.

Many architects, desiring to do a project, fail to provide realistic cost estimates to an owner. Fundamentally, the architect wants to please the client. The architect also wants to see the project completed and does not want to dissuade the owner from proceeding by providing cost estimates beyond the owner's willingness or ability to pay. However, even a careful architect may be misled when providing cost estimates, due to artificially low estimates provided by consultants, potential contractors, and vendors. Like the architect, the consultants, contractors, and vendors also may underestimate the probable construction costs so that they improve their chances to perform the work should the project proceed.

Under such circumstances, while the architect may not be guilty of any culpable conduct, he or she may nevertheless be later confronted with an unhappy client when the estimate turns out to be too low. Other facts also may impact the accuracy of construction estimates, including inflation, existing market conditions, and the availability of labor or material. Thus, for any given project, many factors conspire against the architect when estimating construction costs.¹⁵⁸

Standard of Care

"Negligence occurs when one party deviates from reasonable standards of care owed to another and such conduct naturally and foreseeably results in injury to the other."¹⁵⁹ "A person is bound to exercise that care and caution that would be exercised by a reasonably prudent and cautious person in the same or similar circumstances."¹⁶⁰ When a professional such as an architect has been hired due to a special skill, he or she has a duty "to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence."¹⁶¹ "[R]easonable care requires that [an architect] possess 'a standard minimum of special knowledge and ability' and perform 'in a manner consistent with the knowledge and ability possessed by members of the profession in good standing.'"¹⁶² This standard of care applies whether the claim is based on negligence or breach of contract.¹⁶³

As with any other services, an architect providing construction cost estimates must comply with the appropriate standard of care.¹⁶⁴ However, “[t]hose who hire [architects] are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.”¹⁶⁵ This last point is particularly important in the area of estimates, where few should reasonably expect an architect’s estimate to be anything more than a reasonable approximation in the absence of specific contract language that the architect will design a project with a guaranteed maximum cost.

General Principles

Nationally, many cases have addressed an architect’s liability when providing erroneous cost estimates. Colorado courts also have addressed this issue on several occasions. While the various state courts’ treatment of this issue is uneven, particularly in the area of damages, two general rules have developed.¹⁶⁶ Where the architect’s agreement specifies that the project has an agreed maximum cost that is later exceeded, the architect is not entitled to a fee and may be liable to the owner for damages.¹⁶⁷ Factors relevant in determining whether the architect has breached his or her obligation include:

Whether the agreed maximum cost figure was expressed in terms of an approximation or estimate rather than a guarantee . . . whether the excess of the actual or probable cost resulted from orders by the client to change the plans . . . whether the client has waived his right to object either by accepting the architect’s performance without objecting or by failing to make a timely objection to that performance . . . [and] where the planned building was never constructed, whether the architect, after receiving excessive bids, suggested reasonable revisions in plans which would reduce the probable cost.¹⁶⁸

Under this rule, the architect is held accountable for any costs above the agreed maximum cost in the absence of some of the above factors being satisfied. Thus, an architect who agrees to design a project with a guaranteed maximum construction cost faces considerable risk, especially since his or her fate is largely in the hands of third-party contractors, with whom the architect may be unfamiliar.

The second general rule is that an architect is not entitled to a fee if the actual cost substantially exceeds the maximum agreed cost.¹⁶⁹ This articulation of the rule seems to recognize the inherent limitations of an architect’s estimate, as well as the numerous factors which tend to frustrate that estimate. This rule also seems to have been relied on more frequently than the first rule when addressing an architect’s liability.¹⁷⁰ This could be attributable to architects’ natural resistance to “guaranteeing” construction costs, as well as exculpatory language contained in standard form contracts widely used for architectural services.¹⁷¹

Colorado Law

On several occasions, Colorado courts have addressed an architect’s liability for construction cost estimates. In *Jim Arnott, Inc. v. L & E, Inc.*,¹⁷² the court relied on the general rule that an architect bears no responsibility for increased costs unless the estimating error was substantial.

However, the situation was atypical because the owner's claim was premised on the architect's failure to include necessary water softeners in the original design. The architect did not include these items in its estimate. For some unknown reason, the architect did not participate in the actual design of the water softeners, which later proved to be undersized.

The trial court awarded the owner the costs of installing larger water softeners, rather than the total costs incurred in installing the originally inadequate softeners. In reaching this conclusion, the court compared the original cost of installation, approximately \$8,000, with the total cost of the project and determined that the architect's error was not substantial.¹⁷³ Despite the convoluted fact situation in *Jim Arnott*, when evaluating an architect's liability for cost estimates in Colorado, courts will apparently use the more frequently applied rule that liability will not exist unless the actual cost substantially exceeds the maximum agreed cost.¹⁷⁴

Assistance with regard to what constitutes a substantial deviation from a cost estimate was provided by the Colorado Supreme Court in *Kellogg v. Pizza Oven, Inc.*¹⁷⁵ The testimony at trial was that "a 10% variation is within the norm," of which the court seemed to take judicial notice.¹⁷⁶ Thus, barring owner-directed changes or lengthy construction delays that increase the cost, a construction cost estimate should generally be within 10 percent of the actual cost.

However, strict adherence to this proposition is probably inadvisable because the standard of care may or may not allow for greater leeway in estimating, depending on the size and complexity of a project as well as market-related factors such as the availability of competent contractors, subcontractors, and construction materials. A project's complexity, as opposed to its anticipated cost, is probably the most important factor to be considered when evaluating the appropriate standard of care. For instance, while it may be reasonable for an architect's estimate of a simple project to be fairly close to the actual cost, it may not be reasonable to expect the same precision in estimating from an architect on a complex project of the same cost.

Damages

The court in *Kellogg* also discussed the applicable measure of damages in an atypical context. While the owner is usually the claimant, in *Kellogg*, the plaintiff was a lessee who had contracted with an architect to design a building. The owner-lessor had agreed to pay a fixed amount for construction, while the lessee was to pay any costs above that amount. Two issues were addressed with respect to damages: (1) whether the architect was entitled to a fee, and (2) the amount of the lessor's damages.

Despite a jury determination that the architect negligently failed to compare its estimate with the bids, preventing design changes to reduce the cost before construction, the jury awarded the architect a fee based on the original estimated cost, finding that the architect's work had value. The court affirmed this decision, determining that it was consistent with the verdict against the architect because the lessee's claim was premised on negligence, while the architect's claim was for services rendered under the contract.¹⁷⁷ This decision is interesting because it is contrary to the general rule denying a fee where the costs substantially exceed the estimate.

With respect to the lessee's damages, the court concluded that the appropriate measure was the difference between the actual cost and the estimate, minus 10 percent (the normal variation expected), minus the cost of lessee-directed changes.¹⁷⁸ The court rejected the architect's contention that the lessee was unjustly enriched based on the fact that the claimant was a lessee, not the owner, and there was no evidence of increased value.¹⁷⁹

This measure of damages has been criticized based on the opinion that the lessee's leasehold value probably was increased, that awarding benefit-of-the-bargain damages as opposed to out-of-pocket damages in a negligence action is theoretically wrong, and that the architect was entitled to a fee based on the fact that the plaintiff's claim was for negligence rather than breach of contract.¹⁸⁰ Based on the court's analysis, it appears that should the issue arise again where an owner is a claimant, a different result might follow. If the architect is able to establish that the value of the actual construction was consistent with the cost, a court may deny recovery of damages so as to avoid any unjust enrichment. Because of the unusual factual situation in *Kellogg*, undue reliance should probably not be placed on the result there.

In *Jamie Schapiro AIA & Associates Architects and Planners v. Rubinson*,¹⁸¹ the architect provided an AIA Statement of Probable Cost of Construction in the amount of \$5,020,025. During design, the architect warned Rubinson that expensive additions were being made but never prepared or submitted a revised cost estimate. When the bids came in at more than \$7,000,000, Rubinson proceeded to sign a letter of intent with a contractor to construct the project but also sued Schapiro. The court held that by signing the letter of intent to construct the project, the owner had essentially "mooted" the issue of the difference between the architect's cost estimate and the amount of the bids. It is noted that this result would also be consistent with the AIA B141 Standard Form Agreement Between Owner and Architect, which in subparagraph 2.1.7.6 provides that the owner's remedy when the bids exceed the architect's estimate is to have the architect redesign the project at no charge.

While not involving an estimate by an architect, the case of *Thacker v. Menard, Inc.*¹⁸² is interesting. Thacker selected a plan for a vacation home from several offered by National Plan Service and marketed through Menard. The plan came with an estimate representing that \$13,398.40 worth of materials would be required. Thacker spent \$147,398.40 for materials, then sued NPS and Menard. The court denied any relief based on a disclaimer that accompanied the estimate, despite the fact that it was relatively inconspicuous and was in type that was one-half the size of the other type on the page.

Conclusion

It has been said: "If you cannot see where you are going, you must not go."¹⁸³ This is true in the area of construction-cost estimating for the architect. Generally, proof of architectural negligence or breach of contract requires expert testimony as to the standard of care and its breach. As a general proposition, an architect's estimate should be within 10 percent of the actual costs without considering owner-directed change or delays in construction not attributable to the architect. If a substantial difference exists between the estimate and the adjusted actual cost, the architect may be liable to the owner for damages or denied a fee or both. Damages are based on the difference between the estimate and the actual cost adjusted for owner changes.

Delay in Delivery of Plans

Probably the most frequently asked question after “What will it cost?” is “When will it be ready?” Many claims against A/Es are based on late delivery of plans and the resulting damages. Where the A/E fails to deliver plans on time, he or she may be responsible for the resulting loss.¹⁸⁴ Further, the owner’s acceptance of the late plans does not deprive the owner of his or her claim for damages.¹⁸⁵ The damages claimed by the owner due to late delivery may correspond to the damages available for late completion due to other A/E failures, but have been held to be either the rental value of the completed structure for the period of delay or the reasonable return on the completed structure as an investment for the delay period.¹⁸⁶

Third-Party Liability

The discussion in this section relates to the potential liability of the A/E to parties who are not in contractual privity with the A/E. Such parties include construction workers, contractors, lenders, sureties on the contractor’s performance and payment bonds, tenants and patrons as well as other foreseeable plaintiffs. At least with respect to those who are active participants in the construction project such as contractors and subcontractors, the case of *BRW, Inc. v. Dufficy & Sons, Inc.*, will control the availability of causes of action for economic loss against the A/E.¹⁸⁷ While *Dufficy* may affect the roads that eventual liability will travel before reaching the doorstep of the A/E, it nonetheless remains a reality that a design professional who plans and “supervises” a construction project is under a duty to exercise ordinary care to protect any person who foreseeably may be damaged by his or her failure to do so.¹⁸⁸

Worker’s Safety

Despite numerous jurisdictional exceptions, including Colorado, a significant body of case law has imposed upon the A/E the responsibility for job site safety. In response, § 2.6.6. of the 1987 AIA B-141 Agreement provided language stating that the contractor, not the architect, is responsible.¹⁸⁹

The AIA language regarding the role of the architect’s project visits and the specific disclaimer of responsibility for project safety has resulted in a general rule where such language is utilized that absent a specific contractual assumption of responsibility the A/E is not liable for job-site safety.¹⁹⁰

It has been held that the A/E is not liable where the plaintiff’s injuries result from the method or manner of construction or the contractor’s failure to take appropriate safety precautions.¹⁹¹ Where safety precautions and/or the proper method of construction are well known in the industry and known to be the responsibility of the contractor, the A/E will not be liable.¹⁹² Further, the A/E’s obligation for periodic site visits and the right to reject non-conforming work do not constitute the assumption by the A/E of control over the day-to-day construction activities so as to create safety obligations.¹⁹³ As stated by one court:¹⁹⁴

There can be no liability . . . where the architect's supervisory controls do not exceed those controls necessary to assure that the results of the contractor's work comply in technical detail with the plans and specifications and where the architect is under no duty to supervise a particular procedure utilized to achieve the end result.¹⁹⁵

A particularly good analysis of the AIA documents and their assignment of responsibility for job-site safety can be found in *Waggoner v. W&W Steel Company*.¹⁹⁶ The Oklahoma court held:

Because the contractor, not the architect, was required under the contract to supervise the job and employ all reasonable safety precautions, the architect cannot be held liable for injuries sustained as a result of an unsafe construction procedure.¹⁹⁷

It has further been held that an injured worker cannot assert a contract claim against the A/E since the worker was, at best, an incidental beneficiary of the A/E's contract with the owner.¹⁹⁸ However, a contract requiring the A/E to assure that construction complied with the contract documents, which included OSHA standards and regulations, was held to render the A/E liable for injuries sustained by an employee of the general contractor,¹⁹⁹ and where the A/E does have a right of supervision and control over the construction site, he or she may be responsible for the safety of the contractor's workers.²⁰⁰ Further, where the worker's injuries result from the A/E's negligent design, liability can be imposed for those injuries;²⁰¹ and where the A/E has specific knowledge of a safety hazard and fails to act, the A/E may be liable for a resulting injury.²⁰²

Participation in several OSHA investigations arising from job-site injuries leads to a conclusion that OSHA would embrace the opportunity to impose job-site safety duties on the A/E. Nonetheless, courts continue to resist imposing safety responsibilities on the A/E absent contractual justification. In *Ivanov v. Process Design Associates*,²⁰³ an engineering firm agreed to continuously inspect or supervise the construction and was found responsible for project safety. The courts in both *Peck v. Horrock's Engineering*²⁰⁴ and *Yocum v. City of Minden*²⁰⁵ refused to impose liability for worker safety where the A/E's contract disclaimed such responsibility. The *Yocum* court, interestingly, noted a "moral" responsibility if the A/E was actually aware of a hazardous condition. The New Jersey Supreme Court, however, found that the engineer's responsibility for the "progress" of the work could render the engineer responsible for job-site safety since safety has an unavoidable impact on progress. It found this despite a contractual disclaimer of safety responsibility and language stating that the contractor alone was responsible for safety precautions and OSHA compliance.²⁰⁶ In *Jones v. James Reeves Contractors, Inc.*,²⁰⁷ the court followed the common law rule that an A/E has no duty with respect to job site safety but added two limitations: if the architect by contract or conduct has undertaken to supervise construction or if there is a defect in the A/E's plans that create the dangerous condition. The construction site in question had a geotechnical condition known as "water sand." During excavation an employee of the contractor jumped into the hole to determine its depth and sank up to his knees. Two other employees came to his aid and all three men were suffocated. The Mississippi Supreme Court upheld summary judgment in favor of the A/E because the accident was not attributable to the plans and specifications and the A/E was not responsible for supervision of the construction.

Where the architect's contract limited its responsibilities to design and determination that construction conformed to the design (standard AIA B 141 terminology), the architect was not responsible for injuries to a subcontractor who fell from a ladder.²⁰⁸ However, in *Ivanov v. Process Design Assocs.*,²⁰⁹ where the engineer was responsible for continuously inspecting or supervising the contractor's work, it was responsible for safety precautions.

Evidence of OSHA's willingness to focus on the A/E can be found in the case of *Secretary of Labor v. CH2M Hill*.²¹⁰ CH2M Hill was retained to provide program management, engineering, and construction management. OSHA charged CH2M Hill with a violation after three workers were killed in a methane explosion. Because CH2M Hill had "global" responsibilities, it was subject to OSHA standards. After CH2M Hill spent over a million dollars in fighting the decision, it was ultimately reversed. According to the Secretary of Labor, A/Es can be responsible for safety violations where they are "engaged in construction work." Different interpretations of the nature of the required involvement by the A/E sufficient to be "engaged in construction" are inevitable. The court of appeals in overturning the commission did not accept that CH2M Hill's responsibilities for differing site conditions gave it contractual authority over safety issues. The court did not specifically rule on the commission's new test but did express concern of the commission's decision to ignore the language of the contract.²¹¹ Finally, in *CH2M Hill v. Herman*,²¹² the Seventh Circuit held that whether OSHA's construction safety standards would apply is a fact-specific inquiry but continued to state that the OSHA test may not be appropriate.

A project owner may also be responsible for project safety if it acts as a *de facto* general contractor by issuing "multiple prime" contracts to various trade contractors. An employee of a painting contractor was injured and sued the owner and the flooring contractor. The owner claimed it had no responsibility for job site safety and had surrendered the premises to the flooring contractor, who had the responsibility to keep the premises safe. The court held that the owner had reserved the right to use its own employees on the project as well as other contractors and thus had a duty to coordinate the work. The flooring contractor's obligation to maintain a safe work environment did not extend to overall project responsibility.²¹³ This case illustrates the responsibility an owner takes on when it decides to become its own "general contractor" by issuing multiple prime contracts.

In *Bauer v. Howard S. Wright Construction Co.*,²¹⁴ an eight-foot excavation wall collapsed, injuring a subcontractor's employee. The professional engineer who had designed the soil nailing system also had responsibilities to monitor the construction, noticed cracking in the wall, and ordered the subcontractor to stop work but did not order the employee out of the excavation. The evidence showed that there had been several changes in the engineer's design, but also showed the engineer had approved the changes. The trial court held for the engineer on the basis that the original plans met the standard of care and found that the injury arose out of means and methods of construction. The appellate court found that the design specifications included the means and methods and remanded the case for trial.

Liability to the Contractor

Most courts have had little difficulty in holding the A/E liable to the contractor for defective plans and specifications.²¹⁵ The contractor is justified in relying upon the plans and specifications furnished by the design professional unless they are so apparently defective that a builder of ordinary prudence would realize the defect.²¹⁶ As is discussed in detail in § 8.4.9, *Dufficy* will limit the right of contractors to assert direct negligence claims against the A/E for lost profits, increased cost of performance, and other such claims. *Dufficy* does not, however, reduce the prospect that an A/E may eventually be responsible for harm caused to a contractor by virtue of the A/E's defective performance; it simply dictates the legal process that must be followed to enforce that liability.

The A/E's potential liability to the contractor covers the entire spectrum of the design professional's service from design through completion of construction. In interpreting the contract documents and rendering decisions with respect thereto, the A/E must favor neither the contractor nor the owner, but must exercise impartial judgment.²¹⁷ The A/E must deliver the plans, prepare change orders, and administer the project so as to not delay the contractor.²¹⁸ The A/E may not intentionally and actively interfere with the contractor's performance on the job;²¹⁹ and must process the contractor's pay request in a timely manner.²²⁰

One court has extended the A/E's liability to the contractor to the extreme if not the ridiculous. In *United States v. Rogers & Rogers*,²²¹ the architect was held liable to the contractor for failing to supervise the contractor. The contractor incorporated into the project concrete which did not meet the specifications. A tort claim was permitted by the contractor against the architect based on the architect's failure to require the contractor to perform its work properly.²²²

A seemingly more rational result was reached in *C.L. Maddox Inc. v. Benham Group, Inc.*,²²³ wherein the court held that the designer was not responsible for failing to guard the contractor against defects in the work. While the contract included language stating that the designer would endeavor to guard against defects in the contractor's work it also stated that the designer was not responsible for the contractor's means, methods, techniques, sequences, or procedures. Thus, the court found that while the designer had a duty to visit the site and make recommendations to the contractor, the designer did not guarantee that the contractor would make no errors.

Liability to Sureties and Lenders

One factor in the increased cost of construction is the requirement of project owners that the contractor obtain a bond to insure completion of the construction and payment of the project costs. Payments to the contractor are typically based on the A/E's approval of the contractor's statement as to the percentage of construction completed. The A/E's certification of payment for work not done may create a situation in which the funds available for construction have been expended with more work remaining than can be completed within the remaining funds. In such situations the A/E has, in effect, authorized advance payments and may be liable therefore.²²⁴

Where payments in excess of construction completed result in the contractor's inability to finish the project, the contractor's bonding company may be required to complete the project, either by hiring a new contractor or financing the existing contractor to completion. If the A/E has negligently certified payments, the surety may seek to recover its losses from the A/E.²²⁵

The law does not generally require privity of contract between the design professional and the contractor's surety. The A/E has a duty to protect the owner and surety by exercising reasonable care in certifying the contractor's bills for payment.²²⁶ The degree of care owed by the A/E to a surety has been held to the same as that owed to the owner.²²⁷

Negligent "supervision" of the contractor by the A/E can also create liability to the surety.²²⁸ In *Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc.*,²²⁹ the architect was held liable for losses of the surety when, following the contractor's default, the surety had to finance replacement of defective work. Liability was imposed despite evidence that the architect had, prior to default, informed the contractor that the work was unacceptable and would have to be replaced. Such decisions imposing liability to the surety where the A/E would clearly have no liability to the contractor appear irrational.

Construction lenders can likewise be damaged as a result of the A/E's negligent performance. Where an engineer negligently inspected and certified the work completed, thereby prompting the lender to disburse excess loan proceeds, he was liable.²³⁰

Members of the General Public

The liability of the A/E as discussed in this section has thus far been susceptible of analysis based, at least in part, upon the contractual obligations of the parties to the construction process. In contrast, suits by parties who had no connection with the original design and construction can be evaluated by application of a traditional tort analysis. A general review in this area indicates that most of the suits against design professionals by members of the general public, that is by parties not involved in the design or construction, are suits by subsequent project owners, patrons, or tenants. As discussed earlier in this chapter, the design professional's defense of lack of privity to suits by the general public will be limited to rare instances. The more common result is to hold the A/E liable for foreseeable harm.²³¹

A negligently created defect which renders the building dangerous to third persons whose subsequent use of the premises should be reasonably foreseen has been held to create liability for the design professional despite acceptance of the project by the owner.²³² The liability of the design professional may be based upon "supervision" of construction activities where an undiscovered construction defect results in a post-completion injury.²³³ Liability is also imposed where the injury results from a defect in the design itself.²³⁴ While the A/E may indeed be liable for injuries to members of the general public, the liability is logically limited to injuries which result from the A/E's failure to comply with recognized standards of good practice.²³⁵

Subsequent purchasers of the A/E-designed project are also frequent plaintiffs. The majority of such cases are pursued by purchasers of condominiums. Generally, condominium owners as individuals, as a class, or through a condominium association are permitted to maintain an action against the original design professional.²³⁶

The A/E need not be the project designer in order to incur liability to subsequent purchasers. In one case, an engineer who performed inspection services for a mortgage lender was liable to a purchaser for damages due to undiscovered construction defects.²³⁷ And where the A/E prepares a report for a real estate broker, the building purchaser can maintain an action based on errors or omissions in the report since it is foreseeable that a purchaser will rely upon the report.²³⁸

Where, however, it is not anticipated that the building will be resold, a subsequent purchaser may not be a foreseeable plaintiff, and may not recover.²³⁹

§ 8.3 • EXPANDING THEORIES OF LIABILITY

§ 8.3.1—Implied Warranty

As discussed earlier, the standard of performance usually applied in the design area is based upon theories of negligence. Attempts have been made, however, to import the doctrine of implied warranty from the law of sales into professional services. With nearly virtual unanimity, courts, when requested to extend the doctrine of implied warranty to professionals, have declined to do so. The Florida Court of Appeals was faced with a request to impose liability on an engineer based on a theory of implied warranty in the case of *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc.*²⁴⁰ In declining to do so, the court stated:

With respect to the alleged 'implied warranty of fitness', *we see no reason for application of this theory in circumstances involving professional liability. . . .* An engineer, or any other so called professional, does not 'warrant' his services or the tangible evidence of his skill to be 'merchantable' or 'fit for an intended use.' These are terms uniquely applicable to goods.²⁴¹

A California Court of Appeals²⁴² affirmed the view that a professional does not warrant a satisfactory result. The court stated:

The well settled rule in California is that where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply Those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct.

