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## ARTICLES

# AS THE WALLS CAME TUMBLING DOWN: ARCHITECTS' EXPANDED LIABILITY UNDER DESIGN-BUILD/CONSTRUCTION CONTRACTING

HAL G. BLOCK\*

*If a builder has built a house for a man, and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain.*

*If the child of the householder be killed, the child of that builder shall be slain.*

*If the slave of the householder be killed, he shall give slave for slave to the householder.*

*If the goods have been destroyed, he shall replace all that has been destroyed; and because the house that he built was not made, and it has been fallen in, he shall restore the fallen house out of his personal property.*

*If a builder has built a house for a man and his work is not done properly, and a wall shifts; then that builder shall make that wall good with his own silver.<sup>1</sup>*

## INTRODUCTION

Throughout recorded history architecture has proven to be the most permanent and illuminating of all unwritten records because architecture has always been the best nonliterary expression of its time. An understanding of the history of architecture is essential to an intelligent appreciation of a society's history as that history comes alive through its buildings and ruins of that society. This intelligent understanding is relatively easy to attain because architecture is a living language that may be understood without advanced technical knowledge.<sup>2</sup>

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1. C. EDWARDS, *THE HAMMURABI CODE AND THE SINAITIC LEGISLATION* 65-66 (2d ed. 1971).

2. J. GLOAG, *THE ARCHITECTURAL INTERPRETATION OF HISTORY* (1975).

Although a layman need not possess exceptional skills to appreciate architecture, design professionals<sup>3</sup> do need exceptional skills to appreciate the ever-increasing technical and legal complexities in their profession. This article will address the expanded areas of potential legal liability for architects since the profession's incursion into design-build/construction contracting by comparing the liability of the traditional architect with that of the general contractor when performing their respective duties in the construction process. An examination of the decisions that have been rendered where these distinct services have been provided by the same person, along with the extrapolation of the reasoning provided in collateral decisions, make it apparent that an architect performing non-traditional (but economically more viable) services as both an architect and a contractor is held to a higher standard of performance. This standard, perhaps rightfully so, far exceeds the standard imposed on the architect and the general contractor individually.

### *History of Architectural Liability*

The "master builder" was the forerunner of today's modern architect.<sup>4</sup> Historically, the role of the "master builder" included responsibility, and ultimate liability, for all phases of building including drafting, engineering, aesthetic design, and construction. This required the architect to possess full knowledge of both architectural design and construction methods. The first recorded codification of penalties to be imposed on a master builder was the ancient Babylonian Code of Hammurabi. The Code, purportedly sent to King Hammurabi by the gods Anu and Bel,<sup>5</sup> imposed the same liability on the master builder

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3. As defined by Illinois Revised Statutes, Chapter 10-1/2, § 2 (1975), an architect is a person who is technically qualified and registered under the laws of this state to practice architecture. The practice of architecture within the meaning and intent of this Act includes the offering or furnishing of any professional service such as consultation, planning, aesthetic and structural design, drawings and specifications, or responsible supervision of construction or erection, in connection with the construction of any private or public buildings, building structures, building projects, or additions to or alterations thereof. For a review of the types of architectural practice statutes, see generally Comment, *Malpractice: The Design Professional's Dilemma*, 10 J. MAR. J. PRAC. & PROC. 287 (1977); Comment, *The Roles of Architect and Contractor in Construction Management*, 6 U. MICH. J.L. REF. 447, 458 (1973).

4. Kahn, *The Changing Role of the Architect*, 23 ST. LOUIS U.L.J. 216 (1979).

5. R. WORMSER, *THE STORY OF THE LAW AND THE MEN WHO MADE IT FROM THE EARLIEST TIMES TO THE PRESENT* (rev. ed. 1962). The Babylonians were not the only people to claim divine deliverance of their laws. The

as that which befell his client.<sup>6</sup> The liability of the builder was all-encompassing; neither proof of privity<sup>7</sup> nor of negligence<sup>8</sup> was required as the law of Babylonia recognized strict liability at its ultimate.<sup>9</sup>

The situation did improve. The ancient Egyptians even deified an architect named Imhotep, who is generally recognized as being the master architect of the "step pyramid."<sup>10</sup> Most Egyptian architects, however, were not always so fortunate. As the ultimate example of a terrible fee schedule, legend has it that one of the ancient kings of Egypt had the architect for his pyramid killed at the completion of the pyramid because the architect alone knew the way to all the burial chambers.<sup>11</sup>

The codification of Roman law included a provision for privity between the suing party and the architect. The principle was rigidly applied and resulted in the preclusion of suits by third parties even if physical or monetary damages were incurred.<sup>12</sup> Although the master builder's exposure to suit was limited as to the number of people that could bring an action, he was still liable for damages resulting from both the design and the construction process.

The architect's liability under both the design and construction process began to change during the Renaissance Period. Time constraints and complexities in building construction forced architects into areas of specialization within their profession.<sup>13</sup> The function of the architect was thus reduced to designing and planning of buildings and only supervisory control of the construction process. Actual erection of the physical structure became the sole province of the builder.

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Egyptians claim to have received their laws from the god Toth; the Persians from Ahura Mazda by way of Zoraster; the Hebrews from God.

6. See *supra* text accompanying note 1.

7. See *infra* notes 14-16 and accompanying text.

8. See *infra* note 17.

9. See *infra* notes 124-52 and accompanying text.

10. A. FAKHRY, *THE PYRAMIDS* (1961). The Greeks also considered Imhotep to be godlike and called him Askelepios, revered because of his skill as a physician as well as an architect. Among his titles were Chancellor of the King, The First One Under the King, The Administrator of the Great Mansion, The Hereditary Noble, The High Priest of Helipolis, The Chief Sculptor and the Chief Carpenter. Unfortunately, none of these terms are used to describe architects today.