This rule has been consistently followed in this state with respect to professional services. (Citations omitted).

Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance²⁴³

The Colorado Court of Appeals in the case of *Samuelson v. Chutich*²⁴⁴ first ruled that implied warranty claims were not viable with respect to service contracts. In that case, Veterans Gas and Service, Inc. had installed a gas line to the plaintiff's residence. Several years later, Veteran's alleged that unworkmanlike installation caused an explosion. In refusing to impose liability based upon a warranty theory, the court stated:

We regard it as the better part of wisdom not to extend as a matter of law implied warranties from sales to service contracts. We believe it is the better rule to limit liability to acts of negligence. . . .

This is the rule of a great majority of courts.

Under a doctrine of implied warranties, there could be liability without fault in service contracts. This should not be the court made law in this state. We will just stay with that reliable fellow — the reasonably prudent man.²⁴⁵

Any doubt that the reasoning of the court in the *Samuelson* case was intended to be applicable to contracts for professional services was erased by *Johnson-Voiland-Archuleta, Inc. v. Roark Associates*.²⁴⁶ On appeal, the sole contention was that the trial court had erred in ruling that the professional engineering services performed by J-V-A were not subject to an implied warranty. In upholding the trial court's ruling, the court of appeals stated:

Although there are no Colorado cases dealing specifically with the question of whether professional engineers, in preparing drawings and specifications for construction projects, impliedly warrant that such plans and specifications are fit for their intended use, in *Samuelson v. Chutich*, 187 Colo. 155, 529 P.2d 631, 633 (1974), the Colorado Supreme Court enunciated the general rule that the doctrine of implied warranties is not applicable to service contracts

Accordingly, since plaintiff's claim against the defendant was clearly based on the performance of professional engineering services and not on a sale of goods, under the mandate of *Samuelson v. Chutich, supra*, the trial court was correct in concluding that the professional engineering services performed by plaintiff for the defendants were not subject to any implied warranty.²⁴⁷

In *Coca-Cola Bottling Co. v. Weston & Sampson Engineers, Inc.*,²⁴⁸ Coca-Cola sued its engineer over failure of an aerated lagoon system to meet the limits imposed by its discharge per-

mit. The suit included claims of breach of contract, breach of implied warranty, and breach of express warranty. As nearly as can be determined from the rather confusing opinion, the plaintiff abandoned the breach of contract claim. The appellate court construed the implied warranty claim as being a claim for professional negligence that was barred by a state of repose. The statute did not bar the express warranty claim. Since the court could not determine the basis for the jury's verdict as between the improperly submitted professional negligence claim and the properly submitted express warranty claim, the case was remanded.

It is difficult to determine whether counsel for the parties did a poor job of educating the court or whether the court simply misunderstood much of the design and construction process. At one point the court referred to "three phases to any improvement to real property: the design phase, the construction phase, and the administration phase following the completion of construction."²⁴⁹ It does not appear that the court's misunderstanding of the role of the construction administration phase as running concurrently with construction had any improper impact on the outcome.

The case of *Snyder v. ISC Alloys, Ltd.*²⁵⁰ followed the traditional rule applicable in Colorado that those rendering professional services are liable for negligence and do not extend implied warranties. The U.S. District Court in *Interstate Contracting Corp. v. City of Dallas*²⁵¹ reached the same result. The contractor sued the City of Dallas, alleging a breach of an implied warranty with respect to the plans and specifications. The city filed a third-party complaint seeking indemnity from the engineer. The claim was dismissed with prejudice since under Texas law, a professional does not extend an implied warranty of good and workmanlike performance, a concept uniquely applicable to the sale of goods rather than the provision of professional services.

The performance of the reasonably prudent A/E remains the standard for imposing liability. A cause of action claiming a right to recover based on an implied warranty is not viable in Colorado.

California has recently taken a novel and aggressive approach in dealing with the question of whether the rendering of professional services is accompanied by a warranty. Section 5536.26 of the California Business and Professions Code states:

The use of the words "certify" or "certification" by a licensed architect in the practice of architecture constitutes an expression of professional opinion regarding those facts or findings that are the subject of certification and does not constitute a warranty or guarantee, either express or implied. Nothing in this section is intended to alter the standard of care ordinarily exercised by a licensed architect.

§ 8.3.2—Strict Liability (Product Theories)

Most states have adopted the rule that a manufacturer is strictly liable for injuries caused by a defective product.²⁵² Just as plaintiffs have attempted to recover from design professionals without proving negligence by importing doctrines of implied warranty from sales cases, so have they attempted to recover by importing strict liability theories from product cases. The Colorado courts have indicated that contracts for services and contracts for sales are to be distinguished.²⁵³

To fully understand the reasoning behind the court's refusal to apply product sales theories to service cases, it is necessary to analyze the reasoning which led to the development of present day products liability law.

A number of valid policy reasons have been said to underlie the application of strict liability in products cases. As Justice Traynor pointed out in *Escola v. Coca Cola Bottling Company*,²⁵⁴ manufacturers of widely distributed products are able to distribute the losses of the few who are injured among the many who purchase the product. Further, a manufacturer is induced to take all feasible precautions in the interest of avoiding the penalty of loss of public good will. The third, and perhaps most significant justification, pointed out by Justice Traynor was the virtually insurmountable problem of proving negligence under traditional tort theories in a products liability case. As can be readily seen, none of the justifications for strict liability in products cases exist in cases involving the rendering of professional services. The "deep pocket" defendant's ability to spread the risk and the difficult proof problems which influence courts to relax the negligence standard in products cases are nonexistent in a claim by the project owner against the A/E. The design professional has a very limited client base, and any attempt to spread the loss would result ruin for that A/E. Also, the type of proof required to meet traditional negligence standards is well within the reach of the owner-plaintiff in a design situation.

As pointed out by one court, the difficulty of tracing a product along the chain of distribution to the manufacturer, then pinpointing and proving the negligent act simply does not exist where negligence in the rendering of professional services is alleged.²⁵⁵ The *La Rossa* court refused to apply the doctrine of strict liability to an engineer who contracted to design and supervise the construction and initial operation of a plant which was to manufacture a carcinogenic chemical product. The court reasoned that professional services lack the element of virtual impossibility of proving a negligent act and thus do not lend themselves to the doctrine of tort liability without fault. By way of explanation, the court stated:

Professional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lack the elements which gave rise to the doctrine. There is no mass production of goods or a large body of distant consumers whom it would be unfair to require to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire. Thus, professional services form a marked contrast to consumer products cases and even in those jurisdictions which have adopted a rule of strict products liability a majority of decisions have declined to apply it to professional services.²⁵⁶

The expansion of *Restatement of Torts* § 402A strict liability rules into the realm of service contracts would not merely expand the standard of care for design professionals or ease the consumer's burden of proof; it would necessarily require that the design professional guarantee a desired result and, in fact, achieve that result in order to avoid liability. Our courts have made it clear that those who hire design professionals are not justified in expecting infallibility but can expect only reasonable care and competence. They purchase service, not insurance.²⁵⁷

When, however, the A/E expands the role of providing services, he or she may run the risk of strict liability. In *Hyman v. Gordon*,²⁵⁸ the defendant not only designed but built homes. The court had little difficulty in applying theories of strict liability. It thus becomes necessary to evaluate whether the client has primarily contracted for professional services, in which case strict liability will not apply, or whether the A/E is also making a sale of goods or products, in which case strict liability may apply.²⁵⁹

Cases which speak of design as creating strict liability where the design is clearly for a manufactured product are to be distinguished from cases where the A/E provides design services for a building. In *Union Supply Co. v. Pust*,²⁶⁰ the court stated:

We perceive no valid reason not to expand strict liability to design defects. A defective product may be equally hazardous to the ultimate user or consumer whether its defect arises from a flaw in manufacture or from a flaw in design.²⁶¹

It is with relative ease that courts distinguish the services of providing a design for the construction of a single building from the design service for a manufactured product and, thus, refuse to apply strict liability theories to the former while extending them to the latter. However, where, as in *Kriegler v. Eichler Homes, Inc.*,²⁶² there is mass production from a single design, the building may in fact become a “product” and the designer may be subject to strict liability for design defects.

§ 8.3.3—Liability Under Accessibility Legislation

Americans With Disabilities Act

Architects and engineers are from long experience accustomed to the enforcement of building codes by local code authorities. Within the last several years, however, they have been forced to deal with new project accessibility requirements that differ dramatically from the traditional requirements of building codes. On a nationally mandated level, they must deal with the Americans With Disabilities Act of 1990.²⁶³ The ADA applies to all facilities that are open to the public. Compliance with the Fair Housing Act²⁶⁴ is also required for multi-family housing.

It is important to note that the ADA is not a building code. It is broad, sweeping civil rights legislation intended to protect the estimated 43 million Americans suffering from some form of mental or physical disability.²⁶⁵ It prohibits discrimination in employment, housing, public accommodation, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

The provisions of Title III of the ADA pose the greatest area of concern for the A/E. These provisions require that “architectural barriers” be removed from existing places of public accommodation and that new commercial facilities be designed and constructed so as to be readily accessible.²⁶⁶

The ADA is not a federal building code. Violations of the Act are civil rights violations and thus potentially pose areas of liability previously foreign to design professionals. The A/E may incur liability to the project owner, the federal government and impacted third parties.

Title III states that is unlawful discrimination to:

- 1) fail to remove any “architectural barrier” in any existing place of public accommodation where such removal “is readily achievable”;²⁶⁷
- 2) “design and construct” any place of public accommodation or commercial facility that is not “readily accessible to and usable by” individuals with disabilities unless it can be demonstrated that compliance is “structurally impracticable”;²⁶⁸ and
- 3) alter any place of public accommodation or commercial facility unless doing so in a manner that to the “maximum extent feasible” will make the altered portions “readily accessible to and usable by” those with disabilities.²⁶⁹

Any person who believes he or she has been or is about to be discriminated against in violation of Title III may commence a civil action.²⁷⁰ The only remedy available to private individuals under Title III is injunctive relief in the form of a court order requiring compliance.²⁷¹

However, an aggrieved individual or class of individuals may also request the Department of Justice (DOJ) to initiate an investigation.²⁷² The DOJ, following its investigation, may then file a civil action alleging a violation of the Act. Interestingly, as distinguished from the situation where an individual files his or her own action, if the DOJ initiates an action on behalf of an individual, the court may order not only an injunction, but may also award damages to the aggrieved individual.²⁷³ The court may also impose a penalty of up to \$50,000 for the first violation and up to \$100,000 for subsequent violations.

In *Johnson v. Huizenga Holdings, Inc.*,²⁷⁴ disabled minors sued an architect for violation of the Americans With Disabilities Act.²⁷⁵ The architect sought dismissal on the basis that an architect cannot be liable under ADA § 302, which prohibits discrimination by parties who “own, lease or operate a public accommodation.” The court held that while § 302 may not apply directly to an architect, § 303 defines discrimination under § 302 as a “failure to design and construct facilities that are readily accessible.” Dismissal for the architect would be improper.

In *United States v. Ellerbe Becket, Inc.*,²⁷⁶ the court ruled that architects were not immune from liability under the new construction provisions of the ADA. The *Ellerbe Becket* case was subsequently settled with an agreement that clarified the requirement for ADA compliance and under which Ellerbe Beckett, the nation’s largest architectural firm, agreed to design new stadiums and arenas so that spectators in wheelchairs have an unobstructed view when other fans stand up. The agreement includes detailed measurements of the average height of standing spectators and of a person in a wheelchair to facilitate calculating sight lines.

A wheelchair-bound patron in *Kennedy v. Fitzgerald*²⁷⁷ sued because he was unable to enter a Baskin-Robbins store. He alleged that the owner of the property had agreed to build the

ramp but that the city had denied a building permit and, in so doing, had discriminated. The City of Syracuse argued that the ramp violated its zoning laws, would be too close to a fire hydrant and pole and guy wire, and caused other interferences. Furthermore, the city argued that it was not required to disregard safety concerns and code violations merely because an accommodation for an individual with a disability was involved. The court held that there were genuine issues of fact that precluded granting the city's motion for summary judgment.

In *United States v. Days Inn of America*,²⁷⁸ the court stated that in order to have responsibility under § 303, a party must have a significant degree of control over the design process. An owner that simply contracts with an A/E to design in accordance with the ADA does not have that degree of control. The court remanded the case for a determination of whether Days Inn had actual knowledge of the ADA violations in the plans that it had reviewed and approved.

In *Lonberg v. Sanborn Theaters, Inc.*, the plaintiffs sued the theater's architects alleging failure to "design and construct" the theater to have the proper wheelchair access.²⁷⁹ The court granted summary judgment in favor of the architects. Despite an amicus brief by the United States arguing in favor of architect liability, the Ninth Circuit affirmed. Title III of the ADA applies only to persons who own, lease or operate a place of public accommodation.²⁸⁰ Courts are divided on the question of whether the ADA extends to those who "design and construct" public accommodations or is limited to owners, lessors, lessees and operators of such accommodations. Courts that extend liability to all who design and construct "divine liability wholly divorced from the text of the statute."

Fair Housing Laws

Public awareness of accessibility legislation has focused primarily upon the ADA. Publications and seminars discussing the ADA have educated designers, developers, attorneys, and the general public to ADA requirements. Until recently, far less attention was focused on the Federal Fair Housing Act²⁸¹ and Colorado Fair Housing Act.²⁸² As a result, many developers, designers, and the attorneys representing them were caught unprepared and violations were common.

The Colorado Fair Housing Act (CFHA) and the Federal Fair Housing Act (FHA) both apply to multi-family dwellings designed for first occupancy after March 13, 1991. Both laws require that the dwellings be designed and constructed so as to provide for handicap accessibility. Multi-family dwellings, for the purpose of the law, are buildings with four or more units, provided the buildings have at least one elevator. Also included are other buildings consisting of four or more ground floor units.

The following features are required for all buildings subject to the Acts:

- 1) public and common-use portions must be accessible to and usable by handicapped persons;
- 2) doors for passage into and within dwellings must be sufficiently wide to allow passage for wheelchairs (normally 32 inches *nominal*);

- 3) there must be an accessible route into and through the dwellings;
- 4) light switches, electrical outlets, and environmental controls such as thermostats must be in accessible locations;
- 5) bathroom walls must be reinforced to allow for adaptive installation of grab bars; and
- 6) kitchens and baths must be designed to allow a wheelchair to maneuver in the space.

Guidelines interpreting the law can be found in the Federal Register of March 6, 1991. Some guideline differences, as well as other differences, exist between the CFHA and the FHA. For example, the guidelines published by HUD in the Federal Register refer to the 1986 ANSI standards (American National Standards), whereas the FHA references the 1980 ANSI standards.²⁸³

Questions frequently arise as to which codes, standards, or guidelines satisfy the requirements of CFHA. Further, it is not uncommon for conflicting requirements to exist. Thus, there are three guidelines to follow in advising a developer or designer client:

- 1) Don't rely on only one code or standard. Many times, several apply.
- 2) If there is a conflict between codes/laws/standards, the most stringent will generally apply.
- 3) Advice from or approval by local code officials or building inspectors is not conclusive. Local city and county building departments neither interpret nor enforce state and federal accessibility laws.

The Colorado Civil Rights Commission is responsible for enforcement of the CFHA. The vast majority of complaints are resolved through conciliation. Nonetheless, remedial construction to bring a building into compliance pursuant to a negotiated consent decree can entail many thousands of dollars. Where the A/E's design fails to comply with the CFHA, it is likely that the designer's services failed to meet the standard of care, thereby rendering the A/E liable for at least a percentage of the damages.

Every design professional must be familiar with the requirements of the ADA and Fair Housing Act. Attorneys consulted by clients who have been contacted in the course of a DOJ or Colorado Civil Rights Commission investigation are well advised to secure assistance from counsel experienced in such issues or to thoroughly familiarize themselves with the involved laws and, just as importantly, the procedures and practices.

§ 8.3.4—Abnormally Dangerous Activities

As applied to the design professional, theories of strict liability and abnormally dangerous activities have received only limited court support.²⁸⁴ While no court nationally and certainly no Colorado court has accepted the notion that the design of buildings is an abnormally dangerous activity; the frequency with which Colorado's expansive clays damage buildings, particularly light residential structures, has prompted attempts to invoke the theory as a basis for recovery against A/Es.

The annual cost of repairs for home damage caused by expansive clays in the U.S. exceeds a billion dollars. When the damage to other structures and highways is added, the total exceeds the combined damage caused by hurricanes, floods, earthquakes, and tornadoes.²⁸⁵ An obvious and critical distinction between the hazard posed by expansive clays and the risk present in natural disasters such as earthquakes and hurricanes is the potential for human injury or loss of life.²⁸⁶ Seldom if ever does the damage associated with expansive clays include a threat of personal injury. The lack of any risk of serious personal injury or death may itself render the application of abnormally dangerous activity theories inappropriate to expansive soil cases.

Approximately one-half of the houses built in the U.S. each year are built on expansive clays. Of these, approximately one-half will at some point evidence signs of distress caused by heave or differential movement.²⁸⁷ Accordingly, one can conclude that 25 percent of all homes built each year will experience distress. Of that 25 percent, or one in five will suffer significant or serious damage.²⁸⁸ Thus, the prospects of serious damage (damage of 10 percent or more of the home's value) calculates to approximately 5 percent.

It is well established that a landowner who conducts abnormally dangerous activities on his or her land will be strictly liable for damage to adjoining property.²⁸⁹ In the case of *Doundoulakis v. Town of Hemstead*,²⁹⁰ the court was faced with the question of whether a design professional who had advised the owner as to methods for accomplishing dredging activities which the court considered abnormally dangerous might also be strictly liable.

Following to the town's dredging and landfill operations, the plaintiff's adjoining land began to subside. The plaintiff sued the city, the contractor, and the design engineer. On appeal, the court initially considered whether there was sufficient evidence to support the trial court's theory of absolute liability. Since the record was insufficient to conclude that the defendant's activities were unreasonably dangerous, the appeals court reversed. Since, however, it also disagreed with the dismissal of the negligence claim, the case was remanded for retrial.

In passing, the court noted that if, upon retrial, there was sufficient evidence to find the city liable on a theory of conducting an abnormally dangerous activity, the engineer might also be strictly liable based on his "central" role in designing the project.²⁹¹ The court stated:

Just as the landowner is responsible because for his own benefit he has chosen to engage in an activity of sufficiently high risk of harm to others, so too, those who intentionally undertake or join in the abnormally dangerous activity must bear the consequences resulting from harm to others.²⁹²

While *Doundoulakis* has been relied upon for the proposition that a designer may be strictly liable, close analysis of the decision casts significant doubt on such a construction. An abnormally dangerous activity is one which has sufficient social benefit or utility to prevent it from being considered a nuisance, but which also is accompanied by a high degree of harm to others that cannot be eliminated by the exercise of ordinary, reasonable care.²⁹³

Where, as in *Doundoulakis*, an A/E is retained by an owner who wishes to implement a dangerous undertaking on his or her property, the liability of the A/E should logically be based upon negligence principles, not strict liability standards. If the designer has performed his or her services using reasonable care and has advised the client of the risk and the client elects to proceed, the A/E should not be liable. Such was the result in *McCloone Metal Graphics, Inc. v. Roberts Dredge, Inc.*²⁹⁴

To fully understand the *Doundoulakis* decision, one must also consider the court's discussion regarding policy considerations.

. . . those who engage in activity of sufficiently high risk of harm to others, *especially where there are reasonable even if more costly alternatives*, should bear the cost of harm caused the innocent.²⁹⁵

Consistent with the above quote, the court instructed the trial court on rehearing to determine the relative cost and availability of alternate methods. Thus, despite the reference to absolute liability, it would appear that the actual test described for implementation on remand is in reality a negligence standard. If the engineer selected a design that posed risks and failed to advise the owner of safer options, even if they might be more costly to implement, he or she may have breached the standard of care. The engineer's liability in evaluating the design selected and the advice given to his or her client is to be determined based on a negligence standard; that is, what would other competent engineers have done under the same or similar circumstances? It is thus submitted that *Doundoulakis* does not stand for the proposition that an A/E may be strictly liable to third parties when the engineer has met the standard of care in advising a client who has undertaken an abnormally dangerous activity.

Given the social utility of design and construction on expansive soils as compared to the risk (which, as previously noted, rarely if ever includes physical injury to the homeowner or others and statistically involves serious damage only 5 percent of the time), strong arguments exist that the notion of strict liability or the requirement to exercise the highest degree of care do not apply at all, since arguably, the activity does not even qualify as abnormally dangerous.²⁹⁶ Otherwise stated, design and construction on expansive clays fails to qualify as abnormally dangerous since the social utility outweighs the risk of harm. Were it otherwise, design and construction in high-risk seismic zones and areas prone to hurricanes and tornadoes would likewise qualify as abnormally dangerous, particularly since the risk in such areas includes a personal injury component that is absent in expansive soil cases. Accordingly, the extension of strict liability/abnormally dangerous activity theories to design and construction on expansive clays could be socially undesirable, economically unacceptable, and legally unsupportable.

§ 8.3.5—Liability For Copyright Infringement

Copyright law provides an often-unseen trap for the unwary design professional. A design professional may stumble into the trap when retained by an owner to complete work begun by another design professional. When the original design professional quits or is terminated, it usually retains the rights in the copyright for its work. The replacement design professional, in using

and modifying the original design professional's work, may find itself liable for infringement of the copyright.²⁹⁷ Relatively recent statutory revisions and interpretative case law have resulted in expanded protection. Thus, the copyright laws can serve as a shield protecting the author and a sword wielded against the infringer.

Copyright

Copyright is a form of protection of intellectual property provided by the laws of the United States to the authors of "original works of authorship fixed in any tangible medium of expression."²⁹⁸ Copyright ownership gives the owner the exclusive right to control the reproduction of the copyrighted work in copies.²⁹⁹ Copyright protection automatically arises from the time the work is fixed in a tangible form.³⁰⁰ Upon fixation, the copyright is the property of the author of the work.³⁰¹ Copyright notice (the "©" symbol or the word "Copyright" or the abbreviation "Copr.") is no longer required but is recommended; in an infringement suit, it eliminates the defense that the infringer was unaware that the work was protected.³⁰²

Design professionals may secure copyright protection for "architectural works," which includes the plans and drawings and the building.³⁰³ Significantly, the copyright also protects the right to create derivative works, which are works based upon one or more preexisting works.³⁰⁴

Rights in the copyright usually vest in the design professional, not in the person commissioning the design. This is because an architect is considered an "independent contractor," not an "employee" subject to the "work for hire" doctrine.³⁰⁵ A writing signed by the design professional is required to transfer rights in the copyright.³⁰⁶

Copyright Infringement

Although copyright rights are secured automatically when a work is created, the copyright must be registered before an infringement suit can be filed.³⁰⁷ Registration is a relatively simple process. An application form, along with a copy of the work to be registered and an application fee, must be filed with the Copyright Office.³⁰⁸ For constructed works, photographs that clearly disclose the architectural work must also be filed.³⁰⁹

Federal district courts have original jurisdiction over all civil actions relating to copyrights.³¹⁰ All rights that are "equivalent" to any of the exclusive rights within the scope of the copyright are pre-empted by copyright law, and claims based thereon are properly removable to federal court.³¹¹

The Copyright Act provides for both civil and criminal actions for infringement. To prove infringement in a civil action, the copyright owner must show: (1) ownership of a valid copyright; and (2) copying, or infringement, of the constituent elements of the work that are original.³¹² In the absence of direct evidence of copying, the copyright owner must establish that the alleged infringer had access to the work and that there is "substantial similarity between the copyrighted work and the alleged infringing work."³¹³

Infringement requires a showing of substantial similarity in both ideas and expression.³¹⁴ An analysis of similarity of ideas focuses on objective similarities in the details of the work.³¹⁵ Upon finding substantial similarity in ideas, the analysis then turns to similarity of expression.³¹⁶ Using the response of the “ordinary, reasonable person” as the reference point, “[t]he essential inquiry is whether the total concept and feel of the works in question are substantially similar.”³¹⁷ For example, in finding infringement, one court described the similarities between two sets of construction drawings:

The building design and the site plan are remarkably similar. Both buildings contain unusual features such as sawtooth loading doors and a parapet wall. The ordinary observer would also conclude that the length of the buildings, the use of brick on frontage and back of the building and the floor elevations are very similar. The court notes that the placement of cars and trees as well as the lettering and numbering in some of the CSM drawings is identical to the Everest plans. The placement of the building on the site, the landscaping, the parking areas and vehicular circulation are also virtually identical.³¹⁸

The presence of differences between the works has no bearing on the analysis unless the differences so outweigh the similarities that the similarities can only be deemed “inconsequential.”³¹⁹

Remedies available in a civil action are varied. The copyright owner may seek: (1) temporary or permanent injunctions;³²⁰ (2) actual damages and any additional profits earned by the infringer or statutory damages;³²¹ and (3) costs and attorney fees.³²² However, a design professional may not insist on being hired to finish the project.³²³ At any time prior to final judgment, the copyright owner may elect to recover statutory damages instead of actual damages and profits.³²⁴ In awarding statutory damages, the court in its discretion may award up to \$20,000 for the infringement of a copyright. Where the court finds willful infringement, it may award up to \$100,000. To collect statutory damages or attorney fees, the copyright must have been registered prior to the infringing acts.³²⁵ The statute of limitations for a civil action is three years after the claim accrued.³²⁶

The Copyright Act provides criminal penalties for certain intentional violations of the rights secured by the Act. Fines of up to \$2,500 may be imposed for the fraudulent use of a copyright notice, the fraudulent removal of a copyright notice, or the making of false representations in an application for copyright registration.³²⁷ Willful infringement of a copyright for purposes of commercial advantage or private financial gain may result in a fine of up to \$100,000 ((\$200,000 if the guilty party is an organization), one year in prison, or both.³²⁸

Conclusion

Copyright law provides an important tool in the protection of a design professional’s services. When a design professional is approached to complete a project already underway, a red flag should immediately be raised. By accepting the project, the replacement design professional may be accepting substantial liability, which typically is excluded by the design professional’s errors and omissions insurance policy. Before starting on or agreeing to accept such work, the replace-

ment design professional should at least insist on: (1) written authorization from the original design professional to complete the work; and (2) written indemnification from the project owner for infringement of any copyright held by the original design professional in the project. Having these two documents in place will go a long way toward protecting a design professional from a copyright infringement claim.

§ 8.3.6—Software Licensing Violations

The now virtually universal use of computer-assisted design (CADD) is posing new areas of potential liability for architects and engineers. Architecture and engineering firms are frequent targets for firms that root out unauthorized software use and licensing violations. Disgruntled former employees have discovered the financial rewards to be had from reporting unauthorized software use by their former employers. It is imperative that each copy of all software be properly licensed. In *Trandes Corp. v. Guy F. Atkinson Co.*,³²⁹ Atkinson was licensed to use Trandes' tunnel design software for a specific project. Atkinson copied the software and reused it on another project. The court held that Atkinson was liable for \$17,000 in actual damages and \$34,000 in punitive damages. It should be noted that little likelihood exists that professional liability errors and omissions insurance will cover such liability.

§ 8.3.7—Problems With Electronic Media

CADD documents can be easily transmitted in electronic format. Thus, distribution to individuals who are unauthorized to receive them is an increasing issue. Changes to CADD documents can be undetectable. It is thus critical that A/Es be able to document the detail on the CADD file at the time it was transmitted. Signing a digital file (not currently authorized but under consideration in Colorado) requires hashing the file and then encrypting the hash.

Other liability issues include the fact that the spatial data comprising the CADD files may not accurately reflect dimensions. Due to these inaccurate spatial representations, attempts to scale CADD drawings may result in errors.

Compatibility of both software and hardware presents a growing concern. Certain early generation CADD files may be very nearly impossible to process due to advances in technology that have rendered the software and hardware used in early CADD design obsolete and unavailable.

§ 8.3.8—Liability For Rendering Decisions On Disputes

In *MECO Systems, Inc. v. Dancing Bear Entertainment, Inc.*,³³⁰ the project contractor filed a \$300,000 mechanic's lien. The owner cross-claimed against the architect, alleging a failure to act impartially and in good faith in fulfilling its obligations under the contract to resolve matters in dispute between the owner and the contractor. The trial court dismissed the claim against the architect. The court of appeals held that there was a material issue of fact as to whether the architect breached its duty to act impartially and in good faith when it allowed 66 of the contractor's claimed delay days. The court also stated that the architect's failure to address its own fault called into question its good faith. *Author's Note:* It does not appear that this case significantly erodes the concept of architect's immunity for decisions rendered under the AIA B141 contract. It certainly emphasizes, however, that for immunity to prevail, the decision must be in good faith.

§ 8.3.9—Sick Building Syndrome

The author is unaware of any sick building syndrome (SBS)/ indoor air quality (IAQ) cases that have gone to trial in Colorado, although he was involved in a large multi-plaintiff case in New York involving mold claims in a subsidized housing project. Several hundred tenants claimed to have been made sick by exposure to molds. It was eventually established through analysis of the mold patterns that the molds had been artificially and intentionally “planted” and then grown through “feeding” by steam. That a group of plaintiffs would conjure the idea to “fake” an SBS/IAQ case gives testimony to the awareness of and growth in indoor air quality issues.

Mold growth is the most common microbial contamination. It is pervasive in the built environment inhabiting ceiling tile, carpet, upholstery, and wall coverings. It is also common in HVAC systems especially in drain pans, fan coil units, ductwork, and acoustic liners.³³¹ Assigning responsibility for the existence of contaminants that may include molds, volatile organic compounds (VOCs), and external microbial contaminants drawn into the building by the air intake system can be problematic. Evaluation of the stage at which the contaminant is introduced can be difficult. Molds are often introduced in material storage prior to construction either at the supplier’s yard or after delivery to the contractor. The question may arise as to whether suppliers and contractors are independently responsible for protecting construction materials without any input from the A/E, or whether the standard of care will require the designer to specify special handling and other precautions necessary to avoid unintentional introduction of microbial contaminants.

With few of these cases having been tried to date, the law has not yet developed significantly. However, it appears likely that most courts will handle the cases legally much as they dealt with the asbestos contamination cases of the 1980s, with the probable exception that the market share concept applicable to asbestos claims will not apply.

§ 8.3.10—False Statements

Historically, the federal government has been considered somewhat lax in pursuing claims for errors and omissions in the design of federally funded projects. A definite shift in policy regarding such claims has been observed in recent years and the newly “rediscovered” False Claims Practices Act (the Act was originally passed during the Civil War in response to fraud in military procurement) has provided a new and potent tool in executing the new policy.

As provided in 31 U.S.C. § 3729(a), the Act applies to anyone who “knowingly” presents to the U. S. Government a false or fraudulent claim for payment or who:

knowingly makes, uses or causes to be made or used a false record or statement to get a false or fraudulent claim paid . . . is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the government sustains

Under 31 U.S.C. § 3729 (c), a claim is defined as:

any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded

In addition to the penalty assessable for each separate false claim, damages under the Act are calculated as being equal to three times the difference between the market value of the goods, products, or services received and the actual market value of those goods, products, or services. With respect to claims for defective design, the government has taken the position that architectural or engineering services that do not meet an acceptable standard have little or no market value. Accordingly, to the extent the A/E has submitted invoices requesting payment for services that failed to meet the government's view of the desired quality, each such invoice is considered a separate claim submitted for an amount in excess of the value of the services rendered.

As applied by the U.S. Attorney in the State of Colorado, where a governmental agency claimed the architectural services received were "substandard," the result was a claim for \$10,000 penalty per invoice (one invoice per month over a 13-month project, for a subtotal of \$130,000) plus actual damages calculated as three times the \$247,000 fee for services ($\$247,000 \times 3 = \$741,000$), for a total claim of \$871,000 on a project where the cost of remedying the arguably negligent design was less than \$80,000. In evaluating such a claim, it is important to understand that in order to prevail, the government need not prove an intent to deceive or specific intent to defraud. Adding insult to injury, an A/E faced with such a claim is likely to be informed by his or her professional liability insurer that the insurance does not cover fines, penalties, or treble damages, leaving potential coverage for only \$80,000 out of a possible \$871,000.

§ 8.4 • DEFENSES

In decades past, one of the most frequently asserted defenses by A/Es was lack of privity. With the general demise of the privity requirement, additional defenses have been asserted with increased frequency. These defenses include:

- 1) standard of care;
- 2) no duty;
- 3) approval by others;
- 4) non-conforming work;
- 5) statute of limitations;
- 6) Construction Defect Reform Act;
- 7) privilege;
- 8) indemnification/hold harmless agreements;
- 9) Economic Loss Rule;

- 10) contributory or comparative negligence;
- 11) State of the Art; and
- 12) Certificate of Review.

§ 8.4.1—Standard Of Care

Much has already been said about the yardstick to be utilized in measuring the negligence of a design professional. Based on that discussion, it logically follows that application of the standard of care may create a defense for the A/E to claims of project defects. The A/E may successfully assert that, despite a failure to achieve the desired result, his or her performance was within the range of performance expected of other reasonably prudent professionals within the discipline.

In *Surf Realty Corp. v. Standing*,³³² the architect designed a complicated sliding steel roof panel that did not work. The court held the architect not liable on the claim of faulty design since he did not guarantee a perfect result and had exercised reasonable professional competence in the design.

The architect, in preparing his or her plans, does not guarantee that they will receive the approval of the building department and is liable only for failure to meet the standard of care.³³³ Nor does the A/E guarantee that his or her inspection services will detect every construction defect and, if he or she has exercised reasonable professional care, he or she is not liable.³³⁴ Thus, it logically follows that in most instances the A/E's first line of defense will be based upon compliance with the standard of care.

§ 8.4.2—No Duty

As stated in § 8.2.1, a failure to meet the standard of care is only actionable on the part of one to whom the A/E owes a duty. Many of the cases holding that the A/E is not liable based on the lack of a duty to the plaintiff appear to be little more than another way to characterize a defense based on a lack of privity, a lack of foreseeability of harm to the damaged party, or assumption of risk. Unfortunately, for the purpose of analysis, it appears that many courts, eager to achieve a specific result, are less than clear in defining the precise legal basis for their decisions.

In *Howe v. Bishop*,³³⁵ the Alabama Supreme Court ruled that an architect owed no duty of care to purchasers of an apartment building the architect had designed for the owner/seller. The supreme court affirmed a trial court ruling that the plaintiff purchasers were not foreseeable victims to whom the defendant architect owed a duty of care.

Where the A/E acts pursuant to directions of a damaged plaintiff in providing plans that do not conform to local building codes, since the A/E is acting pursuant to specific instructions, he or she is under no duty to provide plans that conform to the building code. The A/E's duty is to meet the standard of care.³³⁶ Despite the *Howe* court's reliance upon a lack of duty as it *ratio decidendi*, it would appear that the case might more appropriately have been determined on assumption-of-risk doctrines.

In *Westchester County v. Welton Becket Associates*,³³⁷ the architect apprised his client of certain potential problems but did not disclose them to the project bidders. One of the bidders asserted a fraud claim against the architect. In a decision that could be characterized as being based on a lack of privity, the appellate court ruled that the architect owed a duty only to the client, not to the bidders.

*Conti v. Pettibone Companies, Inc.*³³⁸ involved a claim against an engineer by an injured construction worker. In a decision that several years ago might have been decided based on a lack of privity, it was ruled that the defendant engineer had no duty to provide for the injured plaintiff's safety absent a clear contractual provision creating such duty.

In *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*,³³⁹ the court found the A/E owed no duty for project management to the contractor under its contract with the owner. A Texas appellate court achieved the same result.³⁴⁰ The plaintiff brought suit against the defendant architect, alleging that the defendant's negligent administration caused it to suffer extensive delays and to incur increased costs. The court noted that some jurisdictions had adopted the rule that an architect owes a duty of due care to contractors whose economic interests could foreseeably be affected by the architect's performance. However, the court rejected the approach, finding that the duty of the architect is to protect the owner, not to protect the interest of the contractor.

Further, the owner cannot complain of the result if he or she refuses to alter contract specifications when advised of unstable soil conditions.³⁴¹

§ 8.4.3—Approval Of Others

As a professional, it is difficult for an A/E to endeavor to escape liability by asserting that defects in his or her plans and specifications are excused by the approval of third parties. However, the expertise of the approving party and the extent to which the A/E has advised of the risks inherent in a particular design may control the viability of the defense.

Where the A/E prepares defective plans and specifications, the failure of local building authorities to discover the defects rarely provides a defense; by the same token, approval by a building inspector is not conclusive proof that the requirements of a city ordinance were in fact satisfied.³⁴²

Despite a strong dissent, the court in *Thomas E. Hoar, Inc. v. Jobco, Inc.*³⁴³ held that prior governmental approval of the architect's plans is an affirmative defense against a claim of negligence. Where a contract requires compliance with Veteran's Administration regulations, the structure must meet the VA specifications and approval by the VA does not excuse non-compliance with VA specifications.³⁴⁴ Such conflicting decisions notwithstanding, a rational argument does exist that where a governmental entity with authority to grant code variances is both the approving/review authority and the project owner, approval by that authority constitutes a valid defense.

Under most circumstances, the mere approval of plans and their acceptance by the owner will not relieve the A/E of liability for defective design;³⁴⁵ nor does the fact that the owner paid

the builders in full upon project completion absolve the A/E of responsibility for negligent project inspection during construction.³⁴⁶ However, where the owner is aware of code requirements and specifically requests the A/E to prepare plans which are in violation of the code, the A/E is not liable.³⁴⁷

§ 8.4.4—Non-Compliance With Design

For an A/E to be held liable for an allegedly negligent design, it must first be shown that the construction work claimed to be defective was completed in accordance with the plans and specifications. Thus, the contractor's deviation from the A/E's design may provide a defense to a claim of a defective project.

The rule of law stated above is supported by treatise statements, national and Colorado case law. Even if defects in design exist, when construction is not in accordance with the design, there is no causal relation between design and ultimate damage.

The editors of *American Jurisprudence* state the law thusly:

An architect [engineer] is not liable if the employer has failed to follow the plans in an important particular and damages result which may have been due to such departure.³⁴⁸

In CJS, it is stated:

Where the negligence of the architect [engineer] consists of the furnishing of defective plans, specifications, and drawings, it is essential to prove that the builder substantially complied with such plans and specifications. . . .³⁴⁹

In the case of *Balcom Industries, Inc. v. Nelson*,³⁵⁰ the trial court ruled that a condition precedent to liability for negligent design was a showing that construction was accomplished in accordance with the design. Since the condition precedent had not been met, the engineer could not be liable.

The Colorado court in the *Balcom* case cited and relied upon a Georgia case, *Covil v. Robert & Co., Assoc.*³⁵¹ In *Covil*, a joint on a water transmission line disconnected and caused severe flooding. The court stated:

When a case is based upon negligence of an architect or engineer in preparing plans, it is essential that the plaintiff prove that construction of the project designed was accomplished in compliance with the plans and specifications furnished by the defendant. Likewise, it is necessary that plaintiff allege this element as an ultimate fact . . . for without it, there would appear . . . no causal link between the alleged negligence and the injuries complained of.³⁵²

The *Covil* court in its case syllabus provided the following clear and concise statement of the law:

It was necessary that plaintiffs allege . . . that construction of the project . . . was accomplished in compliance with the plans furnished by the defendant; without this essential allegation the petition failed to state a cause of action³⁵³

A jury instruction incorporating this statement of the law was approved in another Georgia case:

If you find that any water line about which the plaintiff complains was not actually located as provided in the plans and specifications, then plaintiff could not recover against the defendant for alleged deficient design of such water line. In order for an architect to be held liable for alleged negligent design, it must first be shown that the work claimed to be defective was constructed in accordance with the plans and specifications prepared by the architect.³⁵⁴

A 1975 Washington case³⁵⁵ involved allegations of negligence in design and construction supervision of a retaining wall which was distorted, bowed, and severely cracked. The court ruled that since the wall was not constructed in accordance with the plans and specifications, the architect could not be liable for failure of the wall.

In the case of *Bayne v. Everham*,³⁵⁶ the plaintiff's intestate was killed by the collapse of a concrete garage designed by the defendant architect. One of several concrete panels was formed six inches too long, but no corresponding increase in steel reinforcing was made. The panel later failed. In other panels, certain specified steel was omitted in some beams. In one beam calling for three reinforcing bars, only two were placed, and in another, the steel was omitted entirely. According to expert testimony, these omissions "materially decreased the efficiency of the beam." In another beam, the steel reinforcing was improperly placed within the concrete, resulting in reduced effectiveness of the beam.

The designer argued that before liability could attach, it must be established that his plans were substantially followed. He argued that evidence showed that the plans and specifications were deviated from in material and vital respects. The defendant further urged that the plaintiff must show (1) not only defective plans, but also (2) that those defective plans were put into execution, causing (3) the collapse of the structure. The court agreed that failure to establish the second element was fatal, and upheld a summary judgment in the designer's favor.

While the cited cases stand alone as establishing a firm and clear statement of the law, the problem can also be approached from a more basic direction. A primary tenet of tort liability requires proof that a defendant's negligence proximately caused the plaintiff's injury. While the foregoing cases state independent rules of law, they are in reality merely cases in which no proximate cause exists.

In *Martin K. Eby Const. Co. v. Neelly*,³⁵⁷ the Tenth Circuit, in interpreting and applying Colorado law, held that even if the plans and specifications had been defective, without evidence of proximate cause, the plaintiff could not recover. Proof of negligence alone, according to the court, is not sufficient to impose liability; there must also be proof that the negligence was the proximate cause of the injury.

The court defined proximate cause as follows:

Proximate cause is that which in natural and continued sequence unbroken by any efficient, intervening cause, produced the result complained of and without which the result would not have occurred.³⁵⁸

Thus, without adherence to the plans and specifications by the contractor, no proximate cause exists between the damage caused by the defective construction and the A/E's design. While failure to follow the designer's plans may absolve the A/E of design liability, an A/E providing supervision, inspection, or observation of construction may be liable for negligence in providing those services.

Older pre-tort-reform cases relieving the designer of liability may require rethinking in light of more recent comparative negligence principles. In *City of Charlotte v. Skidmore, Owings and Merrill*,³⁵⁹ the court allowed a project owner to recover from the architect notwithstanding deviations from the plans by the contractor. The court rejected the architect's argument that the deviations, as a matter of law, absolved him from liability. Instead, the court held that the issue to be decided was one of causation, that is, the extent to which the architect's defective design and/or the contractor's defective work caused or contributed to the damages.

§ 8.4.5—Statute Of Limitations

The vast majority of U.S. jurisdictions presently have a special statute of limitations concerning design and construction claims. The more popular form of statute establishes a maximum period of time following completion of construction or the performance of services beyond which a claim related to design or construction cannot be asserted. The other form also sets a maximum time period following completion in which the claim must be brought, but also provides a shorter period of time within which the action must be brought following its accrual.

The Colorado statute of limitations is of the latter type.³⁶⁰ It provides:

- (1) (a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 after the claim for relief arises, and not thereafter, but in no cases shall such an action be brought more than six years after the substantial completion of the improvement to the real property, except as provided in subsection (2) of this section.

(b) A claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury.

(c) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:

(I) any deficiency in the design, planning supervision, inspection, construction, or observation of construction of any improvement to real property; or

(II) injury to real or personal property caused by any such deficiency; or

(III) injury to or wrongful death of a person caused by any such deficiency.

(2) In case any such cause of action arises during the fifth or sixth year after substantial completion of the improvement to real property, said action shall be brought within two years after the date upon which said cause of action arises.

(3) The limitations provided by this section shall not be asserted as a defense by any person in actual possession or control, as owner or tenant or in any other capacity, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or damage for which it is proposed to bring an action.

As with the Colorado law, statutes in the majority of jurisdictions typically apply to all actions related to design and construction of improvements to real property. Virtually all states include protection of the architect and engineer, a lesser number include contractors, still fewer include material suppliers, and almost all exclude owners or persons in actual possession of the property.