11. There appears to be no factual basis for this legend, but it seems to have worked its way into every architect's history training.

12. B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* (6th ed. 1977). The law was the most important product of the Roman mind. In almost all their other intellectual endeavors, the Romans were the eager pupils of the Greeks, but in law they were, and knew themselves to be, masters. *Id.* at 1.

13. See *generally supra* notes 2 and 4.

Increased specialization resulted in a decrease in the architect's potential liability. For example, the English courts required proof of two distinct elements before any common law cause of action could be brought, for architect malfeasance or otherwise. The first element the English adopted was the Roman concept of privity that required the existence of a legally recognized relationship between the parties. This concept recognized the principal limitation of liability commensurate with compensation for contractual acceptance of risk. The English application of privity stems from the landmark case of *Winterbottom v. Wright*.<sup>14</sup> The court in *Winterbottom* sought to protect the contracting parties on two grounds: that lack of this protection would lead to excessive and unlimited liability resulting in endless complications in determining cause and effect,<sup>15</sup> and that not imposing this requirement would burden the parties with rights and liabilities beyond which they had contracted.<sup>16</sup> The second element, which developed during the Industrial Revolution, was proof of negligence.<sup>17</sup>

American courts strictly adhered to these twin requirements until the landmark case of *MacPherson v. Buick Motor Co.*<sup>18</sup> The court in *MacPherson* held the manufacturer of an inherently dangerous chattel, which was defectively made, liable for injuries suffered by remote users.<sup>19</sup> Although this case was a personal injury suit, the principle was soon extended to cases

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14. 152 Eng. Rep. 402 (Exch. Cham. 1842).

15. The court in *Winterbottom* expressed the concern that "[i]f we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go on a step beyond that, there is no reason why we should not go fifty." *Id.* at 405. See also *Roddy v. Missouri Pacific Ry. Co.*, 104 Mo. 234, 15 S.W. 1112 (1891).

16. *Winterbottom*, Eng. Rep. at 405. In *Marvin Safe Co. v. Ward*, 46 N.J.L. 19 (1884) the court noted that "[t]he object of the parties in inserting in their contract specific undertakings with respect to the work to be done is to create obligations and duties *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waivers by the contracting parties. If their persons can acquire a right in the contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract." *Id.* at 24.

17. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). The standard of care required of an architect was stated very succinctly in *City of Eveleth v. Ruble*, 302 Minn. 249, 225 N.W.2d 521 (1974): "One who undertakes to render professional services is under a duty to the person for whom the service is to be performed to exercise such care, skill and diligence as men in that profession ordinarily exercise under like circumstances." *Id.* at 253, 225 N.E.2d at 524. See also 5 AM. JUR. 2d, *Architects* § 8, 669-70 (1964).

18. 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer held liable for injury to driver of vehicle).

19. *Id.* at 389, 111 N.E. at 1055.

involving purely economic loss.<sup>20</sup> As Judge Cardozo so aptly stated, "[t]he assault upon the citadel of privity is proceeding in these days apace."<sup>21</sup>

With new ground broken, it was only a matter of time before the privity requirement in negligence actions brought against architects and engineers eroded. The imposition of liability without privity proceeded on a case-by-case basis, but the exceptions soon swallowed the rule. The defense of privity today is no longer an obstacle in actions against the architect that seek damages for physical injury or economic loss that are brought by the surety,<sup>22</sup> the prime contractor,<sup>23</sup> the subcontractors<sup>24</sup> or third parties.<sup>25</sup> Its modern limitations incorporate the concept

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20. *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931) (public accountants negligently made certified balance sheet upon which plaintiff corporation loaned money with a resultant loss). *See also* *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (opinion by Cardozo, J.); *Aluma Kraft Mfg. v. Fox & Co.*, 493 S.W.2d 378 (Mo. 1973) (accounting partnership liable for negligent preparation of financial statement).

21. *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

22. *See, e.g.*, *Aetna Ins. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968) (architect negligent in not ascertaining how funds being paid to contractor were being used when architect knew that subcontractors and others were not being paid); *Peerless Ins. Co. v. Cerny & Assoc.*, 199 F. Supp. 951 (D. Minn. 1961) (negligent certification of payment by supervising architect); *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967) (incorrect certification of amount of work completed and material furnished).

23. *See, e.g.*, *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958) (architect liable for negligent interpretation of concrete tests and acceptance of structural components); *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973) (architect liable to contractor for negligent preparation of plans and specifications); *W.H. Lyman Constr. Co. v. Village of Gurnee*, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980) (architect liable for negligent soil borings); *Shoffner Indus. Inc. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 257 S.E.2d 50, *cert. denied*, 298 N.C. 296, 259 S.E.2d 301 (1979) (negligent inspection and approval of roof trusses which architect knew or should have known were defective as to material and workmanship); *Davidson & Jones v. County of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580 (1979), *cert. denied*, 298 N.C. 295, 259 S.E.2d 911 (architect liable for breach of common-law duty of due care).

24. *See, e.g.*, *Detweiler Bros., v. John Graham & Co.*, 412 F. Supp. 416 (E.D. Wash. 1976) (negligent misrepresentation of supervisory architect regarding steam pipes subcontractor was to install); *Gurtler, Hebert & Co. v. Weyland Mach. Shop*, 405 So. 2d 660 (La. App. 1981) (subcontractor building outside stairway can recover from architect in negligence); *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580 (1979) (subcontractor could recover from architect for breach of common-law duty of due care).