In recognition of the repeat challenges to the constitutionality of the statute of limitations, no discussion would be complete without analysis of that topic. Constitutional challenges have taken two primary forms:

Equal Protection — The basis of this argument is that the classifications created by the statute (*i.e.*, protecting the A/E but excluding other parties such as contractors or material suppliers) are not reasonably related to legitimate legislative purposes. Although some cases have found violation of equal protection,³⁶¹ it appears more cases have upheld such limits.³⁶²

During the early 1980s, decisions by two federal courts in Colorado resulted in confusion regarding the Colorado statute of limitations. In *Cudahy Co. v. Ragnar Benson*,³⁶³ no constitutional infirmity was found; however, in *McClanahan v. American Gilsonite Co.*,³⁶⁴ Judge Carrigan held the same statute to be a violation of equal protection.

Since the *Cudahy* and *McClanahan* cases, two factors have combined to clarify the status of Colorado's statutes:

- 1) The Colorado Supreme Court, in *Yarbro v. Hilton Hotels Corp.*,³⁶⁵ found the statute constitutional.
- 2) The statute under consideration in *Cudahy*, *McClanahan*, and *Yarbro* was re-enacted and now includes additional classes of parties involved in the construction process.

Due Process — While the majority of cases considering constitutionality have focused on equal protection, several cases have considered claims that the special statutes deny due process of law.³⁶⁶ Where due process attacks have been considered, the focus has been upon the right of the legislature to abolish a cause of action.³⁶⁷

The 1979 re-enactment of C.R.S. § 13-80-127 (now C.R.S. § 13-80-104) made it clear that the statute applied not only to injury to person and personal property but to injury to the structure itself. That same wording has been carried forward into the current revision. Setting the stage for the 1979 revision, Judge Carrigan in *Duncan v. Schuster-Graham Homes, Inc.*³⁶⁸ and *Tamblyn v. Mickey & Fox, Inc.*³⁶⁹ had ruled that the phrase “injury to person or property” excluded injury to real property. In 1979, the Colorado legislature acted promptly to clarify that in fact its legislative intent was that “property” meant “property” both real and personal.

The most frequently encountered commencement provision requires that an action be commenced within a specified period following completion of the improvement to real property.³⁷⁰ The second most prevalent type of statute ties the commencement of the statutory period to the termination of services.³⁷¹ The Colorado statute combines a two-year discovery commencement date with a maximum period of six years following substantial completion.³⁷²

Legislatively trumping the result reached in the case of *Nelson, Haley, Patterson & Quirk, Inc. v. Garney Companies, Inc.*,³⁷³ a 2001 amendment to C.R.S. § 13-80-104 provides that with respect to all claims against a party that may be liable for a portion of the liability to a third party (including indemnity and contribution claims), the claim for relief arises at the time the underlying claim is settled or judgment is entered. Thereafter, the party making the payment in settlement or satisfaction of the judgment has 90 days to bring its claim for reimbursement against a potentially liable third party.

Despite the fact that it was nearly 20 years ago (1986) when the Colorado legislature repealed C.R.S. § 13-80-127 and replaced it with C.R.S. § 13-80-104, confusion still remains arising from misguided attempts to import case law from the old statute onto current interpretation of

C.R.S. § 13-80-124. A review of some cases decided under § 13-80-127 and a discussion of the changes made with the adoption of § 127 may help reduce what appears to be on-going and unnecessary confusion.

In 1978 in the case of *Duncan v. Schuster-Graham Homes, Inc.* the court ruled that the then existing statute of limitations as embodied in C.R.S. § 13-80-127 applied only to claims for personal injury or damage to property *other than* the defective improvement itself.³⁷⁴ Later in 1978, the Court had a chance to again address the issue in the case of *Tamblyn v. Mickey & Fox, Inc.*³⁷⁵ The Court once again held that the statute did not apply to claims for defects in the improvement itself. Following the lead of the Colorado Supreme Court, the Tenth Circuit in *City of Aurora v. Bechtel, Corp.*, adopted the ruling of *Tamblyn*.³⁷⁶ The Federal District Court did the same in *Cudahy Co. v. Ragnar Benson, Inc.*³⁷⁷

In 1979, the Legislature acted to correct what was perceived as incorrect judicial interpretation of the statute. The language leading to the court's holding in *Tamblyn* was specifically revised in an effort to make it clear that the special construction statute of limitations and not the general statute of limitations was to apply to all claims including those for defects in the improvement itself. In 1985 in the case of *Mohawk Green Apartments v. Kramer*, the court of appeals acknowledged that the 1979 legislative revision of the statute was in direct response to what the legislature saw as "the narrow interpretation given to [the prior statute] by the courts."³⁷⁸

The enactment of C.R.S. § 13-80-104 was seen as an effort to re-write the statute in a manner that would render it more difficult for the courts to engage in future "narrow interpretations" that the legislature viewed as an attempted frustration of the legislative intent. Nonetheless, Colorado courts were not finished with their efforts to restrict the interpretation of the special construction statute of limitations. In *Irwin v. Elam Construction, Inc.* the contractor's operation of heavy construction equipment in the vicinity of the plaintiff's home damaged the home.³⁷⁹ The court refused to apply the statute of limitations stating that the statute was intended to limit only claims related to the project being designed and constructed and did not control with respect to damage caused to different property or otherwise arising out of the design or construction.

The ruling in *Sharp Brothers Contracting Co v. Westvaco Corp.* was, however, at odds with the prior pronouncement of *Irwin*. In *Sharp Brothers*, a fire was caused by the attempted removal of the lining from carbon storage tanks. The plaintiff urged that the special statute of limitations did not apply because the fire was caused by the defendants' negligent operations not by a "defect."³⁸⁰ The court rejected that contention stating "the plain language of the statute supports a broad interpretation" and the statute's "applicability is not limited only to claims resulting from a defect in the improvement; it also applies to any and all actions that result from a deficiency in the design or construction process."³⁸¹

Despite or perhaps because of the difficulty the Colorado courts have had in interpretation and applying the intent of the legislature regarding the scope of coverage desired for the special construction statute, reliance upon prior cases that have been overruled or legislatively negated continues by those who fail or refuse to recognize the history of Colorado's special construction

statute. Caution is required in relying upon any case purporting to interpret any codification of the statute of limitations that preceded the current C.R.S. § 13-80-104. This caution applies not only to the intended scope of the statute, but also to the time the statute commences its accrual.

In *Criswell v. M.J. Brock and Sons, Inc.* and *Financial Associates, Ltd. v. G.E. Johnson Construction Co., Inc.* the court interpreted the legislative intent regarding accrual to require that claims against architects, engineers, and contractors arose not when the plaintiff discovered the defect but when *the cause* of the defect was discovered.³⁸² On this issue too, the legislature was required to act to make clear its desires. Directly rejecting both *Criswell* and *Financial Associates*, the legislature in its enactment of C.R.S. § 13-80-104 specifically and emphatically stated that “a claim for relief arises . . . at the time the claimant . . . discovers or in the exercise of reasonable diligence should have discovered the *physical manifestation* of a defect in the improvement which ultimately causes the injury” (emphasis added).

Both the scope and the accrual trigger of Colorado’s special construction statute of limitations would now appear well established. Caution is required in relying upon any case interpreting any prior embodiment of the law.

§ 8.4.6—Construction Defect Reform Act

The Construction Defect Action Reform Act (CDARA),³⁸³ in C.R.S. § 13-20-803(2), requires a plaintiff/claimant to file and serve an initial list of construction defects within 60 days after the commencement of an action alleging a defect in the construction of any improvement to real property. The list may be amended from time to time during the progress of the case; however, the court is not to set the matter for trial without requiring the defect list. This section applies to both residential and commercial projects. It is assumed that the phrase “an alleged defect in construction” as used in the Act will be interpreted to include allegations of defective design.

C.R.S. § 13-20-804(1) applies to technical violations of the building code in residential construction only and is designed to prevent claims where the technical violation has no real prospect of resulting in damage, loss of use, or personal injury. While this section is clearly well-intentioned, it may spawn more litigation than it prevents. Is it infirm under equal protection arguments since it applies only to residential and not to commercial projects? Is an expert required to establish that the code violation, while causing no present damages, will “probably” do so in the future? What constitutes a sufficient “threat” to the life, health, or safety of the occupants to support a claim? How remote can the threat be? These are all questions, which, along with others not yet dreamt, will become the fodder for litigation over the next few years.

§ 8.4.7—Privilege

During design and contract administration, product and contractor submittals are reviewed by the A/E and approved or rejected for use on the project. The A/E’s approval or rejection is in most cases a “recommendation” to the owner who may in fact accept or reject the A/E’s recommendation. Advice to the owner with respect to appropriate products and firms is an important part of the A/E’s service and guidance, and the privilege associated therewith may serve as a defense to a claim of tortious interference and similar theories.³⁸⁴

Nonetheless, rejected product suppliers and contractors often allege a cause of action based on the A/E's rejection. The claims asserted frequently include tortious interference with contract or prospective business advantage, defamation, negligence, and conspiracy.

In the not too distant past, a cause of action for interference with an existing contractual relationship was viable, but a claim based on a potential contractual relationship was much more questionable. That distinction has, in most jurisdictions, gone the way of the privity requirement and under a proper set of circumstances, a cause of action can exist for interference with prospective business advantage. In *Wasalco, Inc. v. El Paso County*,³⁸⁵ the court noted a distinction between tortious interference with a prospective business advantage, which does not require an underlying contract, and the tort of intentional interference with an existing contractual relationship, which does require the existence of a contract.

According to the U. S. District Court for the Eastern District of Missouri,³⁸⁶ the elements necessary to establish a *prima facie* case for intentional interference with a contractual relationship (or business relationship) are:

- 1) existence of a valid contract (or a business relationship or expectancy);
- 2) knowledge of the contract (or of the business relationship or expectancy);
- 3) an intentional interference causing the breach of the contract (or inducing or causing a termination of the relationship or expectancy);
- 4) absence of justification; and
- 5) resultant damages.

It is to be noted that the court in *Harber* indicated "absence of justification" to be an element of a *prima facie* case of interference with contractual or business relationships. That particular point was further emphasized in *Pillow v. General American Life Insurance Company*.³⁸⁷ In the *Pillow* case, the plaintiff's claim for tortious interference with the contract was dismissed because it did not contain sufficient facts in support of an allegation that the defendant's acts were without justification. The *Restatement (Second) of Torts* likewise recognizes the right of a party to give advice even if that advice interferes with another's business advantage. In full, *Restatement of Torts* § 772 states:

One who *intentionally* causes a third person not to perform a contract or not to enter into a prospective contractual relation with another *does not interfere improperly* with the other's contractual relation by giving the third person truthful information or honest advice within the scope of a request for advice. (*Emphasis added.*)

The historical arrangement of construction projects fits perfectly within the language of § 772. The A/E contracts directly with the owner and is obligated to provide the owner with advice regarding the construction of the project, including material to be incorporated and firms to execute the work. Thus, the language of § 772 creates a privilege for the A/E's actions in advising the owners. By virtue of special education, training, and expertise, the A/E is retained to advise the owner.

A limited number of cases address the issue here presented. With virtual unanimity, those cases support the right of the A/E to give advice regarding materials and services without liability to those manufacturers and firms not approved.³⁸⁸

While no Colorado case arising from a construction situation has been discovered, the Colorado Supreme Court has recognized the tort of intentional interference with a contractual relationship in the field of medicine.³⁸⁹

The law in Colorado, as well as nationwide, is that no cause of action exists for negligent interference with another's contractual or business relationships.³⁹⁰ In its claim for negligence, a plaintiff does nothing more than re-allege an interference with business relationships. While a party may admittedly make inconsistent claims and seek recovery on inconsistent theories, it may not seek to state as a negligence claim, a claim which is in fact, if actionable at all, actionable only as an intentional tort.

Claims alleging civil conspiracy as a result of rejection of suppliers and contractors are also common under Colorado law. To successfully maintain a claim for civil conspiracy, a plaintiff must show a combination between two or more parties who, by some concerted action, seek to accomplish an unlawful purpose or to accomplish some purpose not in itself unlawful by criminal or unlawful means.³⁹¹

It is important to distinguish a civil conspiracy from a criminal conspiracy. In *Pullen v. Headberg*,³⁹² the Colorado Supreme Court stated:

At common law a "conspiracy" is defined as a combination between two or more persons to do a criminal or unlawful act or a lawful act by criminal or unlawful means. In criminal prosecutions, the gist of the action is the conspiracy. But in civil cases, the gist of the action is not the conspiracy, but the damages resulting from it, and unless a civil action in damages would lie against one of the conspirators, if the act was done by him alone, it will not lie against many acting in concert.³⁹³

Thus, an allegation of civil conspiracy cannot, in and of itself, give rise to a cause of action. There must be an unlawful act, or a lawful act in furtherance of an unlawful end. Accordingly, if the A/E's interference is privileged, no claim for conspiracy can prevail either.

§ 8.4.8—Limitation Of Liability

In 1970, ASFE³⁹⁴ suggested that its members consider using limitation of liability clauses³⁹⁵ in their agreements for engineering services. While risk allocation or limitation of liability clauses vary with respect to their precise wording, the essential element of allocating the project risk such that the design professional assumes a maximum, defined quantum of liability is the constant theme.

Accordingly, for purposes of this section, a limitation of liability or risk allocation clause is defined as a contractual agreement between the A/E and his or her client, whereby the liability of the A/E to the client or to individuals or firms under contract with the client is limited. As important as defining what a limitation of liability clause is, is defining what it is not. It is not an exculpatory clause, a release, an indemnity or anti-indemnity clause, or a liquidated damages provision. The tendency to refer to limitation of liability clauses as if they were synonymous with other legal concepts such as total exculpation clauses has created no end of confusion.³⁹⁶

Under Colorado law, “the general rule [is] if a party enters into a contract or any other legal transaction with sufficient mental capacity to understand it, and not under the influence of fraud, coercion, or imposition, the courts will not relieve him of the consequences of his act on the sole ground that the bargain is, as to him, improvident, rash, foolish or oppressive.”³⁹⁷ Furthermore, in *Eastern Tunneling Corp. v. Southgate Sanitation District*, the court held that, under Colorado law, “if the contract places the risk of uncertainty on one of the parties, then that party must absorb losses resulting from the unexpected condition.”³⁹⁸ Parties of equal position in a private contract for services are free to create binding agreements so long as those agreements do not violate statute or public policy.³⁹⁹

A contract cannot be broken down into its various parts in order to subject certain clauses to interpretation. Such a practice seals the various provisions from each other, and does not give full meaning to the contract. “The meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation.”⁴⁰⁰

Limitation of liability clauses embody the application of a basic concept of contract law which recognizes the propriety of parties contracting so as to allocate the risks involved in a particular transaction.⁴⁰¹ In *Robinson Ins. & Real Estate, Inc. v. Southwestern Bell Telephone*,⁴⁰² the plaintiff entered into an agreement for an advertisement in the Yellow Pages. The agreement contained a provision limiting the defendant’s liability to the fee paid by the plaintiff. The plaintiff argued that the clause constituted a liquidation of damages provision and was ineffectual because the specified limit was grossly disproportionate to the probable actual damages.

The court quoted *Williston on Contracts* regarding the distinction between a liquidation of damages clause and a limitation of liability clause:

The limitation of liability is neither a penalty in that it does not normally operate *in terrorem* to induce proper performance, nor is it of the nature of liquidated damages since it does not purport to be a pre-estimate of probable damages resulting from a breach. Sometimes the sum so fixed is regarded by the parties as an outside estimate of what would otherwise be the probable liability, but in determining the amount of recovery it is immaterial whether this is the case or not.⁴⁰³

The court held that absent a showing of unconscionability the limitation of liability clause was enforceable irrespective of the relationship between the limit and the actual probable damages.⁴⁰⁴

The sufficiency and validity of a limitation of liability clause is a question of law for the court to determine. In *Jones v. Dressel*,⁴⁰⁵ the court addressed the validity of an exculpatory clause in a contract for providing air service in preparation of parachuting. The defendants sought a complete bar to recovery by the plaintiff based upon the contractual exculpation clause in the contract. In contrast to the complete bar to recovery provided by an exculpation clause such as that in *Jones*, a limitation of liability clause establishes a predetermined maximum recovery. Cases addressing exculpation clauses, such as that at issue in *Jones*, must be appropriately distinguished from cases in which limitation of liability clauses are at issue.

While *Jones* is distinguishable, it nonetheless, when cautiously applied, provides insight into appropriate construction of a risk allocation clause. The *Jones* court discussed four factors to examine when considering the validity of exculpatory clauses. First, whether there exists a duty to the public. Second, the nature of the service performed under the contract. Third, whether the contract was fairly entered into by the parties. Finally, “whether the intention of the parties is expressed in clear and unambiguous language.”⁴⁰⁶

In crafting its decision, the *Jones* court relied heavily upon *Tunkl v. Regents of University of California*⁴⁰⁷ in examining the duty to the public factor. Considerations included:

- 1) whether the agreement concerns a business of a type generally thought suitable for public regulation;
- 2) whether the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of public necessity;
- 3) whether the party holds himself or herself out as willing to perform this service for any member of the public who seeks the services;
- 4) whether, as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his or her services;
- 5) whether, in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and
- 6) whether, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his or her agents.

The California Supreme Court in *Tunkl* held that an agreement between a hospital and patient, releasing the hospital from liability for the negligent acts of its employees, so vitally affected the public interest as to invalidate any attempt at exculpation. While not directly on point with the issue of a limitation of liability clause in a design services contract, the *Tunkl* factors provide a guiding framework for examination of the validity and enforceability of limitation of liability clauses under Colorado law. As will be discussed subsequently, this test favors enforceability of limitation of liability clauses.

The California case of *Markborough California v. Superior Court*⁴⁰⁸ is generally considered to be the leading authority with respect to enforceability of risk allocation/limitation of liability clauses.⁴⁰⁹ In *Markborough*, the developer of a planned residential development brought an action against the designer of a man-made lake liner after the liner failed. Markborough incurred over \$5 million in expenses to remedy the design defects. The designer sought a summary adjudication of issues with respect to the validity of the contractual risk allocation/limitation of liability clause. The clause limited the designer's liability to the greater of the fee or \$50,000. Markborough argued, *inter alia*, that the clause was not "expressly negotiated and agreed" upon so far as to fall under a California statute which recognized the enforceability of such limitation clauses.⁴¹⁰

The court ruled that "negotiate" (under said statutes) does not require actual discussion, but rather the fair opportunity of each party to discuss such clause.⁴¹¹ Further, in addressing the validity of the provision, the court went beyond the scope of Markborough's arguments. The California court considered the factors recited in *Tunkl*,⁴¹² just as did the Colorado court in *Jones*.⁴¹³ According to the court, "Markborough was given the opportunity to negotiate with respect to the limitation of liability provision."⁴¹⁴ Thus, as an equal bargainer, Markborough had agreed to assume a portion of the risk of loss. Accordingly, there was no basis for allowing Markborough to shift back to the A/E that portion of the risk which Markborough had agreed to accept by virtue of the risk allocation terms of the parties' contract.

The United States District Court for the Southern District of New York, in *Long Island Lighting Co. (LILCO) v. IMO Delaval, Inc.*,⁴¹⁵ interpreted a limitation of liability clause in a contract between LILCO and Stone & Webster (S&W).⁴¹⁶ S&W contracted to provide design, engineering, and construction management services in connection with the Shoreham Nuclear Power Facility (Shoreham).⁴¹⁷ The clause in question limited S&W's liability to the proceeds of the insurance required by the parties' contract in the Insurance and Indemnity article. LILCO alleged that S&W negligently supervised the construction of Shoreham, and that S&W breached their contract by "failing to provide various professional services 'consistent with the best engineering and architectural practices.'"⁴¹⁸ LILCO claimed damages for costs associated with repair, replacement, economic loss, and other sundry items.

The court found that the parties' sophistication in negotiating the contract implied their contemplation of claims of malpractice, negligence, and breach of contract, and that LILCO's remedy for these claims lay in claims against the contractually required insurance policies, per the "Insurance and Indemnity" clauses.⁴¹⁹ Furthermore, the court held that the provision did not violate the New York state anti-indemnification statute⁴²⁰ since limitation of liability clauses are not synonymous with indemnity provisions. As discussed above, limitation of liability clauses are neither indemnity nor anti-indemnity clauses.

The Colorado General Assembly has not adopted anti-indemnity legislation. Accordingly, reliance must be placed upon the Colorado case law as established in *Jones v. Dressel*,⁴²¹ the guidance of decisions by other Colorado trial courts,⁴²² and precedent from other jurisdictions.⁴²³ In analyzing precedent from other jurisdictions, caution must be applied. Thirty-nine states have adopted anti-indemnification statutes upon which those states' courts have determined certain

exculpation clauses to be invalid.⁴²⁴ Prior to the passage of such statutes, those states' courts generally allowed private contracting parties to limit their liability, with the notable exceptions being common carriers, physicians, and attorneys. Apparently, no court has seen fit to include design professionals.

The Alaska Supreme Court interpreted a limitation of liability/risk allocation clause in *City of Dillingham v. CH2M Hill Northwest, Inc.*⁴²⁵ The city brought suit against CH2M Hill in connection with the preparation of an environmental plan for the construction of a sewage treatment facility. CH2M Hill filed a motion for partial summary judgment based upon a limitation of liability clause in the parties' contract that limited the engineer's liability to the greater of \$50,000 or the engineer's total compensation. The city argued that such a clause was invalid in light of Alaska's anti-indemnification statute. Based upon the legislative history of the statute, the court held that a clause which limited liability for negligent acts violated the anti-indemnification statute. According to the court, the legislative history reflected a clear intention to include limitation of liability clauses within the statute.⁴²⁶

Colorado appellate courts have not squarely addressed the question of whether a limitation of liability clause is valid and enforceable in contracts for design, engineering, procurement, and construction services between a developer and an A/E. However, the *Jones* decision, as it relates to the *Tunkl* decision, has been relied upon by at least one Colorado court to uphold the parties' agreed-upon allocation of risk.⁴²⁷

In *Town of Alma v. Faulkner-Kellog*,⁴²⁸ the defendant provided design services for the installation of sewer lines for the Town of Alma. According to the court, the contract was entered as the result of arms-length bargaining, and the limitation of liability clause was expressed in clear and unambiguous language. On the subject of the *Jones* test of a public duty, the court held that the agreement was not void as against public policy because the defendant did not directly contract with the public,⁴²⁹ nor did the defendant have superior bargaining power which would place the public at the mercy of the defendant, nor did the defendant occupy a position in relation to the public such that the public was under the control of the defendant. Thus, the clause was enforceable.