25. *See, e.g.*, *Cooper v. Jevne*, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976) (purchasers of condominiums could proceed against architects for past and future repairs and maintenance due to defective design); *Inman v. Binghampton Hous. Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895 (1957) (child hurt when he fell off negligently designed porch); *Quail Hollow East Condominium Assoc. v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12, *cert. denied*, 301 N.C. 527, 273 S.E.2d 454 (1980) (purchasers of condominiums could

of foreseeability and proximate cause.<sup>26</sup> Only a minority of jurisdictions still permit the defense, and even these courts limit the application of the defense to specific fact situations.<sup>27</sup>

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recover against architect for negligent design and supervision of construction of water pipe system).

26. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). The court rejected the privity requirement and held that whether or not liability to third persons existed "involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Id.* at 650, 320 P.2d at 19.

27. Privity is no longer a barrier to physical injury actions and is rarely a hindrance in economic loss actions. *But see* *Harbor Mechanical, Inc. v. Arizona Elec.*, 496 F. Supp. 681, 683 (D. Ariz. 1980) (citing *Blecick*); *Blecick v. School Dist. No. 18*, 2 Ariz. App. 115, 406 P.2d 750 (1965) (an action for refusal to certify completion so that contractor could receive final payment: mere existence of two contracts with one contracting party common to both does not give one party a right to enforce obligations owed by architect to other); *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977) (assignee of contractor not allowed to bring action against subcontractor following settlement of contractor's suit with the owner).

In addition to the fall of privity as a defense, the commonly used defense of agency was abandoned. *Huber, Hunt & Nichols v. Moore*, 67 Cal. App. 3d 278, 136 Cal. Rptr. 603 (1977). Generally, when the architect is developing the plans and specifications, he serves as an independent contractor and when the architect supervises construction, he is the agent of the owner. *See* *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962); *Montgomery v. Levy*, 406 Pa. 547, 177 A.2d 448 (1962). Modern problems arising out of the agency issue include defining the architect's duties under the supervision aspects of the contract in relation to the right to stop work. Some jurisdictions have held that if an architect fails to stop work and injury results to the contractor the architect may be held liable. *E.g.*, *Waggoner v. W. & W. Steel Co.*, 657 P.2d 147 (Okla. 1982) (liability predicated on theory that architect was agent of the owner). *But see*, *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976) (mere status as supervising engineer was insufficient to form a basis for liability).

Another safeguard that the architect could rely on in the past was the doctrine that the owner accepted the responsibility for any defects in the construction process once the owner had accepted the plans. *Boswell v. Laird*, 8 Cal. 2d 469 (1957); *Necker v. Harvey*, 49 Mich. 517, 14 N.W. 503 (1883). This rule was specifically rejected, however, as to architects and contractors in *Totten v. Gruzen*, 245 A.2d 1 (N.J. 1968). *Accord*, *Johnson v. Equipment Specialists, Inc.* 58 Ill. App. 3d 133, 373 N.E.2d 837 (1978) (the underlying purpose of tort law cannot be accomplished if liability is extinguished by the act of delivery to the contractee). Two exceptions to this rule have been noted: when the contractor followed the plans and specifications when they were not obviously dangerous, and when the owner discovers the danger, or should have discovered the danger. *Terry v. New Mexico State Highway Comm.*, 98 N.M. 119, 645 P.2d 1375 (1982). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 104 (4th ed. 1971).

Also severely restricted was the architect's defense that he was acting as an arbitrator between the owner and the contractors. An architect generally has immunity in his capacity as an arbitrator and cannot be held liable in the absence of bad faith. *Craviolini v. Scholer & Fuller*, 89 Ariz. 24, 357 P.2d 611 (1960); *City of Durham v. Reidsville Eng'g Co.*, 255 N.C. 98, 120 S.E.2d 564 (1961). The party opposing immunity has the burden of proof,

### *Advent of Design-Build*

With the increased cost of building, owners/developers searched for ways to reduce costs; and with overhead and fixed costs increasing, speed and cost efficiency of design and construction became almost as important as the aesthetic values and architectural budgets plummeted. With less money available for the design process, many architects found it necessary to expand their practices into other revenue producing areas. The first expansion was into the relatively new field of construction management. An architect who also acts as a construction manager contracts directly with the owner for services well beyond those of a supervisory architect.<sup>28</sup> A construction manager's duties may include scheduling, coordinating, inspecting, expediting cash flow and certifying cash payments. Many construction managers have either architectural or construction backgrounds, and their functions overlap those of both the architect and the general contractor.<sup>29</sup> In addition to the basic contract for architectural services, this contractual relationship also relieves the owner of numerous responsibilities while providing financial remuneration for the architect.

Prior to 1978, most architects were ethically precluded from taking the step from construction management to construction contracting by the American Institute of Architects (AIA).<sup>30</sup> An architect was permitted to design buildings, but could not participate in construction other than as a supervisory architect or

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Ballou v. Basic Constr. Co., 407 F.2d 1137 (4th Cir. 1969), and must differentiate the acts of the architect in his capacity as independent contractor, agent and arbiter. Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278, 136 Cal. Rptr. 603 (1977). The architect's immunity as an arbitrator, however, is limited strictly to those acts within his duties as an arbitrator of disputes between the contractor and the owner. These duties are strictly construed by the courts and attempts to redefine the duties to bring the architect within the scope of immunities have been frustrated. Johnson v. Basic Constr., 292 F. Supp. 300 (D.C. Cir. 1970). See also Little, *The Architects' Immunity as Arbiter*, 23 ST. LOUIS U.L.J. 339 (1979).

28. Comment, *The Roles of Architect and Contractor in Construction Management*, 6 U. MICH. J.L. REF. 447 (1973).

29. See generally *id.*

30. The American Institute of Architects (AIA) is a national society of registered architects and associated members founded in 1857 and organized as a membership corporation. Approximately one-half of the estimated 60,000 registered architects in this country are members. The AIA carries on a wide variety of activities at the national level including the devising and publishing of handbooks, forms, codes and guidelines for the practice of architecture. Part of its services includes monthly magazines and newsletters, literature for use of nonarchitects in dealing with and selecting architects and, most importantly, the preparation and periodic updating of standard form contracts to be used by attorneys for design professionals. Mardirosian v. AIA, 474 F. Supp. 628, 633 (D.C. Cir. 1979).



construction manager.<sup>31</sup> This restriction eliminated areas of great potential profit during a time when high interest rates slowed construction and decreased the need for architectural services. As one prominent Chicago architect stated, "[a]rchitects are fighting for their lives and that's why they are reaching out in order to survive."<sup>32</sup>

In response to overwhelming economic realities, the 1978 national convention of the AIA approved an experimental change to the AIA Code of Ethics and Professional Conduct.<sup>33</sup> The change permitted members to participate in profit or loss situations related to labor and materials in construction contracting. This new concept became known as design-build construction contracting.

Under the traditional architectural services model, a linear relationship existed between the architect, owner and contractor. The owner was caught in the middle because of his separate contracts with the architect and the contractor. No contractual relationship existed between the architect and the contractor. The architect had a fiduciary relationship with the owner. The owner relied upon the architect as a channel of communication with the contractor and as arbitrator of any disputes. Under design-build, the owner contracts with one entity, either the architect or the contractor, to design and build the entire project and present the owner with a finished product utilizing the owner's financial resources, or presents the owner with a finished product on a "turn-key" basis.<sup>34</sup> In response to *Mardirosian v. AIA*,<sup>35</sup> it now appears that design-build is a permanent fixture

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31. This ethical preclusion as interpreted by Chicago architect Sidney Epstein was that "the AIA says that if the architect could be affected financially by his interest in the construction, he may lose his objectivity in protecting the owner's interests above his own (as builder)." Mr. Epstein disagreed with this view and stated: "But it not only is proper but beneficial to the owner for the architect to participate in construction. The closer control that can be exercised gives owners speed, quality and good project cost control." Chicago Sun-Times, July 27, 1978, at 99, col. 2.

32. *Id.* at 99, col. 1 (interview of M. David Dubin).

33. CODE OF ETHICS AND PROFESSIONAL CONDUCT Rule 407 (1979). See also *Mardirosian*, 474 F. Supp. at 628. Although membership in the AIA is not a mandatory requirement for the practice of architecture in the United States, the initials "AIA" after an architect's name is recognized as a symbol of reputation, standing and ability. A censure or suspension by the AIA hinders the ability of the architect to obtain projects and other employment. *Id.* at 633-34.

34. The "turn key" contractor is a developer who has completed responsibility for the completed project including design, except to the extent that such responsibility is specifically waived or limited by the contract. *Mobile Hous. Env'ts v. Barton & Barton*, 432 F. Supp. 1343 (D. Col. 1977).

35. 474 F. Supp. 628 (1979). In *Mardirosian*, the plaintiff brought an anti-trust action against the AIA after an ethics review board suspended Mardirosian from AIA membership upon finding a violation of two of its

in the range of services that can be offered by an architect.<sup>36</sup>

### *Design-Build as an Open Door to Increased Liability*

The movement to design-build projects has opened new areas of potential income for architects. It has also, however, exposed them to expanded liability from which they were previously protected by the separation of design and construction. To understand this potential exposure better, it is necessary to understand the basic differences between architects who provide traditional design services and architects who contract as design-builders.

Architects generally must fulfill three separate professional roles during the design and construction process. The architect acts, as an independent contractor in the preparation of the initial plans and specifications. He next acts as an agent of the owner in observing the construction work as it progresses. Finally, the architect fulfills the additional role of a quasi-judicial officer with a qualified immunity when he act as arbiter in resolving disputes between owner and contractor.<sup>37</sup>

The obligations and duties of an architect are generally reflected in his contract with the owner. Although many form contracts are available with unlimited private variations, the most widely used and commonly accepted are those published by the AIA. Two documents in particular, the Standard Form of Agreement Between Owner and Architect (AIA document B141) and the General Conditions of the Contract for Construction (AIA document A201), generally define the scope of services to be provided by the architect.

Under B141, the architect's basic services are broken down into five basic areas. The schematic design phase is that in

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ethical standards. In holding that standard 9 of the AIA's Code of Ethics was anticompetitive on its face and could not be justified on the basis of eliminating professional deception, the court held that based on *National Soc'y of Professional Eng'rs. v. United States*, 435 U.S. 679 (1978), activities of learned professional societies are subject to antitrust actions regardless of their differences with other business services. 474 F. Supp. at 636-38.

36. The AIA task force evaluating design-build reported that of the 3,682 member firms returning questionnaires through May 14, 1979, only 10.2% (374 firms), indicated some experience with design-build and only 21% of those firms' present business involved design-build projects. Of the 3,308 firms reporting no experience with design-build, only 696 (21%) thought it likely that they would participate. Yet a large percentage of all firms thought it was a good idea because owners prefer to work with an architect rather than a general contractor, more and more owners favor design-build, and more and more are in favor of architect control of design-build projects. AIA, *Design-Build/Contracting Monitoring Task Force Report*, May 1981.