Architecture and engineering firms are purely private in nature. They do not provide essential public services for the general public in the same context as do hospitals and common carriers. Developers, contractors, and others seeking the services of A/Es can readily obtain design services from multiple A/E firms if they are dissatisfied with the terms of a proposed agreement.

Arguments that the requirement for Colorado A/Es to secure a state license vests in every A/E contract a public interest⁴³⁰ meeting the *Jones*⁴³¹ and *Tunkl*⁴³² criteria also miss the mark. The court in *Town of Alma*⁴³³ recognized this distinction. Despite the fact that Faulkner-Kellog contracted with a Colorado municipality, the court stated: "The Court agrees with . . . defendant that defendant does not directly contract with the public."⁴³⁴

It thus appears, arguments to the contrary notwithstanding, that appropriately negotiated risk allocation clauses are likely to be enforceable in Colorado. Court decisions from other juris-

dictions which rely upon anti-indemnification statutes as a basis for declaration of invalidity are clearly distinguishable and should be considered inapplicable. Likewise, writings and opinions which muddy clear jurisprudence by impermissibly confusing limitation of liability concepts with concepts of indemnity and total exculpation must be evaluated with extreme caution.

While Colorado still lacks appellate law specifically and directly blessing limitation of liability clauses in architectural and engineering service contracts, the national trend favoring such clauses is firmly entrenched. Colorado trial courts appear receptive to this trend.

In *Valhal Corp. v. Sullivan Associates, Inc.*,⁴³⁵ the Third Circuit distinguished exculpatory, hold harmless, and indemnity clauses from limitation of liability clauses. The court noted that even though limitation of liability clauses may not be favored, they are a routinely enforced part of business and commercial life. Thus, a \$50,000 limitation of liability was enforced reversing a \$1 million jury verdict notwithstanding an argument that the clause violated public policy under a Pennsylvania statute. In *Marbro, Inc. v. Borough of Tinton Falls*,⁴³⁶ the court addressed and rejected the frequently raised position that limitation of liability clauses act as a disincentive for A/Es to exercise reasonable care.

In *Sear-Brown Group v. Jay Builders, Inc.*,⁴³⁷ the plaintiff sued the engineer on theories including gross negligence and misrepresentation. The court held that the engineer's limitation of liability clause would not apply to a misrepresentation made to induce the plaintiff to enter into the contract and would not protect the engineer against claims of gross negligence. *Author's Note:* As the use of limitation of liability clauses continues to increase, there appears to be a corresponding increase by plaintiffs in the application of misrepresentation and gross negligence claims. While the prospect for success on these claims may be marginal, they may avoid a partial summary judgment or other ruling limiting damages to the amount of the stated limit. This uncertainty as to the final outcome, at a minimum, keeps the A/E in the case for a larger sum during settlement discussions.

In *CBI Na-Con, Inc. v. UOP, Inc.*,⁴³⁸ the designer's limitation of liability clause limited liability to the designer's own willful acts or negligence. The court held that a limitation of liability clause was different from an indemnity clause, and thus the language did not have to meet the same clear and unequivocal test to be enforceable.

The court in *Long Island Lighting Co. v. Imo Delaval, Inc.*⁴³⁹ held that New York's anti-indemnification statute did not render a limitation of liability clause unenforceable, since the owner was a sophisticated party.

Cases and other authorities reviewed in connection with the preparation of this section are listed in the endnote at the conclusion of this section.⁴⁴⁰

§ 8.4.9—Economic Loss Rule

General Statement of the Rule

No cause of action will lie in tort when purely economic damage, with no physical injury to persons or property, is caused by the negligent breach of a contractual duty.⁴⁴¹ Economic loss damages must be supported by an independent duty of care to be recoverable in a negligence action.⁴⁴²

In order to best understand the economic loss rule as now applied in Colorado, it is beneficial to review the history of the rule concluding, of course, with the supreme court's ruling in *BRW, Inc. v. Dufficy & Sons, Inc.*⁴⁴³ It is also instructive to read the opinion of the Colorado Court of Appeals in the same case in order to better appreciate the eventual supreme court ruling.⁴⁴⁴

The discussion that follows tracks the history of Colorado's effort to wrestle with the economic loss rule. Considered first is the status prior to the court of appeals decision in *Dufficy*, followed by a discussion of the rule's status during the brief period of time before the supreme court reversed the court of appeals. Finally, the supreme court *Dufficy* pronouncement is discussed.

Colorado Analysis Prior to *Dufficy*

In Colorado, "a party suffering only economic losses from a breach of an express or implied contractual duty may not assert a tort claim for such breach absent an independent duty of care under tort law."⁴⁴⁵ According to the *Grynberg* court, the relevant inquiry does not focus so much on the damages sought as on the source of the duties imposed. "The proper focus in an analysis under the economic loss rule is on the source of the duties alleged to have been breached."⁴⁴⁶

In *Town of Alma v. AZCO Construction, Inc.*, decided the same day as *Grynberg*, Colorado's Supreme Court affirmed the dismissal of a negligence claim wherein the duties breached derived from a contract between Alma and AZCO.⁴⁴⁷ In affirming the lower court's holding that the economic loss rule barred the negligence claim, the supreme court reasoned that the rule "serves an important role and should be observed and applied in Colorado jurisprudence."⁴⁴⁸ The court further stated "the contract in the instant case expressly assigned a duty of care to AZCO in the installation of the water system. It was this contractual duty that AZCO allegedly breached."⁴⁴⁹ Thus, since the negligence claim was "based solely on the breach of a contractual duty resulting in purely economic loss" it was subject to dismissal.⁴⁵⁰

The *Alma* court also noted that the "essential difference between a tort obligation and a contract obligation is the source of the duties of the parties."⁴⁵¹ "Tort obligations generally arise from duties imposed by law. In contrast, contract obligations arise from promises made between the parties."⁴⁵² The court went on to explain:

Limiting tort liability when a *contract exists between the parties* is appropriate because a product's potential nonperformance can be adequately addressed by rational economic actors bargaining at arms length to shape the terms of the con-

tract. For example, a buyer may demand additional warranties on a product while agreeing to pay a higher price, or the same buyer may choose to assume a higher level of risk that a product will not perform properly by accepting a more limited warranty in exchange for a lower price. *Limiting the availability of tort remedies in these situations, holds parties to the terms of their bargain*⁴⁵³ (emphasis added).

Building on the statement in *Grynberg* to the effect that the focus should be on the source of the duty rather than the nature of the loss, the *Alma* court clarified:

*The question, thus, is not whether the damages are physical or economic. Rather, the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty the plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action*⁴⁵⁴ (emphasis added).

Prior to *Dufficy*, and with the court's combined decisions in *Alma*, and *Grynberg*, the economic loss rule would have seemed both well established and reasonably well defined. However, two important questions were left unaddressed:

- 1) Did the court intend to limit the application of the rule to cases where the plaintiff and defendant were in contractual privity and could thus address the losses in an action in contract?
- 2) How does one identify the "independent duty not arising out of contract" that is required to support a claim for economic losses in a tort action?

Guidance, if not direct answers to both questions, was available through reference to prior Colorado cases.

Addressing the second question first — In order to support the result in both *Grynberg* and *Alma*, it was necessary for the court to explain why a tort claim was allowed in *Cooley v. Big Horn Harvestore Systems*. Big Horn contracted to install a grain storage and distribution system for use in Plaintiff's cattle feeding operation. However, Big Horn went beyond its contractual obligations and provided advice with regard to nutritional programs for Plaintiff's cattle. Since the duty breached when the Plaintiff's cattle failed to thrive on the nutritional program outlined by Big Horn did not arise from contract, it was an "independent duty" capable of supporting a separate tort claim.⁴⁵⁵ Accordingly, *Big Horn* provides at least one pre-*Dufficy* example to assist in defining the required "independent duty." Even though the parties owed certain contractual duties, where Big Horn undertook services outside of the contract, those services represented an independent duty.

Thus, it appears that the duty asserted as an “independent duty” sufficient to support a tort claim must be unrelated to or at least not required by the contract performance. An allegation that an architect or engineer performing contractually mandated duties also has an “independent duty” to any other member of the ownership, design, or construction team with whom the A/E has no contract will fail. The “duty” imposed by virtue of the A/E’s professional license will not suffice. While this rule of law existed at least since the 1991 *Big Horn* holding, it appears to have been largely ignored prior to *Dufficy*.

Turning now to the first question — It is undeniable that the parties in both *Alma* and *Grynberg*, were in contractual privity. It must also be acknowledged that the court in both cases specifically referenced duties “between the parties” to the contract. Did the court by making specific mention of “the parties to the contract” limit the economic loss rule to situations in which there was a contract (either express or implied) between the plaintiff and the defendant or was the court simply recognizing that in the specific case before it, the plaintiff and defendant were in privity? Could the rule ever bar any claim where contractual privity did not exist between the parties? Again, an earlier case provided at least some pre-*Dufficy* guidance.

In *Torrões v. Tapia*, a restaurant owner asserted negligence and breach of contract claims against the designers and builders of his restaurant.⁴⁵⁶ After citing the rule as set forth in *Jardel*, the *Torrões* court continued: “This economic loss rule applies when the plaintiff is a party to the contract as well as when the plaintiff is a third-party beneficiary of a contract, since the duty the contract promisor owed and breached is determined by the manifested intentions of the parties to the contract and is entirely contractual.”⁴⁵⁷

The court’s statement in *Torrões*, thus, allowed application of the rule to at least one class of plaintiffs not in actual privity; specifically, third-party beneficiaries of a contract. It is also clear that neither *Alma* nor *AZCO* overruled *Torrões*. To the contrary, *Alma* cited *Torrões* with approval, distinguishing no part of the ruling in that earlier case.

Continuing with a pre-*Dufficy* analysis, could the rule be extended to situations in which there is neither a direct contract nor a third-party beneficiary relationship? Again, *Torrões* offered some assistance. With respect to Pino (one of the defendants in *Torrões*) the court noted, “[t]he record is unclear as to whether plaintiff had a contractual relationship with . . . Pino.” Notwithstanding the absence of any evidence of contractual privity, the court dismissed the claim against Pino stating: “Finally, because any claim against Pino is based directly or indirectly on a breach of contract claim, plaintiffs are barred from recovering against Pino as well under the economic loss rule”⁴⁵⁸ (emphasis added).

A claim by a contractor that it was damaged by the A/E’s defective performance of design duties would appear to qualify as a claim “based directly or indirectly” on a breach of contract. Thus, under *Torrões*, an argument that the economic loss rule applied to the contractor’s claim against the A/E would seem to be well-founded. Accordingly, the ruling of the *Torrões* court, with respect to Pino, offered further pre-*Dufficy* support for the notion that the rulings of *Alma* and *AZCO* did not limit the operation of the rule to cases where the plaintiff and

defendant were in privity. It was sufficient that they were members of the project team and thus their claims arose “directly or indirectly” out of one or more of the contracts between the owner, designers, and constructors.

In a pre-*Dufficy* analysis, where a remedy in contract existed against *any other* project participant, an action in contract would remain the vehicle for recovery of purely economic losses. Of course, it was only strangers to the project with respect to whom there was no contractual claim available. Thus, only strangers to the project would be allowed tort claims against *any* member of the project team. The liabilities of project team members would remain within the matrix of contractual rights and remedies. Questions of independent tort duty and foreseeability as a gauge of that duty were inapplicable and confusing distractions. It was only with respect to strangers to the project who were not within the matrix of the project contracts that it became necessary to engage in an analysis of tort-based duties.

Pre-*Dufficy*, the economic loss rule was less than fully defined, notwithstanding the years that had passed since Colorado's 1988 seminal statement of the Rule in *Jardel*. It appeared, however, that the court had significantly narrowed the remaining questions. Thus, when the collective holdings of the cases discussed herein are consolidated, it appears that the holding of the court of appeals in *Dufficy* was a greater departure from *stare decisis* than was generally thought. It also follows that the holding of the supreme court was much less a pronouncement of a new rule of law than a consolidation and clarification of the collective holdings of prior cases. This point will be made with greater clarity in the following biopsy of the court of appeals ruling.

Analysis of the Court of Appeal's Ruling in *Dufficy*

Dufficy was a painting subcontractor for a bridge owned by the City of Denver and designed by BRW. BRW was also to provide contract administration/inspection services during construction but subcontracted with PSI for the performance of those services. *Dufficy* claimed that it incurred additional costs due to the negligent preparation and interpretation of specifications by BRW and the negligent administration/inspection of PSI. The trial court granted a summary judgment in favor of the engineers based on the economic loss rule.

Dufficy argued that engineers such as BRW and PSI owed an independent duty supporting a claim even in the absence of a contract. The Court of Appeals first recognized prior Colorado pronouncements on the Rule stating: “The economic loss rule is intended to maintain the boundary between contract and tort and to prevent tort law from swallowing the law of contracts.”⁴⁵⁹ As the supreme court stated:

In this way, the law serves to encourage parties to confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties' efforts to build these cost considerations into the contract. The economic loss rule thus serves to ensure predictability in commercial transactions.⁴⁶⁰

Then, without further analysis, the court of appeals in *Dufficy* went on to state:

Colorado courts have not previously recognized an independent common law duty of care owed by a licensed engineer to a contractor or subcontractor who relies on the plans and specifications prepared by the engineer. Because we now conclude there is such an independent duty of care under the tort law, we hold that the economic loss rule does not preclude Dufficy's tort claims here.⁴⁶¹

The Court then proceeded to explain its rationale as being premised primarily on two factors:

- 1) Contractors and subcontractors face the risk of financial loss if required to follow defective plans and specifications; and
- 2) Extending the liability of architects and engineers in this manner will encourage them to exercise greater care in the performance of their duties.

This first plank in the court of appeal's reasoning overlooked the reality that under prior conceptions of the economic loss rule, the contractors and subcontractors whose welfare concerned the court had the opportunity to recover any damages suffered—they simply recovered within the chain of contract.

The court's second argument has been raised by numerous courts in a variety of contexts. However, the argument has never been established with even a modicum of support. There is simply no evidence that architects, engineers, doctors, lawyers or other professionals perform at a lower level of professionalism or diligence merely because their liability to a party other than or in addition to their clients must follow contractual chains of recovery before "coming home to roost." BRW had a measure of liability to its client, the City of Denver, equal to any damages suffered by Dufficy. Thus, contrary to the logic of the court of appeals, BRW was not at liberty to relax its level of professional performance based on a perceived lack of exposure to liability.

Thus, what the court of appeals in *Dufficy* really established was that Dufficy should be allowed to recover without pursuing its claims through the contractual chain. One may be prompted to inquire as to what difference the decision in *Dufficy* really made if the same recovery was available and the only distinction was the number of claims that must be asserted to achieve an identical result. The answer, of course, was in the extent to which *Dufficy* eroded or destroyed contractual protections entered into by certain of the parties; protections that may not be binding on parties not in privity regarding that contract. Examples of such agreements include limitation of liability and modified statute of limitations provisions.

Analysis of the Supreme Court's Ruling in *Dufficy*

When analyzed as has been done herein, the supreme court ruling is not nearly so dramatic a holding as many have attempted to make it appear. In reality, it was the court of appeals ruling that changed the face of Colorado law for a brief period. The final ruling of the supreme court in fact returned Colorado law to its prior state. A relatively brief quote from the opinion of the supreme court provides a cogent explanation of the opinion:

We reverse the court of appeals. . . . Our economic loss rule requires the court to focus on the contractual relationship between the parties, rather than their professional status, in determining the existence of an independent duty of care. The interrelated contracts in this case contained BRW's and PSI's duty of care. Dufficy's tort claims are based on duties that are imposed by contract and therefore, contract law provides the remedies. Accordingly, the economic loss rule bars Dufficy's tort claims.⁴⁶²

For the supreme court to reach the conclusion it reached, it was necessary to address whether there was a distinction between a two-party contract such as existed in *Alma* and a situation such as that presented in *Dufficy*, wherein there was a matrix of interrelated contracts; not unlike what exists on any complex construction project. Holding that the application of the economic loss rule was in no way limited to situations where there was a direct, two party contractual relationship, the court stated:

The economic loss rule applies between and among commercial parties for three main policy reasons, none of which depends upon or is limited to the existence of a two-party contract: (1) to maintain a distinction between contract and tort law; (2) to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining; and (3) to encourage the parties to build the cost considerations into the contract because they will not be able to recover economic damages in tort.⁴⁶³

Allowing recovery in tort where a party's duty is contractually defined does violence to the sanctity of contract. After the supreme court *Dufficy* pronouncement, it is now clear that Colorado law will maintain a bright line of demarcation between tort and contract law. Whether a parties' rights and duties are defined by a single contract or depend upon a complex spider web of interrelated contractual relationships, the court will seek to untangle the contract and honor the terms expressed.

Impact of *Dufficy* on a Contractor's CGL Insurance

Whether a claim is brought in contract or tort has no effect on the existence of coverage under a contractor's CGL insurance. A common misconception appears to be that a construction contractor's Commercial General Liability (CGL) insurance policy covers only tort claims and that where a claim is being pursued only in contract, coverage under the CGL policy is jeopardized. This misconception results from a serious misunderstanding of the terms of the CGL policy and has caused considerable post-*Dufficy* confusion and consternation, not to mention inappropriate reservation of rights letters or outright denials of coverage by confused or poorly informed insurance adjustors and attorneys.

At issue is the so-called "contractual liability exclusion" as set forth in common CGL policy forms. The "contractual liability" that is excluded from coverage under the policy's contractual liability exclusion is *only* liability assumed by contract that the insured would not otherwise have through the application of the law.⁴⁶⁴ Thus, where the claim is that an insured contractor

breached a construction contract by placing defective construction, the contractual liability exclusion does not act to exclude coverage. Coverage may or may not exist under the policy's grant of coverage or may be excluded by another exclusion but it is unaffected by the contractual liability exclusion. Whatever other coverage analysis must be performed to achieve a final answer on the existence or lack of coverage, the contractual liability exclusion cannot apply to bar coverage where another legal basis for liability exists.

Even where one accepts the fundamental notion that the contractual liability exclusion does not trump coverage if another basis for liability exists, the common inclusion of indemnity agreements in construction contracts causes some to conclude that the indemnity clause is in and of itself "liability assumed by contract." They then reach the conclusion that the contractual liability exclusion defeats coverage for any liability that falls within the contractual indemnity clause. It may or may not. Many contractual indemnity clauses do little more than restate the common law principle that one is responsible for the damages one causes. If an insured who is liable under a contractual indemnity clause would be liable to the indemnitee under common law principles, coverage is not affected. Where liability in excess of that imposed under the common law is contractually agreed upon, coverage may exist for a portion and portion may be uninsured. Assume a contract that requires a subcontractor to indemnify the general contractor for 110 percent of the damages suffered by the general contractor as a result of the subcontractor's defective performance. Only the additional 10 percent will fall prey to the contractual liability exclusion and coverage for the basic liability is unaffected.

In *Roger H. Proulx & Co. v. Crest-Liners, Inc.*, the contractor employed a roofer to perform roofing and to waterproof a water tank located on the roof. The liner leaked and damaged parts of the building. Repairs included painting and drywall patching.⁴⁶⁵

The contract between the roofer and the waterproofer required the waterproofer to name the roofer as an additional insured on its liability policy. J&H Marsh & McLennan of Utah, Inc. issued a certificate of insurance showing the roofer as an additional insured under a CGL policy with National Union Fire Insurance Co. The agent, however, failed to properly process the paperwork, and the roofer was not actually named as an additional insured. When the roofer filed a notice of claim, the insurer denied coverage.

The contractor and the roofer settled. The roofer then sued the insurance broker for negligence in failing to make the roofer an additional insured. The broker defended claiming that the policy would not have covered the loss anyway because the claim was for economic loss and not property damage. The trial court entered summary judgment in favor of the broker on the ground that the contractor's claim against the roofer was for breach of contract and such economic damages are not covered by the policy. The California Appellate Court reversed. According to the court, it was clear that the policy covered damages "because of" property damage, and here the contractor sought to recover damages "because of" property damage. Whether the legal theory was founded in tort or in contract was immaterial.

Arguments that a plaintiff should be allowed to maintain a tort claim in spite of *Dufficy* since dismissal of the tort claim would negate the contractor's CGL insurance are misguided and should be rejected. Whether the claim is brought in contract or tort does not affect coverage.

§ 8.4.10—Contributory/Comparative Negligence

One of the most frequently asserted defenses for the A/E is the contributory or comparative negligence of the plaintiff. When the plaintiff's actions fall below the conduct reasonably expected under contributory negligence theories, recovery is barred or diminished. Under the comparative negligence theories in most jurisdictions, including Colorado, recovery is reduced in proportion to negligence unless the plaintiff's negligence equals or exceeds the defendant's, in which case recovery is barred. Some states, however, follow "pure" comparative negligence rules, where the plaintiff's recovery is reduced in direct proportion to his or her negligence, regardless of the extent of plaintiff's negligence.

Where an architect was sued for negligence in the preparation of a cost estimate, the owner's own negligence was successfully asserted as a complete defense.⁴⁶⁶ An owner/plaintiff's claim was barred against the soils engineer who had prepared a report, major portions of which the owner failed to read and follow.⁴⁶⁷

In *Loup-Miller v. Brauer & Associates*,⁴⁶⁸ the court held in a case tried under the Colorado Comparative Negligence Statute, C.R.S. § 13-21-111, that it was improper to instruct the jury on assumption of risk. Rather, the court felt that assumption of risk should be treated under comparative negligence in the same manner as other negligent conduct by the plaintiff. However, in the 1986 tort reform, the legislature enacted C.R.S. § 13-21-111.7, which requires the court to instruct the jury on the elements of the assumption of risk if that defense is asserted. The statute does codify that part of the holding in *Loup-Miller* providing that assumption of risk is to be considered by the trier of fact in apportioning negligence under C.R.S. § 13-21-111. This statute subsequently survived a constitutional challenge in *Harris v. The Ark*.⁴⁶⁹

In *Mid-Western Electric, Inc. v. DeWild Grant Reckert & Associates, Co.*,⁴⁷⁰ the defendant engineer approved catalog cuts for UV detectors, even though the detectors did not meet the specifications. The subcontractor was damaged when the owner rejected the detectors. A judgment in favor of the subcontractor was reversed. There was evidence that the subcontractor relied on the assurances of a new supplier whose bid was half of the other bidders and had failed to review plans and specifications for discrepancies. Thus, the trial court erred in refusing to instruct as to contributory negligence.

§ 8.4.11—State Of The Art

A/Es are liable only for a failure to comply with the standard of care in existence at the time they render their services. In *Vizzini v. State of New York*,⁴⁷¹ the plaintiff parked on the east side of the highway in order to cross over to the west side to buy a cup of coffee. She slipped when she attempted to cross an asphalt culvert that sloped an initial 36.5 percent and increased to 46.7 percent. The plaintiff's expert relied on the 1997 Department of Transportation Manual to testify that the culvert was defectively designed since the manual allowed no slope in excess of 6

percent. However, the evidence established that at the time of design, the then current manual allowed slopes from 25 percent to 67 percent. Since the slope complied with the design criteria applicable at the time of design, dismissal of the plaintiff's claims was affirmed. The change in design standards did not render the culvert defective.

§ 8.4.12—Certificate Of Review

C.R.S. § 13-20-602 requires that in every action for damages based upon the alleged negligence of a licensed professional or a company or a firm employing a licensed professional, the plaintiff's attorney file with the court a certificate of review. The certificate must indicate that the attorney has consulted a person with expertise in the area of the alleged negligent conduct and that the expert has concluded the claim does not lack substantial justification.

The statute applies to every claim that requires proof of professional negligence as a predicate to recovering, whatever the formal designation of the claim might be. The purpose of this statute is to expedite the litigation process in cases filed against licensed professionals and to prevent the filing of frivolous actions.⁴⁷² The certificate of review must be filed within 60 days after service of the complaint, and failure to comply with this mandate may result in the dismissal of the complaint. In *Shelton v. Penrose/St. Francis Healthcare System*,⁴⁷³ the supreme court outlined the certificate of review procedure:

Subsection 602(1) requires a plaintiff to file a certificate of review within sixty days of the service of the complaint for any claim based on allegations of professional negligence that require expert testimony to establish a prima face case. *See Martinez*, 842 P.2d at 250. If a plaintiff determines that expert testimony is not required, no certificate need be filed. *See id.* at 251. If a plaintiff determines that expert testimony is required but that timely filing is not possible, the plaintiff must request an order extending the filing period for good cause. *See id.* In the event that neither a certificate nor a motion to extend the filing period is filed within the sixty day period, a defendant has two options; move, pursuant to subsection 602(4), to dismiss the case; or move, pursuant to subsection 602(2), to require the plaintiff to file a certificate. In either context, the plaintiff may demonstrate that no expert testimony is required. *See Martinez*, 842 P.2d at 251.

In *Shelton*, the court also specifically stated that it was improper for the trial court to accept expert reports in place of the certificate, even though the expert reports provided all of the necessary information that a Certificate would have provided.

Once the A/E files a motion to dismiss, one question that frequently arises is whether the dismissal must be with or without prejudice. The Tenth Circuit has held in two separate unpublished cases that a dismissal with prejudice is appropriate when a plaintiff fails to timely meet the requirements of C.R.S. § 13-20-602 and no good cause is shown for the failure.⁴⁷⁴ In *Chubb Group of Insurance Companies. v. Snowmass Wildcat Fire Protection District*,⁴⁷⁵ the appellants alleged professional negligence against Cottle, Graybeal, Yaw Architects, Ltd. (Cottle). Cottle moved to dismiss based upon the appellants' failure to timely file a certificate of review. The

Tenth Circuit affirmed the district court's order granting Cottle's motion to dismiss with prejudice. The Tenth Circuit stated that the appellants did not file a certificate of review or a motion for an extension of time within 60 days after service of their third amended complaint, as required by C.R.S. § 13-20-602. Therefore, the court held that the district court did not err in granting Cottle's motion to dismiss (with prejudice).

In *Miller v. Rowtech, LLC* the defendant, a licensed professional, failed to complain of the plaintiff's failure to file a certificate of review until after trial was completed and judgment had entered when the issue was first raised in a post-trial motion.⁴⁷⁶ The court of appeals first noted that the statute contained "no specific language suggesting that the requirement is jurisdictional."⁴⁷⁷ The court recognized that in *State of Colorado v. Nieto*,⁴⁷⁸ the court had stated that the filing of a certificate created a procedural prerequisite. However, a procedural prerequisite is not the substantive equivalent of "jurisdictional." If a requirement is jurisdictional, compliance is required irrespective of a defendant's demand for compliance and any judgment entered without compliance is void.

§ 8.4.13—Disclaimers

In *White v. Edsall Construction Co., Inc.*, Edsall contracted to construct a helicopter hanger for the Montana National Guard. The tilt-up doors for the hangers included a complex specification and drawings with a series of motors, cables, pulleys and counterweights that attached to the door at three "pick points." The weight was to be distributed between the three pick points and carried by overhead trusses. The design drawings included the following note:

CANOPY DOOR DETAILS, ARRANGEMENTS, LOADS, ATTACHMENTS, SUPPORTS, BRACKETS, HARDWARE ETC. MUST BE VERIFIED BY THE CONTRACTOR PRIOR TO BIDDING. ANY CONDITIONS THAT WILL REQUIRE CHANGES FROM THE PLANS MUST BE COMMUNICATED TO THE ARCHITECT FOR HIS APPROVAL PRIOR TO BIDDING AND ALL COST OF THOSE CHANGES MUST BE INCLUDED IN THE BID PRICE.

Other notes on the drawings required the contractor to verify the door weight and distribution of the weight to each pick point.⁴⁷⁹

In order to make the design function, Edsall found that it needed to add a fourth pick point. The cost to do so and to appropriately modify the trusses prompted a claim for \$70,000. The Armed Services Board of Contract Appeals (ASBCA) found that the disclaimer was inadequate to shift the risk for the canopy door design to Edsall and awarded the additional costs. The Army appealed.

The U.S. Court of Appeals for the Federal Circuit affirmed ASBCA's ruling in favor of Edsall.⁴⁸⁰ The court, in part, relied upon the case of *U.S. v Spearin*.⁴⁸¹ Under *Spearin*, where the government provides design specifications, the contract includes an implied warranty that the specifications are free from design defects. This implied warranty attaches only to design specifications, not performance-based specifications. In order for a disclaimer to overcome the implied warranty that accompanies design specifications, the disclaimer must be express and specific.

In *Edsall*, the court found the designer's drawings and specifications for the three-pick-point canopy door system incorporated substantial design elements and could not be considered a performance specifications. Thus, the Army's design specifications carried the *Spearin* implied warranty. Further, the disclaimer on the A/E's drawing was not sufficient to shift the risk for the door design to Edsall. While the disclaimer required the contractor to verify details, supports, attachments, and loads, the court held it did not clearly alert the contractor to substantive design flaws that required correction and approval before bidding. The disclaimer was general in nature, requiring the contractor to check door *details*, not door *design*.

§ 8.4.14—Immunity

C.R.S. § 13-21-108.3 provides that architects and professional engineers who render or provide assistance during an emergency or disaster are entitled to qualified immunity from civil liability arising out of their assistance. The assistance must occur during a disaster and must relate to or concern a building, structure, architectural, or engineering system. However, as used in this section, an "emergency" means a disaster emergency declared by executive order or proclamation of the governor. Thus, the immunity would not attach in the absence of such a proclamation. The "qualified" aspect of the immunity arises from the proviso that no protection exists for gross negligence or willful misconduct.

§ 8.5 • PROFESSIONAL LIABILITY INSURANCE

Whether representing or defending a design professional, owner, or other participant in the design and construction process, a basic understanding of the insurance available to an A/E is required. The insurance available drives many of the contractual provisions the A/E may insist upon and, later, when problems arise, the claims and defenses that can or should be asserted. An attorney asserting a claim against an A/E must be familiar with the design professional's insurance in order to craft pleadings which have the greatest likelihood of invoking coverage.

Professional liability insurance, sometimes referred to as errors and omissions (E & O) insurance, protects the A/E from damages caused to others by the A/E's negligent acts, errors, or omissions in the performance of professional services.

There are relatively few carriers providing A/E professional liability insurance. Currently, DPIC Companies is the leading A/E insurer in Colorado, followed by CNA. While different companies have different policy forms, all policies currently available to A/Es share certain features that it is important to understand.

All design professional E & O insurance currently available is written on either a *claims made* or a *claims made and reported* basis. Under both of these policy forms, the insurance in force on the date a claim is first made is the only insurance that will respond, even though the project was completed several years previously. Both claims made and claims made and reported policies cover claims made during the policy period, provided that the negligent act, error, or

omission which gives rise to the claim occurred after the *retroactive date* (commonly called the “retro” date). The retroactive date is normally the date on which the A/E first purchased and has since maintained continuous, uninterrupted coverage. It is possible for the retro date to be some different date, such as the inception date of the firm. A claim arising from services performed prior to the retro date will not be covered in the absence of a prior acts endorsement.

The crucial factor is that for coverage to exist, the policy must be in force at the time the claim is made. In order to have coverage today for a project completed five years ago, the policy must have been continuously in effect. The A/E that is insured continuously for 20 years but drops coverage even one week before a claim is made has no insurance for that claim unless an extended discovery reporting period has been purchased.⁴⁸²

Three critical provisions control the amount of coverage potentially available. The first is the *annual aggregate limit*. The second is the per occurrence or per claim limit, which is normally the same as the annual aggregate. The third is the *expense within limits* feature.

Irrespective of the number of claims asserted in any single policy period, the total obligation of the insurance company can never exceed the aggregate limit; nor can the payment for any single claim exceed the per occurrence limit. Certain insurance companies, including DPIC, offer *split limits* policies. Under a split limits policy, the company offers a maximum limit per claim and a higher annual aggregate limit. Thus, an A/E who carries split limits of \$1 million per occurrence/\$2 million annual aggregate is protected up to \$1 million maximum on any single claim but, for two or any greater number of claims in the same policy period, is protected to a maximum of \$2 million.

Consideration of available limits is, however, incomplete without recognizing the *expense within limits* feature. This provision, which is standard with all E & O carriers in Colorado, provides that the policy limit, that is the amount available to pay claims, is reduced by claims expenses including filing fees, attorney fees, expert witness costs, and all other expenses of defense. The expense within limits feature has resulted in these policies being referred to as Pac-Man, self-consuming policies or eroding policies.

The A/E's chosen *deductible* will also have an impact on the available funds to pay a claim. Deductibles of \$5,000 and \$10,000 are relatively common with deductibles of \$25,000 not uncommon. Larger A/E firms may have deductibles of \$250,000 or more. Claims expenses and/or loss payments must consume the deductible before the expense within limits provision begins reducing the policy limit. Thus, a policy with a \$10,000 deductible and a \$500,000 aggregate will pay \$450,000 if defense costs prior to settlement or judgment total \$60,000. Ordinarily, the deductible (which applies to both costs and liability payments) must be fully paid before the insurance company begins making payments. If, however, the A/E is unable to meet its deductible obligation, the insurance company is nonetheless obligated to pay the complete loss (up to the policy limit) and then look to its insured to recover the deductible.

Occasionally, an A/E will have a self-insured retention (SIR) rather than a deductible. The distinction between an SIR and a deductible can be significant. Under an SIR, the A/E “retains” a pre-set amount of each loss with “excess” insurance coverage above the SIR. In contrast to its responsibilities under a policy having a deductible, the insurance company may have no obligation if the SIR is not met.

The insurance discussed thus far is customarily described as the A/E’s *practice policy*. As valuable as is the protection offered, an owner may be concerned that an A/E that is appropriately insured at the time of the design may for some reason fail to renew the insurance and thus be uninsured a year or two later when a problem surfaces. Where the A/E has failed to renew coverage due to financial difficulties, a contract provision requiring the A/E to maintain insurance for a specific number of years is of little value. If the A/E had the assets to satisfy a judgment, it would not have allowed the insurance to lapse. Another legitimate concern of the owner is that other claims may have eroded or totally consumed the aggregate limit before the owner’s claim is filed, or even after filing but before settlement or satisfaction of a judgment. These and other owner concerns may be satisfied through purchase by the owner of a *project policy* or project-specific insurance.

Particularly on larger projects, project policies offer several advantages. The owner selects (and normally pays for) multi-year coverage from design through a specified period following completion (commonly three to five years). This specified period following completion is generally known as the *discovery period*. Provided that the premium is paid, the coverage is guaranteed for the discovery period and is non-cancelable. The project owner need not be concerned that the A/E will fail to renew its practice policy each year. Nor need the owner worry that prior claims by others will have eroded the available policy limits.

Another advantageous feature of a project policy is that normally the entire design team (architect, engineers, and sub-consultants) are all covered by the project policy. Thus, the owner is not faced with assembling an overall package of protection from the several practice policies of the architect, engineers, and consultants, all with varying deductibles, limits, and policy provisions.

Those with significant experience in construction litigation will also recognize an additional more subtle benefit associated with a project policy. Much of the conflict which protracts design and construction claims is related to counterclaims and blame-shifting within the project team. When the entire design team is covered by a project policy, such disputes are eliminated. If the loss resulted from negligent design, act, error, or omission, it matters not whether the architect or one of the engineers is liable, nor does the percentage of fault to be allocated among them matter; the project policy must respond.

The need to understand available insurance provisions and the manner in which E & O insurance is drafted and administered is critical to both contract drafting and litigation for all attorneys, whether representing owners or design professionals. As project delivery alternatives continue to expand (design-build, multiple primes, CM constructor, CM advisor, bridging, etc.),

the need to acquire a solid understanding of managing project risk including available insurance coverage will only increase.

As noted above in § 8.2.2, it is increasingly common for owners to seek to modify the A/E's standard of care by contract. One large governmental owner in Colorado has released a "standard" contract requiring the architect to perform at the "highest standard of care" of the profession. Such elevated expectations may not be covered by the A/E's insurance. Most, if not all, professional liability policies exclude the assumption of liability not otherwise imposed by the law. Since the law measures an A/E's liability by the standard of care, a commitment to perform at a standard above the standard of care may not be insured. An additional problem is presented as to the manner and extent of proof required to establish this undefined standard set forth in the contract. Thus, owners expecting a benefit derived from contractually escalating the standard of care may find only disappointment if they have thereby jeopardized the A/E's insurance.

§ 8.6 • CONCLUSION

The pressures generated by more costly and complex design and construction methods places ever-increasing pressure on design and construction professionals to deliver "perfect" projects on time and within budget. Tight budgets and the drive to protect the "bottom line" have driven from construction budgets the cushion that in times gone by might have absorbed increased construction costs or the cost of repairs and modifications. The predictable and seemingly unavoidable result of these pressures is in an alarming increase in claims against project designers.

Attorneys representing these design professional must acquaint themselves not only with general principles of contract and negligence actions but with the subtleties of these and other legal theories as applied to the design professional. Additionally, they must acquaint themselves sufficiently with the technical aspects of design and construction to communicate effectively with their clients. Whether the client is an owner, design professional, or injured third party, the client can reasonably expect his or her selected attorney to have a basic understanding of the technical issues as well as an intensive, specialized knowledge of the law.

One cannot overlook the fact that the standard of care for an attorney is essentially the same as that applied to A/Es. The attorney must possess and apply that degree of knowledge, skill, judgment and training customarily possessed and applied by other competent practitioners in the field under the same or similar circumstances. In today's environment of specialization, that standard can be high indeed. It has been the objective of this chapter to serve as a resource along the path of enabling an attorney to acquire at least certain aspects of the required degree of knowledge, skill, and judgment.

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NOTES

1. *Pollock's Law of Torts* 336 (15th ed. 1951).
2. *LeLievre and Dennes v. Gould*, 1 Queen's Bench 491, 497 (1893).
3. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72-75 (Colo. 2004).
4. *Cooper v. Jevne*, 128 Cal. Rptr. 724 (Cal. App. 1976).
5. *Perlmutter v. Flickinger*, 520 P.2d 596 (Colo. App. 1974).
6. *Doyle v. Linn*, 547 P.2d 257 (Colo. App. 1975).
7. *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So.2d 976 (Fla. App. 1979).
8. *Noble v. Worthy*, 378 A.2d 674 (D.C. App. 1977); *c.f.*, *Yarbro v. Hilton Hotels*, 655 P.2d 822 (Colo. 1982) (hotel guest fell from window of a hotel).
9. *Pastorelli v. Associated Eng'rs, Inc.*, 176 F. Supp. 159 (D.R.I. 1959).
10. *Fireman's Fund Am. Ins. Co. v. Phillips Carter Resiter & Assoc.*, 546 P.2d 72 (N.M. 1976).
11. *Johnson v. Board of County Comm'rs*, 897 P.2d 169 (Kan. App. 1995).
12. *Hobbs v. Florida First Nat'l Bank*, 406 So.2d 63 (Fla. App. 1981).
13. *Bruemmer v. Clark Equip. Co.*, 341 F.2d 23 (7th Cir. 1965); *but see Wheeler & Lewis v. Slifer*, 577 P.2d 1092 (Colo. 1978) ("Where architects, as a matter of law, had no duty to supervise construction precautions taken for the safety of the workmen, architects were not liable to employee of subcontractor.").
14. *Crain & Crouse, Inc. v. Palm Bay Towers Corp.*, 326 So.2d 182 (Fla. 1976).
15. *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So.2d 613 (Miss. 1969) (A/E owed no duty to subcontractor).
16. *See J & J Elec., Inc. v. Gilbert H. Moen Co.*, 516 P.2d 217, 227 (Wash. App. 1973) (acknowledging some jurisdictions have held that an architect or engineer may be held liable to third parties for failure to perform duties undertaken by contract).
17. *R.H. Macy & Co. v. Williams Tile & Terazzo Co., Inc.*, 585 F. Supp. 175 (N.D. Ga. 1984) (no duty owed to tile installer or tile supplier because of lack of privity).
18. *Lyon v. Belosky Constr. Inc.*, 669 N.Y.S.2d 400 (A.D. 1998).
19. *Jaime Schapiro AIA & Assoc. Architects and Planners v. Rubinson*, 784 So.2d 1135 (Fla. App. 2000).
20. *Greenhouse v. C.F. Kenner Assoc. Ltd.*, 723 So.2d 1004 (La. App. 1998).
21. *Murphy v. Conner*, 199 A.2d 929 (N.Y. App. Div. 1993).
22. *Foster v. Chung*, 743 So.2d 144 (Fla. App. 1999).
23. *Tahoe-Vinings v. Vinings Partners*, 424 S.E.2d 30, 31 (Ga. App. 1992).
24. *Krusi v. S.J. Amoroso Constr. Co., Inc.*, 997 Cal. Rptr.2d 294 (Cal. App. 2000).
25. *Piantidosi v. Dragone*, 2000 Conn. Super. LEXIS 1622 (Conn. Super. Ct. 2000) (not selected for official publication).
26. *Bruzga v. PMR Architects, P.C.*, 693 A.2d 401 (N.H. 1997).
27. *Vikell Investors Pac., Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589, 594 (Colo. App. 1997).
28. *Johnson v. Board of County Comm'rs*, 897 P.2d 169 (Kan. App. 1995).
29. *Cullum Mech. Constr. v. South Carolina Baptist Hosp.*, 520 S.E. 809 (S.C. App. 1999).
30. *Boren v. Thompson & Associates*, 999 P.2d 438 (Okla. 2000).
31. *Nota Constr. Corp. v. Keyes Associates, Inc.*, 694 N.E.2d 401 (Mass. App. 1998).
32. *Id.* at 405-06.
33. *Bilotta Constr. Corp. v. Village of Mamaroneck*, 604 N.Y.S.2d 966 (A.D. 1993).
34. *Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832 (Mo. App. 1993).
35. *Jim's Excavating Serv., Inc. v. HKM Assoc.*, 870 P.2d 248 (Mont. 1994).
36. *17 Vista Fee Associates v. Teachers Ins. and Annuity Assoc. of Am.*, 693 N.Y.S.2d 554 (A.D. 1999).
37. *Lyons v. CNA Ins. Cos.*, 558 N.W.2d 658 (Wisc. App. 1996).

38. *Reliance Ins. Co. v. Morris Assocs., P.C.*, 607 N.Y.S.2d 106 (A.D. 1994).
39. CJI-Civ. 9:6 (CLE ed. 2005).
40. CJI-Civ. 15:23 (CLE ed. 2005); *Rian v. Imperial Mun. Servs. Group*, 768 P.2d 1260 (Colo. App. 1988).
41. 25 A.L.R. 2d 1085, 1088; 5 Am. Jur. 2d *Architects*, § 10; 6 C.J.S., *Architects*, § 27.
42. *Covil v. Robert & Co.*, 144 S.E.2d 450, 453 (Ga. 1965).
43. *Paxton v. Alameda County*, 259 P.2d 934, 938 (Cal. App. 1953).
44. *Pittman Constr. Co. v. City of New Orleans*, 178 So.2d 312, 321 (La. App. 1965).
45. *United Blood Servs. v. Quintana*, 827 P.2d 509, 520 (Colo. 1992).
46. *Corcoran v. Sanner*, 854 P.2d 1376, 1379 (Colo. App. 1993).
47. CJI-Civ. 15:23 (CLE ed. 2005).
48. *530 East 89 Corp. v. Unger*, 373 N.E.2d 276 (N.Y. 1977)
49. *Major v. Leary*, 241 App. Div. 606, 268 N.Y.S. 413 (2d Dept. 1934).
50. *Id.* at 606.
51. *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968).
52. *Id.* at 476.
53. CJI-Civ. 15:24 (CLE ed. 2005).
54. *Tamarac Dev. Co. v. Delamater, Freund & Assocs.*, 675 P.2d 361, 365 (Kan. 1984).
55. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608 (Tex. 1996).
56. *Paxton*, 259 P.2d at 938.
57. *Nauman v. Harold K. Beecher & Assocs.*, 467 P.2d 610, 615 (Utah 1966).
58. *Clayton v. Hepp*, 504 P.2d 1117, 1118 (Colo. App. 1972).
59. *Chastain v. Atlanta Gas Light Co.*, 176 S.E.2d 487 (Ga. 1970); *Reber v. Chandler High Sch. Dist. No. 202*, 474 P.2d 852 (Ariz. App. 1970); *Smith v. Goff*, 325 P.2d 1061, 1064 (Okla. 1958); *Kortz v. Kimberlin*, 165 S.W. 654 (Ky. 1914); *South Burlington Sch. Dist. v. Calcagni-Frazier-Zajchowski Architects*, 410 A.2d 1359, 1362-63 (Vt. 1980).
60. *Jaeger v. Henningson, Durham & Richardson, Inc.*, 714 F.2d 773, 776 (8th Cir. 1983).
61. *Kostohryz v. McGuire*, 212 N.W.2d 850, 854 (Minn. 1973); compare with *Kellogg v. Pizza Oven, Inc.*, 402 P.2d 633 (Colo. 1965).
62. See *National Cash Register, Co. v. Haak*, 335 A.2d 407, 410-12 (Pa. 1975) (an engineer with the necessary special experience may testify as an expert regarding the architect's performance). See also *IMR Corp. v. Craig A. Hemphill d/b/a Hemphill Builders & Millwork Co.*, 926 S.W.2d 542, 544 (Mo. App. 1996) (an engineer is not qualified to express opinion on standard of care for a general contractor).
63. *Perlmutter v. Flickinger*, 520 P.2d 596 (Colo. App. 1974).
64. *Yantzi v. Norton*, 927 S.W.2d 427, 432 (Mo. App. 1996).
65. *Town of Breckenridge v. Golforce, Inc.*, 851 P.2d 214, 216 (Colo. App. 1994).
66. *Kemper Architects v. McFall, Konkel, Kimball Consulting Eng'rs*, 843 P.2d 1178, 1182, 1186-87 (Wyo. 1992).
67. *Id.* at 1189-90 (quoting *Stauffer Chem. Co. v. Curry*, 778 P.2d 1083, 1099 (Wyo. 1989)).
68. *Walker v. Bluffs Apartments*, 477 S.E.2d 472 (S.C. App. 1996).
69. *Edgewater Apartments v. Flynn*, 627 N.Y.S.2d 385 (A.D. 1995).
70. *Yantzi v. Norton*, 927 S.W.2d 427 (Mo. App. 1996).
71. *Garaman, Inc. v. Williams*, 912 P.2d 1121 (Wyo. 1996).
72. *Corcoran v. Sanner*, 854 P.2d 1376 (Colo. App. 1993).
73. *City of York v. Turner-Murphy Co.*, 452 S.E.2d 615 (S.C. App. 1994).
74. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).
75. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
76. *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999).
77. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004).
78. E.g., *Brushston-Moira Central Sch. Dist. v. Alliance Wall Corp.*, 195 A.D.2d 801, 600 N.Y.S.2d 511 (N.Y. 1993).