37. *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278, 136 Cal. Rptr. 603 (1977) citing *Lundgren v. Freeman*, 307 F.2d 104, 116 (9th Cir. 1962).

which the architect initially reviews the owner's program and the preliminary evaluation of the budget.<sup>38</sup> During the design development phase, drawings and documents are developed to reflect the size and character of the project.<sup>39</sup> A full set of drawings and specifications necessary to bid and construct the project are prepared during the construction documents phase.<sup>40</sup> In the bidding phase, the architect renders assistance to the owner in obtaining and analyzing bids,<sup>41</sup> and during the construction phase he serves as a representative of the owner in interpreting the drawings, arbitrating disputes and certifying payments to the general contractor.<sup>42</sup>

Certain specific duties are normally excluded from an architect's basic services. The architect is not required to make exhaustive or continuous inspections.<sup>43</sup> He has no control over, and is not in charge of or responsible for, construction means, methods, techniques, sequences or procedures.<sup>44</sup> The architect is not responsible for safety precautions associated with the contractor's work or for the acts, errors or omissions of the contractor or subcontractor which result from failure to follow contract documents.<sup>45</sup> Liability does not exist for the good faith interpretations or decisions in his capacity as arbitrator of disputes between the owner and contractor.<sup>46</sup> Although he can reject work not in compliance with the contract documents, his ability to stop work on a project is limited to special situations.<sup>47</sup> The architect's review of the contractor's shop drawing or product submittals is limited to a review for general compliance with the contract documents.<sup>48</sup> These limitations offer some protection for the architect in the normal architect-owner relationship. The design-builder, however, generally does not have the luxury of those contractual limitations because of the very nature of his undertaking. Moreover, the design-builder is subjected to a higher standard of liability than either the architect or the contractor would be subjected to individually.

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38. AIA Document B141, *Standard Form of Agreement Between the Owner and Architect*, § 1.1 [hereinafter referred to as AIA Document B141].

39. *Id.* at § 1.2.

40. *Id.* at § 1.3.

41. *Id.* at § 1.4.

42. *Id.* at § 1.5.

43. *Id.* at § 1.5.4. See also AIA Document A201, *General Conditions of the Contract for Construction* § 2.2.3 [hereinafter referred to as AIA Document A201].

44. AIA Document B141 § 1.5.5; AIA Document A201 § 2.2.4.

45. AIA Document B141 § 1.5.5; AIA Document A201 § 2.2.4.

46. AIA Document B141 § 1.5.9; AIA Document A201 § 2.2.7.

47. AIA Document B141 § 1.5.12; AIA Document A201 § 2.2.13.

48. AIA Document B141 § 1.5.13; AIA Document A201 § 2.2.14.

## FOUNDATIONS OF LIABILITY UNDER DESIGN-BUILD

An architect performing a design-build contract will be liable for errors or omissions arising out of his negligence in the "design" portion. Additional theories of liability which may attach to a design-build architect, the modern version of the ancient "master builder," are breach of express warranty, breach of implied warranty, and strict liability in tort. Lines of cases imposing liability on architects combine with those imposing liability on contractors, resulting in design-builders being subject to greater liability than both areas together. In addition, other considerations, such as gaps in insurance coverage, must be addressed.

*Express Warranty*

The first major area of potential additional liability confronted by an architect who enters into a design-build contract is express warranty. Warranties may be embodied in the terms of the contract or in the nature of the contracted work. Warranties arising under the architectural design process warranties attributable to the construction process and warranties that are within construction contracts when the contractor provides the plans and specifications all subject architects to liability. As previously noted, the English common law imposed a standard of care upon the architect, and a breach of that standard sounded in negligence.<sup>49</sup> As the law expanded under specific circumstances to allow recovery without proof of negligence,<sup>50</sup> the concepts of warranties, both express and implied, and strict liability in tort developed out of the areas of product liability and the law of sales.<sup>51</sup>

An action upon a warranty was originally an action in tort and was couched in terms of an action based on deceit.<sup>52</sup> This eventually evolved into an action based on misrepresentation.<sup>53</sup>

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49. *See supra* note 17.

50. *E.g.*, *Smith v. Lockheed Propulsion Co.*, 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967) (defendant conducted abnormally dangerous activities). *See also* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 78, 96-104 (4th ed. 1971).

51. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 96-104 (4th ed. 1971).

52. *See Skeel, Advertised-Product Liability: Nature of the Problem—What is a "Warranty?"*, 8 CLEV. MAR. L. REV. 2 (1959). Express warranties were at first only actionable through the use of an action on the case for deceit. The first forms embodied a deception of the court and a consequent perversion of the ordinary course of a legal proceeding.

53. In the original actions, there were no remedies for misrepresentation, only for fraud. A contract induced by misrepresentation or fraud was not invalid or actionable in contract. The concept of a warranty as collateral

In the seventeenth century, tort actions were expanded to allow an action for a mere affirmation of fact made without knowledge of its falsity or negligence.<sup>54</sup> In 1778, the case of *Stuart v. Wilkins*<sup>55</sup> was the first to hold that an action would lie for breach of an express warranty as part of the contract for sale. Thus, express warranties became characterized as "freak" hybrids born of the illicit intercourse of tort and contract.<sup>56</sup>

The evolution from an action in tort to one in assumpsit to one strictly in contract followed the development of the English common law.<sup>57</sup> Warranties are now regarded as express or implied by the terms of the contract, and an action in contract is the usual remedy.<sup>58</sup>

It should be noted that an action in negligence is different from that of an action charging breach of express warranties. Recovery in an action for professional negligence requires a qualitative assessment of the degree of skill and precision used by an architect in the performance of his profession. There is much less certainty in architectural design than in manufacturing a product; it is almost inevitable that an architect will make some errors in judgment, especially on large, complex projects. The express warranties offered by the architect, however, depend on the particular agreement that the architect entered into with the person who employs him. In the absence of a special agreement he does not guarantee a perfect plan or satisfactory

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to a contract developed into the old common law action of assumpsit. Assumpsit basically involved the idea of an indirect breach of contract. See generally Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

54. *Cross v. Gardiner*, 89 Eng. Rep. 453 (1683); *Medina v. Stoughton*, 91 Eng. Rep. 1297 (1701).