79. *Id.* at 801.
80. *BRW, Inc.*, 99 P.3d at 72-75. See also discussion *infra* at § 8.4.9.
81. *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244, 252-53 (W.D. Pa. 1991); *Corcoran*, 854 P.2d at 1379; cf. *Darrell Thacker v. Menards Inc.*, 105 F.3d 382 (7th Cir. 1997).
82. *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229 (4th Cir. 1995).
83. *E.g., Gagne v. Bertran*, 275 P.2d 15, 19-20 (Cal. 1954).
84. As with agreeing to an elevated standard of care, providing an express warranty may also generate liability not covered by the A/E's insurance.
85. While there may never have been such a contract, it is interesting to speculate as to the court's reaction to a contract that attempts to allow the A/E to perform *below* the standard of care.
86. *Arkansas Rice Grower's Coop. Assoc. v. Alchemy Indus., Inc.*, 797 F.2d 565 (8th Cir. 1986).
87. *Peter Kiewit Sons' Co. v. Iowa S. Utilities Co.*, 355 F. Supp. 376 (S.D. Iowa 1973).
88. *Chesapeake Paper Products Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229 (4th Cir. 1995).
89. *In re John Grace and Co., Inc.*, 1998 Bankr. LEXIS 1460 (Bankr. E.D.N.Y. 1998) (electronic publication only).
90. *Temple Sinai-Suburban Reform Temple v. Richmond*, 308 A.2d 508 (R.I. 1973).
91. *Id.* at 509.
92. *Id.* at 510.
93. *Freese v. Lemmon*, 210 N.W.2d 576 (Iowa 1973).
94. *KEC Corp. v. New York State Envtl. Facilities Corp.*, 76 Misc.2d 170 (N.Y. 1973).
95. *Williams v. Polgar*, 204 N.W.2d 57 (Mich. 1972).
96. *McDonough v. Whalen*, 304 N.E.2d 199, *rev'd on other grounds*, 313 N.E.2d 435 (Mass. 1974).
97. *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764 (Wis. 1974).
98. *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973).
99. *Id.* 402.
100. *Id.* at 403 (dissent).
101. *Id.* at 404 (dissent).
102. *Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301 (Colo. App. 1988).
103. *Harbor Mech., Inc. v. Arizona Elec. Power Coop.*, 496 F. Supp. 681, 684 (D. Ariz. 1980).
104. *San Francisco Real Estate Investors v. J.A. Jones Const. Co.*, 524 F. Supp. 768 (D.C. Ohio 1981).
105. *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. Civ. App. 1982).
106. *Local Joint Executive Bd., Culinary Workers Union, Local No. 226 v. Stern*, 651 P.2d 637 (Nev. 1982).
107. *Howe v. Bishop*, 446 So.2d 11 (Ala. 1984) (owed no duty since it was not foreseeable to the A/E that anyone other than the building owner would own the apartments).
108. *John Day Co. v. Alvine & Assoc.*, 510 N.W.2d 462 (Neb. App. 1993).
109. *Widett v. United States Fidelity and Guar. Co.*, 815 F.2d 885 (2d Cir. 1987).
110. See generally *Hogan v. Postin*, 695 P.2d 1042 (Wyo. 1985).
111. *Tomb & Assocs., Inc. v. Wagner*, 612 N.E.2d 468 (Ohio App. 1992).
112. *Jardel Enters.*, 770 P.2d at 1303; see also *Thompson v. Espey Huston Assocs., Inc.*, 899 S.W.2d 415, 420-21 (Tex. App. 1995).
113. *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 348 (Ill. 1990).
114. *American Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1190 (Utah 1996).
115. *Boston Inv. Property #1 State v. E. W. Burman, Inc.*, 658 A.2d 515, 517 (R.I. 1995). See discussion at § 8.4.7 regarding limitation of liability.
116. *Jardel Enters.*, 770 P.2d at 1304.
117. *Id.*

118. *Id.*
119. *Lee County v. Southern Water Contractors, Inc.*, 298 So.2d 518 (Fla. App. 1974).
120. *Id.* at 520.
121. *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689 (Fla. App. 1979).
122. *Hotel Utica, Inc. v. Armstrong*, 404 N.Y.S.2d 455 (N.Y. App. Div. 1978).
123. *Peter Kiewit Sons' Co. v. Iowa S. Utils. Co.*, 355 F. Supp. 376 (S.D. Iowa 1973).
124. *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267 (Colo. 2000).
125. *Id.*
126. *Gateway W. Ry. v. Morrison Metalweld Process Corp.*, 46 F.3d 860 (8th Cir. 1995).
127. *Pike v. Howell Building Supply Co., Inc.*, 748 So.2d 710 (Miss. 1999).
128. *Paxton v. Alameda County*, 259 P.2d 934 (Cal. App. 1953).
129. *Hamilton v. Gravinsky*, 474 P.2d 185 (Colo. App. 1970), *modified and aff'd*, 483 P.2d 385 (Colo. 1971).
130. *Id.*
131. *Huang v. Garner*, 203 Cal. Rptr. 800, 804-05 (Cal. App. 1984).
132. *Straus v. Buchman*, 89 N.Y.S. 226 (1904); *St. Joseph Hosp. v. Corbetta Constr. Co.*, 316 N.E.2d 51 (Ill. 1974); *Fidelity & Cas. Co. of New York v. J.A. Jones Constr. Co.*, 325 F.2d 605 (8th Cir. 1963).
133. *Holmes v. Wink*, 811 So.2d 330 (Miss. App. 2001).
134. *Thomson v. Espey, Hurton & Assocs.*, 899 S.W.2d 415 (Tex. App. 1995).
135. *City of New York v. Black & Veatch*, 1997 U.S. Dist. LEXIS 15510 (S.D.N.Y. 1997) (not selected for official publication).
136. *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 164 A.2d 201 (Pa. 1960).
137. *Bayshore Dev. Co. v. Bonfoey*, 78 So. 507, 509 (Fla. 1918).
138. *Surf Realty Corp. v. Standing*, 78 S.E.2d 901, 907-908 (Va. 1953).
139. *Miller v. DeWitt*, 208 N.E.2d 249 (Ill. App. 1965), *modified* 226 N.E.2d 630 (Ill. 1967).
140. *Kortz v. Kimberlin*, 165 S.W. 654 (Ky. 1914).
141. See Appendix A, AIA Doc. B-141 Comparison of 1987 and 1997 Editions, ¶ 2.6.2.1 (1997).
142. *Id.*
143. *Wheeler & Lewis*, 577 P.2d 1092 (Colo. 1978).
144. *Palmer v. Brown*, 273 P.2d 306, 316 (Cal. App. 1954).
145. *Kortz v. Kimberlin*, 165 S.W. 654 (Ky. 1914).
146. *Palmer*, 273 P.2d at 317.
147. *First Nat'l Bank of Akron v. Cann*, 503 F. Supp. 419, 436 (N.D. Ohio 1980).
148. *Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd.*, 506 N.W.2d 706 (Neb. 1993).
149. *Skidmore, Owings, and Merrill v. Connecticut Gen. Life Ins. Co.*, 197 A.2d 83 (Conn. 1963).
150. *Hubert v. Aitken*, 19 N.Y.S.R. 914, 2 N.Y.S. 711 (1888).
151. *Nauman v. Harold K. Beecher & Assocs.*, 467 P.2d 610 (Utah 1970).
152. *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., Inc.*, 168 So.2d 333 (Fla. App. 1964).
153. See *Kellogg v. Pizza Oven, Inc.*, 402 P.2d 633 (Colo. 1965).
154. C.R.S. § 13-21-111.5.
155. *Putman v. The Village of Bensenville*, 786 N.E.2d 203 (Ill. App. 2003).
156. The terms “construction cost estimate” and “statement of probable construction cost” are used interchangeably throughout this section.
157. When a public works project is involved, the maximum cost is generally established by law. Therefore, in this context the architect is not faced with the “dilemma” architects are confronted with when doing private sector work. However, the architect may nevertheless be liable should the actual cost exceed the maximum cost dictated by law.
158. Due to the recognized difficulties when providing construction cost estimates, architects increasingly utilize the services of cost consultants to provide estimating services, particularly on projects of significant size, cost, or difficulty, in an attempt to avoid later cost-related problems.

159. *Fagerberg v. Webb*, 678 P.2d 544, 547 (Colo. App. 1983); *see also Restatement (Second) of Torts* § 281.
160. *Blankette v. Public Serv. Co. of Colo.*, 10 P.2d 327, 329 (Colo. 1932).
161. *Samuelson v. Chutich*, 529 P.2d 631, 633 (Colo. 1974) (*quoting Gagne v. Bertran*, 275 P.2d 15 (Cal. 1954)); *see also* CJI-Civ. 15:26 (CLE ed. 2005).
162. *Corcoran*, 854 P.2d at 1379 (*quoting United Blood Servs.*, 827 P.2d at 519); *see also Rian v. Imperial Mun. Servs. Group, Inc.*, 768 P.2d 1260 (Colo. App. 1988).
163. *See, e.g., Lee County*, 298 So.2d at 520.
164. *Coombs v. Beede*, 36 A. 104 (Me. 1896).
165. *Samuelson*, 529 P.2d at 633-34 (*quoting Gagne v. Bertran*, 275 P.2d 15 (Cal. 1954)); *see also Smith v. Goff*, 325 P.2d 1061 (Okla. 1958); *Coombs*, 36 A. at 104.
166. Annotation, "Effect on Compensation of Architect or Building Contractor of Express Provision in Private Building Contract Limiting the Cost of the Building," 20 A.L.R. 3d 778 (1968); *see also* Am. Jur. 2d *Architects* § 16 (1995).
167. *See, e.g., Zannoth v. Booth Radio Stations*, 52 N.W.2d 678 (Mich. 1952).
168. *Griswold & Rauma, Architects, Inc. v. Aesculapius Corp.*, 221 N.W.2d 556, 560-61 (Minn. 1974).
169. *Id.* at 560-61; *Caldwell v. United Presbyterian Church*, 180 N.E.2d 638 (Ohio 1961) (actual cost exceeded budget by more than 20 percent).
170. *See* 5 Am. Jur. 2d *Architects* § 16 n. 94 (1995) (listing cases in which this rule has been applied).
171. *See* Appendix A, AIA Doc. B-141 Comparison of 1987 and 1997 Editions, art 5.2 (1997).
172. *Jim Arnott, Inc. v. L & E, Inc.*, 539 P.2d 1333, 1339 (Colo. App. 1975) (not selected for official publication).
173. *Id.*
174. *See* notes 169 through 171 and accompanying text, above.
175. *Kellogg*, 402 P.2d at 633.
176. *Id.* at 634.
177. *Id.* at 636.
178. *Id.*
179. *Id.*
180. Acret, *Architects and Engineers*, § 5.15 at 162 (3d ed. 1993).
181. *Jaime Schapiro AIA & Associates Architects and Planners v. Rubinson*, 784 So.2d 1135 (Fla. App. 2000).
182. *Thacker v. Menard, Inc.*, 105 F.3d 382 (7th Cir. 1997).
183. *Evans v. Downer & Co.*, 102 L.J.K.B. 568 (1933).
184. *Osterling v. Frick*, 131 A. 250 (Pa. 1925).
185. *Edwards v. Hall*, 141 A. 638 (Pa. 1928).
186. *Roanoke Hosp. Assoc. v. Doyle & Russell, Inc.*, 214 S.E.2d 155, 161 n. 6 (Va. 1975).
187. *See BRW, Inc.*, 99 P.3d at 72-75.
188. *Montijo v. Swift*, 3 Cal. Rptr. 133 (Cal. App. 1953).
189. *See* Appendix A, AIA Doc. B-141 Comparison of 1987 and 1997 Editions, ¶¶ 2.6.5 and 2.6.6. (1987); *see also* AIA Doc. B-141 Comparison of 1987 and 1997 Editions, ¶ 2.6.2.1 (1997). Clauses such as the cited provisions, which define the scope of the architect's services, have been characterized as exculpatory in nature. *See* Murray, "The Validity of Exculpatory Clauses in Architectural Service Contracts," 25 *Colo. Law* 39 (March 1996). Such a characterization would seem questionable; the quoted language, instead, when read with the contract as a whole, merely states what services the architect will and will not provide.
190. *Krieger v. J.E. Greiner, Co., Inc.*, 382 A.2d 1069, 1074 (Md. 1978); *Wheeler & Lewis v. Slifer*, 577 P.2d 1092 (Colo. 1978); *Rian v. Imperial Mun. Svcs. Group, Inc.*, 768 P.2d 1260 (Colo. App. 1988). *E.g., Walters v. Kellam and Foley*, 360 N.E.2d 199 (Ind. App. 1977); *Reber v. Chandler High Sch.*

Dist. No. 202, 474 P.2d 852 (Ariz. App. 1970); *Walker v. Wittenberg, Delony & Davidson, Inc.*, 241 Ark. 525, *on reh'g* 412 S.W.2d 621, 626 (Ark. 1967); *Day v. National-U. S. Radiator Corp.*, 128 So.2d 660 (La. 1961); *Meek v. Spinney, Coady & Parker Architects, Inc.*, 365 N.E.2d 1378 (Ill. App. 1977); *Brown v. Gamble Constr. Co., Inc.*, 537 S.W.2d 685 (Mo. App. 1976); *Heslep v. Forrest & Cotton, Inc.*, 449 S.W.2d 181 (Ark. 1970); *Peterson v. Fower*, 493 P.2d 997 (Utah 1972). *Contra, e.g., Miller v. DeWitt*, 226 N.E.2d 630 (Ill. 1967), and other cases cited in *Krieger*, above.

191. *Wheeler & Lewis*, 577 P.2d at 1096; *Walters*, 360 N.E.2d at 199; *Seeney v. Dover Country Club Apartments, Inc.*, 318 A.2d 619, 624 (Del. Super. 1974); *Brown*, 537 S.W.2d at 685; *Wells v. Stanley J. Thill and Assoc., Inc.*, 452 P.2d 1015 (Mont. 1969); *Walker*, 412 S.W.2d at 621; *see Ramos v. Shumavon*, 21 A.D.2d 4, 247 N.Y.S.2d 699 (1964); *see also Seaman Unified Sch. Dist. No. 345 v. Casson Constr. Co.*, 594 P.2d 241, 246 (Kan. App. 1979) (relying on AIA conditions).

192. *Vonasek v. Hirsch and Stevens, Inc.*, 221 N.W.2d 815 (Wis. 1974); *Seeney*, 318 A.2d at 619.

193. *Meek*, 365 N.E.2d at 1378; *McGovern v. Standish*, 341 N.E.2d 739 (Ill. App. 1975); *Emberton v. State Farm Mut. Auto. Ins. Co.*, 358 N.E.2d 1254 (Ill. App. 1976).

194. *Seeney*, 318 A.2d at 624; *Parks v. Atkinson*, 505 P.2d 279 (Ariz. App. 1973); *see Sullins v. Third and Cataline Constr. Partnership*, 602 P.2d 495 (Ariz. App. 1979).

195. *Seeney*, 318 A.2d at 624.

196. *Waggoner v. W&W Steel Co.*, 657 P.2d 147 (Okla. 1982).

197. *Id.* at 151.

198. *Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205 (9th Cir. 1979).

199. *W. Duncan v. Pennington County Hous. Auth.*, 283 N.W.2d 546 (S.D. 1979).

200. *Hortman v. Becker Constr. Co. Inc.*, 284 N.W.2d 621 (Wis. 1979).

201. *Tiffany v. Christman*, 287 N.W.2d 199 (Mich. App. 1979).

202. *Balagna v. Shawnee County*, 668 P.2d 157 (Kan. 1983).

203. *Ivanov v. Process Design Assoc.*, 642 N.E.2d 711 (Ill. App. 1994).

204. *Peck v. Horrock's Eng'g*, 106 F.3d 949 (10th Cir. 1997).

205. *Yocum v. City of Minden*, 649 So.2d 129 (La. App. 1995).

206. *Carvalho v. Toll Bros. & Developers*, 675 A.2d 209 (N.J. 1996). [Note: Engineer was actually aware of the hazardous condition.]

207. *Jones v. James Reeves Contractors, Inc.*, 701 So.2d 774 (Miss. 1997).

208. *Block v. Lohan Assoc., Inc.*, 645 N.E.2d 207 (Ill. Ct. 1993).

209. *Ivanov v. Process Design Assoc.*, 642 N.E.2d 711 (Ill. App. 1994).

210. *Secretary of Labor v. CH2M Hill*, OSHRC, N. 89-1712 (April 21, 1997).

211. *CH2M Hill v. Herman*, 192 F.3d 711 (7th Cir. 1999).

212. *Id.*

213. *West v. Briggs & Stratton Corp.*, 536 S.W.2d 828 (Ga. App. 2000).

214. *Bauer v. Howard S. Wright Constr. Co.*, 2000 Wash. App. LEXIS 1227 (2000) (not selected for official publication).

215. *C.H. Leavell & Co. v. Glantz Contracting Corp.*, 322 F. Supp. 779 (E.D. La. 1971).

216. *Roth v. Great Atl. and Pac. Tea Co.*, 108 F. Supp. 390 (D. N.Y. 1952).

217. *Macomber v. State*, 58 Cal. Rptr. 393, 398 (Cal. App. 1967).

218. *C.H. Leavell & Co.*, 322 F. Supp. at 779.

219. *Gherardi v. Board of Ed. of City of Trenton*, 147 A.2d 535, 540-41 (N.J. 1958).

220. *Blecick v. School Dist. #18*, 406 P.2d 750 (Ariz. App. 1965).

221. *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958).

222. *Contra, e.g., Jardel Enters.*, 770 P.2d at 1301 (no recovery for pure economic loss under negligence, absent privity of contract).

223. *C.L. Maddox, Inc. v. Benham Group, Inc.*, 88 F.3d 592, 602 (8th Cir. 1996).

224. *See Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 477 n. 3 (work performed and general contractor paid per A/E, but misapplied payments).

225. See *Hall v. Union Indem. Co.*, 61 F.2d 85 (8th Cir. 1932); *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967) (surety released from bond).
226. *Peerless Ins. Co. v. Cerny*, 199 F. Supp. 951 (D. Minn. 1961); *State v. Malvaney*, 72 So.2d 424, 431 (Miss. 1954).
227. *Calandro Dev., Inc. v. R.M. Butler Contractors, Inc.*, 249 So.2d 254, 265 (La. App. 1971).
228. See, e.g., *National Union Indem. Co. v. G.E. Bass & Co.*, 369 F.2d 75 (5th Cir. 1966).
229. *Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d at 472.
230. *Hobbs v. Florida First Nat'l Bank*, 406 So.2d 63 (Fla. App. 1981).
231. E.g., *Laukkanen v. Jewell Tea Co.*, 222 N.E.2d 584, 588-89 (Ill. App. 1966); *Montijo*, 33 Cal. Rptr. 133 (Cal. App. 1953).
232. *Pastorelli v. Associated Eng'rs, Inc.*, 176 F. Supp. 159, 166-67 (D.R.I. 1959).
233. *Mai Kai, Inc. v. Colucci*, 186 So.2d 798 (Fla. App. 1966).
234. *Stephens v. Stearns*, 678 P.2d 41, 47-48 (Idaho 1984); *Noble v. Worthy*, 378 A.2d 674 (D.C. App. 1977).
235. *Hutchings v. Harry*, 242 So.2d 153 (Fla. App. 1970).
236. E.g., *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So.2d 976 (Fla. App. 1979); *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689 (Fla. App. 1979); *Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co.*, 268 S.E.2d 12 (N.C. App. 1980).
237. *Robert E. Owen & Assocs. v. Gyongyosi*, 433 So.2d 1023 (Fla. App. 1983).
238. *Rhodes-Haverty Partnership v. Robert and Co. Assocs.*, 293 S.E.2d 876 (Ga. App. 1982); *LeFevour v. Howorka*, 586 N.E.2d 656 (Ill. App. 1991).
239. *Howe v. Bishop*, 446 So.2d 11 (Ala. 1984).
240. *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., Inc.*, 168 So.2d 333 (Fla. Dist. Ct. App. 2d Dist. 1964).
241. *Id.* at 335 (emphasis added).
242. *Allied Properties v. John A. Blume & Assocs., Eng'rs*, 102 Cal. Rptr. 259 (Cal. App. 1972).
243. *Id.* at 264 (quoting *Gagne*, 275 P.2d at 21).
244. *Samuelson v. Chutich*, 529 P.2d 631 (Colo. 1974).
245. *Id.* at 633-634 (citations omitted).
246. *Johnson-Voiland-Archuleta, Inc. v. Roark Assoc.*, 572 P.2d 1220 (Colo. App. 1977).
247. *Id.*
248. *Coca-Cola Bottling Co. v. Weston & Sampson Engineers, Inc.*, 695 N.E.2d 688 (Mass. App. 1998).
249. *Id.* at 693.
250. *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 251 (W.D. Pa. 1991).
251. *Interstate Contracting Corp. v. City of Dallas, Texas*, 2000 U.S. Dist. LEXIS 13111 (N.D. Tex. 2000) (not selected for official publication).
252. E.g., *Greenman v. Yuba Power Prods, Inc.*, 27 Cal. Rptr. 697, 700 (Cal. 1963); *Webb v. Zern*, 220 A.2d 853 (Pa. 1966); *Patitucci v. Drelich*, 379 A.2d 297 (N.J. 1977); see generally 13 A.L.R. 3d 1057, 1071-72, § 4.
253. *Samuelson*, 529 P.2d at 631.
254. *Escolar v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).
255. *La Rossa v. Scientific Design Co.*, 402 F.2d 937 (3rd Cir. 1968).
256. *Id.* at 942-43.
257. *Gagne*, 275 P.2d at 15.
258. *Hyman v. Gordon*, 111 Cal. Rptr. 262 (Cal. App. 1973).
259. See *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Cal. App. 1969) (design and mass production of homes); *Patitucci v. Drelich*, 379 A.2d 297 (N.J. 1977) (residential developer/builder/vendor strictly liable for defective sewage system); *Avner v. Longridge Estates*, 77 Cal. Rptr. 633 (Cal. App. 1969) (defective design of a water system); and *Stuart v. Crestview Mut. Water Co.*, 110 Cal. Rptr. 543 (Cal. App. 1973) (developer strictly liable for installation of its water distribution system, but engineer not strictly liable because it only rendered a professional service).

260. *Union Supply Co. v. Pust*, 583 P.2d 276 (Colo. 1978).
261. *Id.* at 280.
262. *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Cal. App. 1969).
263. 42 U.S.C. §§ 12101 through 12213.
264. 42 U.S.C. §§ 3601 through 3631. *See also* C.R.S. §§ 24-34-501, *et seq.*
265. Americans With Disabilities Act (ADA) § 2(a); 42 U.S.C. § 12101.
266. ADA §§ 302(b)(2)(A)(iv) and 303(a); 42 U.S.C. § 12182.
267. ADA § 302(b)(2)(A)(iv); 42 U.S.C. § 12182.
268. ADA § 303(a)(1); 42 U.S.C. § 12183.
269. ADA § 303(a)(2); 42 U.S.C. § 12183.
270. ADA § 308(a)(1); 42 U.S.C. § 12188.
271. ADA § 308(a); 42 U.S.C. § 12188.
272. ADA § 308(b)(1)(A)(i); 42 U.S.C. § 12188.
273. ADA § 308(b)(2); 42 U.S.C. § 12188.
274. *Johnson v. Huizenga Holdings, Inc.*, 963 F. Supp 1175 (S.D. Fla. 1997).
275. 42 U.S.C. §§ 12101, *et seq.*
276. *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997).
277. *Kennedy v. Fitzgerald*, 102 F. Supp.2d 100 (N.D.N.Y. 2000).
278. *United States v. Days Inn of Am.*, 151 F.3d 822 (8th Cir. 1998).
279. *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029 (9th Cir. 2001)
280. 42 U.S.C. § 12182(a).
281. 42 U.S.C. §§ 3601 through 3631.
282. C.R.S. § 24-34-502.2.
283. American National Standards Institute A117.1.
284. For a discussion of inherently dangerous activities in Colorado, *see Huddleston v. Union Elec. Ass'n*, 841 P.2d 282 (Colo. 1992), and *Huddleston v. Union Electric Ass'n*, 897 P.2d 865 (Colo. App. 1995).
285. Handy, *The Day The House Fell* 105 (ASCE Press, 1995).
286. The risk of mountain airplane travel discussed in *Huddleston*, 841 P.2d at 282, obviously also includes a substantial risk of personal injury.
287. Handy, *supra* n. 285 at 94.
288. *Id.*
289. *Doundoulakis v. Town of Hemstead*, 42 N.Y.2d 440 (N.Y. 1977).
290. *Id.*
291. *Id.* at 450-451.
292. *Id.* at 451.
293. *Restatement (Second) of Torts* § 520 (1977).
294. *McCloone Med. Graphics, Inc. v. Roberts Dredge, Inc.*, 207 N.W.2d 616 (Wis. 1973).
295. *Doundoulakis*, 42 N.Y.2d at 448 (emphasis added).
296. Contrast the risk inherent in design and construction on expansive clays with the risk of harm and death associated with the activities described in CJI-Civ. 12:13 (CLE ed. 2005), which require the highest degree of care.
297. The replacement design professional may also be liable for false designation of origin under the Lanham Act, 15 U.S.C. § 1125(a). *See Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998).
298. 17 U.S.C. § 102.
299. 17 U.S.C. § 106.
300. 17 U.S.C. § 302; *CSM Investors, Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1309 (D. Minn. 1994).
301. 17 U.S.C. § 201.
302. 17 U.S.C. § 401.
303. 17 U.S.C. § 101.
304. 17 U.S.C. §§ 103 and 106.

305. *Kunycia v. Melville Realty Co.*, 755 F. Supp. 566, 573-74 (S.D.N.Y. 1990); *Bryce & Palazzola Architects and Assoc., Inc. v. A.M.E. Group, Inc.*, 865 F. Supp. 401 (E.D. Mich. 1994). See also Appendix A, AIA Doc. A-201, § 1.6 (1997); AIA Doc. B-141, § 1.3.2 (1997).

306. 17 U.S.C. § 204. *Compare I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996) (although there was no writing transferring rights in the copyright, the court found that an architect, by its actions, gave a nonexclusive license to use its drawings).

307. 17 U.S.C. § 411.

308. U.S. Copyright Office Circ. No. 41 (1998).

309. *Id.*

310. 28 U.S.C. § 1338.

311. 17 U.S.C. §§ 301(a) and 1338; for example, suits for conversion, misappropriation, unfair competition, and tortious interference with contract have been held to have been pre-empted by the Copyright Act. 18 Am. Jur. 2d, *Copyright and Literary Property* § 7 (1985). 28 U.S.C. § 1338; e.g., *Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289 (E.D. Tex. 1988).

312. *CSM Investors, Inc.*, 840 F. Supp. at 1309.

313. *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987).

314. *CSM Investors, Inc.*, 840 F. Supp. at 1311.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 1312.

320. 17 U.S.C. § 502.

321. 17 U.S.C. § 504.

322. 17 U.S.C. § 505.

323. See Wargo, "Copyright Protection for Architecture and the Berne Convention," 65 *N.Y.U. L.Rev.* 403 (1991).

324. 17 U.S.C. § 504.

325. 17 U.S.C. § 412.

326. 17 U.S.C. § 507(b).

327. 17 U.S.C. § 506.

328. 17 U.S.C. § 506(a); 18 U.S.C. §§ 2319(b), 3559, and 3571.

329. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655 (4th Cir. 1993).

330. *MECO Systems, Inc. v. Dancing Bear Entertainment, Inc.*, 948 S.W.2d 185 (Mo. App. 1997).

331. See "Stuck Inside These Four Walls: Recognition of Sick Building Syndrome Has Laid the Foundation to Raise Toxic Tort Litigation to New Heights," *Texas Tech. Law R.*, 1041, 1056 (1995).

332. *Surf Realty Corp. v. Standing*, 78 S.E.2d 901, 907-08 (Va. 1953).

333. *530 East 89 Corp.*, 388 N.Y.S.2d at 284.

334. See generally *Jewish Bd. of Guardians v. Grumman Allied Indust., Inc.*, 464 N.Y.S.2d 778 (1983).

335. *Howe v. Bishop*, 446 So.2d 11 (Ala. 1984).

336. *Greenhaven Corp. v. Hutchcraft & Assoc.*, 463 N.E.2d 283 (Ind. App. 1984).

337. *Westchester County v. Welton Becket Assoc.*, 478 N.Y.S.2d 305, 316 (N.Y. App. Div. 1984).

338. *Conti v. Pettibone Co., Inc.*, 445 N.Y.S.2d 943 (N.Y. 1981).

339. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982).

340. *Bernard Johnson, Inc.*, 630 S.W.2d at 371-72.

341. *Pittman Constr. Co. v. City of New Orleans*, 178 So.2d 312 (La. App. 1965).

342. *Johnson v. Salem Title Co.*, 425 P.2d 519 (Or. 1967).

343. *Thomas E. Hoan, Inc. v. Jobco, Inc.*, 291 N.Y.S.2d 380 (N.Y. 1968).

344. *Gilley v. Mitchell*, 603 P.2d 1251 (Or. 1979).

345. *Simpson Bros. Corp. v. Merrimac Chem. Co.*, 142 N.E. 922 (Mass. 1924).

346. *Schwartz v. Kuhn*, 71 Misc. 149, 126 N.Y.S. 568 (1911).
347. *Greenhaven Corp. v. Hutchcraft & Assoc.*, 463 N.E.2d 283 (Ind. App. 1984).
348. 5 Am. Jur. 2d, *Architects*, § 23.
349. 6 CJS, *Architects*, § 49.
350. *Balcom Indus., Inc. v. Nelson*, 454 P.2d 599 (1969).
351. *Covil v. Robert & Co.*, 144 S.E.2d 450 (Ga. 1965).
352. *Id.* at 455.
353. *Id.* at 452.
354. *Wheat Street Two, Inc. v. James C. Wise, Simpson, Aiken & Assocs., Inc.*, 208 S.E.2d 359 (Ga. 1974).
355. *McGuire v. United Bhd. of Carpenters and Joiners of Am., Local No. 470*, 314 P.2d 439, 447 (Wash. 1957).
356. *Bayne v. Everham*, 163 N.W. 1002, 1007 (Mich. 1917).
357. *Martin K. Eby Constr. Co. v. Neelly*, 344 F.2d 482 (10th Cir. 1965).
358. *Id.* at 485.
359. *City of Charlotte v. Skidmore, Owings, and Merrill*, 407 S.E.2d 571 (N.C. 1991).
360. C.R.S. § 13-80-104.
361. *E.g., Fujioka v. Kam*, 514 P.2d 568 (Ha. 1973); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977); *Broome v. Truluck*, 241 S.E.2d 739 (S.C. 1978); *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454 (Wis. 1975).
362. *E.g., Salinero v. Pon*, 177 Cal. Rptr. 204 (Cal. App. 1981); *O'Brien v. Hazelet & Erdal*, 299 N.W.2d 336, 342 (Mich. 1980); *Howell v. Burk*, 568 P.2d 214, 221 (N.M. 1977); *Reeves v. Ille Elec. Co.*, 551 P.2d 647 (Mont. 1976); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 503 P.2d 108 (Wash. 1972); *Carter v. Hartenstein*, 455 S.W.2d 918 (Ark. 1970).
363. *Cudahy Co. v. Ragnar Benson*, 514 F. Supp. 1212 (Colo. 1981).
364. *McClanahan v. American Gilsonite Co.*, 494 F. Supp. 1334 (Colo. 1980).
365. *Yarbro*, 655 P.2d at 827.
366. *E.g., Carter v. Hartenstein*, 455 S.W.2d 918 (Ark. 1970) (statute does not violate due process).
367. *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977). Finding no violation of due process but finding the Oklahoma statute unconstitutional on other grounds. Finding the statute unconstitutional on grounds of due process, *see Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973). Finding the statute constitutional, *see O'Brien*, 299 N.W.2d at 336; *Josephs v. Burns*, 491 P.2d 202 (Or. 1971); *Reeves v. Ille Elec. Co.*, 551 P.2d 647 (Mont. 1976).
368. *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637, 640 (Colo. 1978).
369. *Tamblyn v. Mickey & Fox, Inc.*, 578 P.2d 641 (Colo. 1978).
370. *See, e.g., Alaska Stat. § 09.10.055; Mo. Ann. Stat. § 516.097; Pa. Conn. Stat. Ann. Tit. 42 § 5536.*
371. *See, e.g., N.J. Stat. Ann. § 2A: 14-1.1; Ohio Rev. Code Ann. § 2305.131.*
372. C.R.S. § 13-80-104.
373. *Nelson, Haley, Patterson & Quirk, Inc. v. Garney Companies, Inc.*, 781 P.2d 153 (Colo. App. 1989).
374. *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637 (Colo. 1978).
375. *Tamblyn v. Mickey & Fox, Inc.*, 578 P.2d 641 (Colo. 1978).
376. *City of Aurora v. Bechtel Corp.*, 599 F.2d 382 (10th Cir. 1979).
377. *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981).
378. *Mohawk Green Apartments v. Kramer*, 709 P.2d 955, 956 (Colo. App. 1985).
379. *Irwin v. Elam Constr., Inc.*, 793 P.2d 609 (Colo. App. 1990).
380. *Sharp Brothers Contracting Co. v. Westvaco Corp.*, 817 P.2d 547 (Colo. App. 1991), *after remand* 878 P.2d 38 (Colo. App. 1994).
381. *Id.* at 550.
382. *Criswell v. M.J. Brock and Sons, Inc.*, 681 P.2d 495 (Colo. 1984) and *Financial Associates, Ltd. v. G.E. Johnson Constr. Co., Inc.*, 723 P.2d 135 (Colo. 1986).

383. C.R.S. § 13-20-803.
384. See CJI-Civ. 24:1 (CLE ed. 2005).
385. *Wasalco, Inc. v. El Paso County*, 689 P.2d 730 (Colo. App. 1984).
386. *Harber v. Ohio Nat'l Life Ins. Co.*, 390 F. Supp. 678 (E.D. Mo. 1974).
387. *Pillow v. General Am. Life Ins. Co.*, 564 S.W.2d 276, 282 (Mo. App. 1978).
388. E.g., *Kecko Piping Co. v. Town of Monroe*, 374 A.2d 179 (Conn. 1977); *Alfred A. Altimont, Inc. v. Chatelin, Samperton & Nolan*, 374 A.2d 284 (D.C. App. 1977).
389. *Radiology Prof'l Corp. v. Trinidad Area Health Ass'n, Inc.*, 577 P.2d 748 (Colo. 1978) (no recovery for the plaintiff because the contract was nonexclusive in nature and had not been breached).
390. See CJI-Civ. 24:1 (CLE ed. 2005); and CJI-Civ. 24:2 (CLE ed. 2005) defining "intent."
391. *McGlasson v. Barger*, 431 P.2d 778 (Colo. 1967).
392. *Pullen v. Headberg*, 127 P. 954 (Colo. 1912).
393. *Id.* at 506.
394. ASFE, The Association of Engineering Firms practicing in the Geosciences, was formerly known as the American Society of Foundation Engineers.
395. "Limitation of liability" and "risk allocation" will be used synonymously throughout this section.
396. See Murray, *supra* n. 189.
397. *Eastern Tunneling Corp. v. Southgate Sanitation Dist.*, 487 F. Supp. 109, 114 (D. Colo. 1979) (quoting *Ace Flying Servs., Inc. v. Colorado Dept. of Agric.*, 348 P.2d 962, 965 (Colo. 1960)).
398. *Id.* at 113.
399. See *McMillion v. McMillion*, 522 P.2d 125 (Colo. App. 1974) (divorce separation agreement).
400. *USF&G v. Budget Rent-a-Car*, 842 P.2d 208, 213 (Colo. 1992).
401. *Robinson Ins. & Real Estate, Inc. v. Southwestern Bell Tel.*, 366 F. Supp. 307, 310 (W.D. Ark. 1973).
402. *Id.*
403. *Id.* at 312 (quoting *Williston on Contracts* § 780A at 710).
404. *Id.* at 312 (citing *Western Union Tel. Co. v. Nester*, 309 U.S. 582 (1940)).
405. See *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (exculpatory clause).
406. *Id.*
407. *Tunkl v. Regents of Univ. of Calif.*, 383 P.2d 441 (Cal. 1963).
408. *Markborough v. Super. Court*, 277 Cal. Rptr. 919 (Cal. App. 4 Dist. 1991).
409. See "Enforceability of Limitation of Liability Clause," *The Construction Lawyer* (April 1994).
410. *Markborough*, 277 Cal. Rptr. at 922.
411. *Id.* at 924.
412. *Tunkl*, 383 P.2d at 441.
413. *Jones*, 623 P.2d at 376.
414. *Markborough*, 277 Cal. Rptr. at 927.
415. *Long Island Lighting Co. v. IMO Delaval, Inc.*, 668 F. Supp. 237 (S.D.N.Y. 1987).
416. Just as certain commentators have tended to confuse the concept of limitation of liability with other concepts such as exculpation, indemnity, and liquidated damages, so too have certain courts. In reviewing any writing or court opinion on the subject, it is necessary first to confirm that the concept of limitation of liability has not been impermissibly confused with any other concept.
417. One might forcefully argue that if ever a contract for engineering services could be considered to be vested with a public duty, a contract for a nuclear power facility would qualify.
418. *Long Island Lighting Co.*, 668 F. Supp. at 242.
419. *Id.* at 244; see also *Kalisch-Jarcho, Inc. v. New York*, 448 N.E.2d 413, 416 (N.Y. 1983); *contra Ricciardi v. Frank*, 620 N.Y.S.2d 918 (N.Y. Civ. Ct. 1994) (disclaimer did not absolve engineer negligence).
420. *Long Island Lighting Co.*, 668 F. Supp. at 245.
421. *Jones*, 623 P.2d at 376.
422. E.g., *Town of Alma*, No. 83CV107 (Park City 1984).
423. E.g., *Markborough*, 277 Cal. Rptr. at 922.

424. Murray, *supra* n. 189. While the conclusions of the article's author are not entirely clear, the inferred conclusion appears to be that, in Murray's opinion at least under certain circumstances, exculpatory clauses may be unenforceable in Colorado. Murray draws no distinction between clauses that allocate the risk of loss and clauses that are fully exculpatory so as to totally bar recovery. Nor is the distinction between indemnification (which provides protection against a third-party's claims) and allocation of risk (which addresses losses between the contracting parties) recognized. Murray's failure to draw these critical distinctions leads to potentially unsupportable conclusions.

425. *City of Dillington v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1275-77 (Alaska 1994).

426. The persuasive authority of *Dillingham* is thus properly limited to instances wherein there exists an anti-indemnity statute subject to the broad construction that existed with respect to the Alaskan statutory provision.

427. Order Granting Partial Summary Judgment, *Town of Alma v. Faulkner-Kellog Assoc., Inc.*, No. 83CV107 (Park City 1984).

428. *Id.*

429. The court recognized the distinction between providing services to the public at large and providing services to a governmental or other entity, which entity might service the public at large. Faulkner-Kellog provided services to the Town of Alma. Alma provided public utility services to the public.

430. *See* Murray, *supra* n. 189.

431. *Jones*, 623 P.2d at 376.

432. *Tunkl*, 383 P.2d at 441.

433. *Town of Alma*, No. 83CV107 (Park City 1984).

434. *Id.* at 2.

435. *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3d Cir. 1995).

436. *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159 (N.J. Super 1996).

437. *Sear-Brown Group v. Jay Builders, Inc.*, 665 N.Y.S.2d 162 (A.D. 1997).

438. *CBI Na-Con, Inc. v. UOP, Inc.*, 961 S.W.2d 336 (Tex. App. 1997).

439. *Long Island Lighting Co. v. IMO Delaval, Inc.*, 668 F. Supp. 237 (S.D.N.Y. 1987).

440. *Benenato v. McDougall*, 137 P. 8 (Cal. 1913).

441. *See Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301 (Colo. App. 1988).

442. *Town of Alma v. AZCO Construction, Inc.*, 10 P.3d 1256, 1262-1264 (Colo. 2000).

443. *BRW, Inc.*, 99 P.3d at 72-75.

444. *See Dufficy & Sons, Inc. v. BRW, Inc.*, 74 P.3d 380 (Colo. App. 2002).

445. *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000).

446. *Id.*

447. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256 (Colo. 2000).

448. *Id.* at 1263.

449. *Id.* at 1264.

450. *Id.* at 1266.

451. *Id.* at 1262.

452. *Id.*

453. *Id.*

454. *Id.*

455. *Cooley v. Big Horn Harvestore Sys.*, 813 P.2d 736 (Colo. 1991).

456. *Torronez v. Tapia*, 967 P.2d 216 (Colo. App. 1998).

457. *Id.* at 220.

458. *Id.*

459. *Dufficy & Sons, Inc.*, 74 P.3d at 382.

460. *Town of Alma*, 10 P.3d at 1262.

461. *BRW, Inc.*, 74 P.3d at 382.

462. *BRW, Inc.*, 99 P.3d at 71.

463. *Id.*

464. *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999).
465. *Roger H. Proulx & Co. v. Crest-Liners, Inc.*, 119 Cal. Rptr. 2d 442 (Cal. App. 2002).
466. *Siteman v. Woodward-Clyde & Assoc., Inc.*, 503 S.W.2d 141 (Mo. App. 1973).
467. *Loup-Miller v. Brauer & Assoc.*, 572 P.2d 845 (Colo. App. 1977).
468. *Id.*
469. *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991).
470. *Mid-Western Elec., Inc. v. DeWild Grant Reckert*, 500 N.W.2d 250, 255 (S.D. 1993).
471. *Vizzini v. State of New York*, 717 N.Y.S.2d 415 (App. Div. 2000).
472. *Martinez v. Badis*, 842 P.2d 245 (Colo. 1992).
473. *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623 (Colo.1999).
474. *See Karara v. Czopek*, No. 95-1361, 1996 U.S. App. LEXIS 13648 (10th Cir. 1996) (affirming the dismissal of an action with prejudice after the plaintiff failed to timely comply with C.R.S. § 13-20-602 and no good cause was shown for permitting a longer period of time).
475. *Chubb Group of Ins. Cos. v. Snowmass Wildcat Fire Protection Dist., No. 94-1069*, 1995 U.S. App. LEXIS 5736 (10th Cir. 1995).
476. *Miller v. Rowtech, LLC*, 3 P.3d 492 (Colo. App. 2000).
477. *Id.* at 494.
478. *State of Colorado v. Nieto*, 993 P.2d 493 (Colo. 2000).
479. *White v. Edsall Constr. Co., Inc.*, 296 F.3d 1081 (Fed. Cir. 2002).
480. *See id.*
481. *U.S. v. Spearin*, 248 U.S. 132, 136 (1918).
482. *Calocerinos & Spina Consulting Eng'rs, P.C. v. Prudential Reinsurance Co.*, 856 F. Supp. 775 (W.D.N.Y. 1994).