55. 99 Eng. Rep. 15 (1778).

56. Ames, *supra* note 53, at 8.

57. The movement from tort to assumpsit was based in part on the radical differences between the modern and primitive conception of legal liability. The original theory of a tort action was based on an injury caused by an act of a stranger, without plaintiff participation. Damage caused by another acting for the primary party was not a tort unless the nature of the profession imposed such a duty. A pleading in assumpsit based on detriment remedied the situation. Also, if a contract was induced by fraud or misrepresentation, no action on the contract could lie as the contract itself was not deemed to be rendered invalid by the misrepresentation. With the holding that a warranty at the time of sale created an obligation in the nature of an assumpsit, *Stuart v. Wilkin*, 99 Eng. Rep. 15 (1778), the law of warranty entered the domain of contract law. See Ames, *supra* note 53; Skeel, *supra* note 52.

58. A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased to be consensual, and at the same time came to lie mainly in contract. Note, *Necessity of Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 414-15 (1929).

result.<sup>59</sup>

The leading Illinois case holding that an action for breach of express warranty will not lie absent a special agreement is *Rozny v. Marnul*.<sup>60</sup> In this case, Marnul was hired by Rozny to survey a plot of ground upon which the plaintiffs built a house. The survey was inaccurate, and the trial court entered a judgment of \$13,350 to cover the expense of moving the house.<sup>61</sup> The appellate court reversed,<sup>62</sup> but on appeal, the Illinois Supreme Court carefully examined the nature and terms of the contract between the parties. A major factor considered by the court was the express, unrestricted and wholly voluntary "absolute guarantee for accuracy" that appeared on the inaccurate survey.<sup>63</sup> Without this statement, the court would have most certainly barred recovery.<sup>64</sup> Although this case involved a surveyor, the legal principles are valid in actions against architects or engineers. It must be noted that although the plans need not be per-

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59. *Mississippi Meadows, Inc. v. Hodson*, 13 Ill. App. 3d 24, 26, 299 N.E.2d 359, 361 (1973) (architects topographical plan not required to include grid points of surveyor). See also *Looker v. Gulf Coast Fair*, 203 Ala. 42, 81 So. 832 (1919) (design of grandstand that collapsed during construction); *Allied Properties v. John Blume & Assoc.*, 25 Cal. App. 3d 848, 851, 102 Cal. Rptr. 259, 263-64 (1972) (feasibility study and design for pier for small boats did not guarantee that it was reasonably suitable for small crafts); *Bayshore Dev. Co. v. Bonfoey*, 75 Fla. 455, 461, 78 So. 507, 510 (1918) (specifications for stucco deemed sufficient and were not expected to produce a leakproof building); *Kortz v. Kimberlin*, 158 Ky. 566, 569, 165 S.W. 654, 655 (1914) (architect supervising construction is not liable for every defect in its construction); *Coombs v. Beede*, 89 Me. 187, 189, 36 A. 104, 105 (1896) (it was enough that failure was not by fault of architect); *Chapel v. Clark*, 117 Mich. 638, 639, 76 N.W. 62, 62 (1898) (contract complied with when plans met standards of other men ordinarily skilled and experienced in that area); *Ressler v. Nielsen*, 76 N.W.2d 157, 162 (N. Dak. 1956) (damages denied for minor problems in the building); *Pancoast v. Russell*, 148 Cal. App. 2d 909, 307 P.2d 719 (1957) (architect does not guarantee satisfaction in results and supervision of house construction); *Wills v. Black & West*, 344 P.2d 581, 584 (Okla. 1959) (alleged misrepresentation that roof was well constructed, conformed to building code and was adequate); *Smith v. Goff*, 325 P.2d 1061, 1064 (Okla. 1958) (in design and supervision of homes under construction architect need only perform with ordinary care); *White v. Pallay*, 119 Or. 97, 247 P. 316, 317 (1926) (warranty of satisfaction in result denied in absence of special agreement); *Surf Realty Corp. v. Standing*, 195 Va. 431, 443, 78 S.E.2d 901, 904 (1953) (in absence of special agreement architect exercising ordinary skill not liable for fault in construction resulting from defects in plans).

60. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

61. *Id.* at 57, 250 N.E.2d at 657.

62. 83 Ill. App. 2d 110, 227 N.E.2d 156 (1967), *rev'd*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).

63. 43 Ill. 2d at 66, 250 N.E.2d at 663.

64. The original complaint was in negligence and contract. Before the case went to the jury, the negligence count was stricken and the case proceeded on a "guarantee" contained in the plat. J. SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* 673, n.63 (2nd ed. 1977).

fect, if strictly adhered to they must produce a building of the kind called for without marked defects in character, strength or appearance.<sup>65</sup>

An inherent express warranty is given by the architect that the building built per his plans and specifications will meet all building code provisions in effect at the time. A breach of this warranty is often referred to as negligence *per se*. If an architect knows the location of the proposed building, he is charged with knowledge of the building restrictions in that area, and must draw the plans and specifications accordingly.<sup>66</sup> The violation, however, must be the proximate cause of the injury and the injury must be of the type in which the statute intended to protect.<sup>67</sup> This duty is nondelegable and cannot be escaped by subcontracting part of the work to others.<sup>68</sup> For example, if an architect is awarded a contract for the design and engineering of a building, he is liable for any defects in the structural engineering of the walls if the walls so designed are in violation of a building code.<sup>69</sup>

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65. *Chrischilles v. Griswold*, 260 Iowa 453, 460, 150 N.W.2d 94, 99 (1967) (quoting *Trunk & Gordon v. Clark*, 163 Iowa 620, 624, 145 N.W. 277, 279 (1914)).

66. *See, e.g., Burran v. Dambold*, 422 F.2d 133 (10th Cir. 1970) (collapse of concrete and steel umbrella structure which violated Uniform Building Code); *St. Joseph Hosp. v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (1974) (architect and manufacturer liable for failure of plastic laminate paneling to meet Chicago Building Code flame-spread ratings); *McDaniel Bros. v. Wilson*, 45 S.W.2d 293 (Tex. Civ. App. 1931) (absolute duty imposed by excavation ordinances); *Virginia Elec. & Power v. Savoy Constr. Co.*, 224 Va. 36, 294 S.E.2d 811 (1982) (construction company liable for explosion and fire because of failure to plug and seal electrical cables in violation of National Electrical Code); *Bott v. Moser*, 175 Va. 11, 7 S.E.2d 217 (1940) (architect could not recover fees when plans did not meet set-back requirements); *Bebb v. Jordan*, 111 Wash. 73, 189 P. 553 (1920) (architect could not recover fees when plans did not meet city light and air restrictions).

67. *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 366 A.2d 101 (1976) (failure to comply with building code was proximate cause of injury).

68. *Johnson v. Salem Title*, 246 Or. 409, 425 P.2d 519 (1967) (architect had nondelegable duty to meet building code provisions).

69. *Id.* at 414, 425 P.2d at 522. It is generally irrelevant that the city building inspector approved the plans. This protection is based upon the "public duty doctrine" which states that "a governmental agency is freed from liability for an otherwise actionable offense if the offense is a breach of a duty owed the general public but, conversely, not freed from liability if the duty is owed to a particular class of individuals." *McNeal v. Division of State Police*, 412 So. 2d 1123, 1128 (La. 1982). At least three courts, however, have held a municipality liable. In *Stewart v. Schmieder*, 386 So. 2d 1351 (La. 1980), the Louisiana Supreme Court stated that the "public duty doctrine" did not protect or relieve the city from liability when the city engineer inspected the plans and specifications and issued a building permit for a building which later proved defective and caused injury to the public. The court held the city engineer to the standard of a private engineer and concluded that such engineer would have detected the weakness in the design. *Id.* at 1358. *See also* *Trianon Park Condominium Ass'n v. City of Hialeah*,

The warranty cases involving the contractor center upon the duty of the contractor to follow the plans and specifications supplied by the architect. Absent contrary language in the contract, if the contractor follows the plans and specifications exactly, he generally will be free from liability due to a poor result so long as he performs in a workmanlike manner.<sup>70</sup> The exception to this rule occurs when the defect is so obvious that the contractor has a duty to report the problem to the architect or owner and the contractor fails to do so.<sup>71</sup>

Problems arise when the contractor guarantees more than merely performing the work and furnishing the materials in compliance with the plans and specifications. The basis for the courts' decisions is generally a determination of the scope of the additional guarantee agreements in the contract. If the guarantee is interpreted broadly, the contractor may be liable for any imperfect conditions arising either from his failure to follow the plans and specifications or a defect in the plan itself, independ-

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423 So. 2d 911 (Fla. App. 1982) (holding city liable for negligent inspection). *But see* Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (building inspections do not involve a "quasi-judicial" function within the meaning of governmental tort immunity statute).

70. The general rule is that a builder must substantially perform his contract according to its terms, and, in the absence of a contract governing the manner, he will be excused only by acts of God, impossibility of performance or acts of the other party to the contract which prevent performance. If he wishes to protect himself against the hazards of the soil, the weather, labor or other uncertain contingencies, he must do so by his contract. *W.H. Lyman Constr. Co. v. Village of Gurnee*, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980) (damages for extra work due to poor subsurface soil conditions disallowed when contractor failed to make independent inspection); *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713 (Ky. Ct. App. 1979) (contractor who knew that he was covering an easement with excess fill liable even though following plans and specifications); *Barraque v. Neff*, 202 La. 360, 11 So. 2d 697 (1942) (contractor who convinced owner to substitute materials liable when materials proved defective); *Valley Constr. Co. v. Lake Hills Sewer Dist.*, 67 Wash. 2d 910, 410 P.2d 796 (1965) (contractor liable when handshaping of hardpan according to specifications to accept syphon line was impossible and his use of excavated materials for bedding proved insufficient and caused line breaks); *White v. Mitchell*, 123 Wash. 630, 213 P. 10 (1923).

71. The contractor may rely on the plans and specifications at least where they are not "so apparently defective that an ordinary builder of ordinary prudence would be put on notice that work was dangerous and likely to cause injury." *Roth v. Great Atlantic & Pacific Tea Co.*, 108 F. Supp. 390, 394 (E.D.N.Y. 1952) *citing* *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 N.Y. 43, 145 N.E. 321 (1924). *See also* *Penn Bridge Co. v. City of New Orleans*, 222 F. 737 (5th Cir. 1915) (contractor can recover if fault in plans not discoverable by him by the exercise of ordinary diligence upon inspection). *But see* *Trustees of First Baptist Church v. McElroy*, 223 Miss. 327, 78 So. 2d 138 (1955) (contractor held not liable for explosion of hot waterheater even though dangerous condition was known because architect had same knowledge).



ent of any other cause.<sup>72</sup>

We are now faced with a seemingly contradictory situation. An architect is not responsible for perfect plans and specifications and does not guarantee a perfect result, and a contractor must only build according to the plans and specifications. Can a design-builder then escape liability by simply changing hats on the same project? The courts have faced this question and have answered with an emphatic "NO".

One of the earliest cases espousing this principle is the case of *Louisiana Molasses Co. v. Le Sassier*.<sup>73</sup> In this case, the plaintiff contracted with the defendant to make the plans and serve as the contractor for the construction of a five-story warehouse. When one of the warehouses was discovered to be defective, the architect-contractor argued that when he changed from an architect to a builder he was afforded the independent protection of both. In finding for the plaintiff, the court noted that whenever an owner takes bids on plans and specifications made by an architect, the contractor who is awarded the bid is not responsible for defects caused by incorrect plans and specifications. The court stated the case is different, however, when the contractor draws up his own plans and specifications as an architect.<sup>74</sup>

A much cited case furthering this principle is *Barraque v. Neff*.<sup>75</sup> In *Barraque*, suit was brought against a contractor and his surety for the cost of remedying defects in a building in which cracks and leaks in a wall developed into a serious defect within a year after the completion of the building.<sup>76</sup> The contractor himself had drawn the plans and specifications and also prepared the contract for the construction of the building. The court cited *Louisiana Molasses* holding that when a contractor prepares the plans and specifications, "[h]e cannot escape responsibility for defectiveness of the work by [arguing] that the defect was in the specifications and not in the work."<sup>77</sup>

More recently, the Supreme Court of Wisconsin decided *Stevens Construction Corp. v. Carolina Corp.*<sup>78</sup> In this case, Stevens sued to recover the unpaid balance on a construction

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72. See, e.g., *Shopping Center Mgmt. Co. v. Rupp*, 54 Wash. 2d 624, 343 P.2d 877 (1959) (contractor guaranteed satisfactory operation of all materials and equipment installed under its contract); *Port of Seattle v. Puget Sound Sheet Metal Works*, 124 Wash. 10, 213 P. 467 (1923) (guarantee of roofing broadly construed to cover melted roofing materials).

73. 52 La. Ann. 2070, 28 So. 217 (1900).

74. *Id.* at 2077, 28 So. at 221.

75. 202 La. 360, 11 So. 2d 697 (1942).

76. *Id.* at 362, 11 So. 2d at 697.

77. *Id.* at 368-69, 11 So. 2d at 700.

78. 63 Wis. 2d 342, 217 N.W.2d 291 (1974).

contract. Stevens contracted with Carolina Corporation to furnish and install a properly designed prestressed concrete system to support the weight indicated in the architectural plans. The prestressed system was improperly designed, resulting in building damage after its installation. Although there was an architect for the basic building concept, Stevens had the responsibility for the design and construction of the system. The court rejected Stevens' argument that it did not have design responsibility and held it liable for the resulting damage.<sup>79</sup>

The preceding cases are illustrative of the myriad of cases that addressed this conflict.<sup>80</sup> The courts have imposed a higher standard on the architect-contractor than would be imposed on each individually in the normal linear contract relationship.

This increase in potential liability appears to be justified. An architect who is engaged to complete a design package and then contracts to build the project has a complete and greater understanding of the detailing and the design concept. It has been a familiar anecdote among architects that if an architect went out in the field to inspect his own work, he most likely would not be able to recognize his own details that he so laborously drew in the office. The usual philosophy is that the contractor will figure out how to build any new or complex detail.<sup>81</sup> To allow the architect legal protection for his error when

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79. *Id.* at 353-54, 217 N.W.2d at 298.

80. *See, e.g.*, *First Nat'l Bank of Akron v. Cann*, 669 F.2d 415 (6th Cir. 1982) (design-build firm held liable for breach of express warranty that actual work would correspond with plans); *J. Ray McDermott v. Vessel Morning Star*, 431 F.2d 714 (5th Cir. 1970), *cert. denied*, 409 U.S. 948 (1972) (person who designs structure is responsible for insufficiencies in effectiveness for purpose intended); *Lincoln Stone & Supply Co. v. Ludwig*, 94 Neb. 722, 144 N.W. 782 (1913) (contractor who designed and built house denied right to argue that house was built according to specifications); *Philadelphia Hous. Auth. v. Turner Constr. Co.*, 343 Pa. 512, 23 A.2d 426 (1942) (contractor held liable for extra costs when he substituted his own paint specifications); *Presnall v. Adams*, 214 S.W. 357 (Tex. Civ. App. 1919) (architect who designed and supervised construction held liable for any defects in the construction); *White v. Mitchell*, 123 Wash. 630, 213 P. 10 (1923) (contractor who built home liable when widened footings would have prevented corner from sinking due to soft soil); *McConnell v. Gordon Constr. Co.*, 105 Wash. 659, 178 P. 823 (1919) (contractor who furnished plans for building that collapsed due to inadequacy of plans held to have guaranteed their sufficiency).

81. At the shop drawing stage, the contractor who has been awarded the contract will submit, for the architect's approval, drawings that will indicate how the contractor intends to build the project. The architect will then comment on the drawings and will either allow the contractor to proceed or require resubmittal of additional shop drawings. The purpose of the shop drawings is to check that the drawings generally conform to the plans and specifications, that the general contractor understands the design concept and that his drawings and details demonstrate that understanding.

Although in many construction cases negligent approval or disapproval of the shop drawings is alleged against the architect, one of the few cases

he is the one who has contracted to construct the project would leave the architect and the profession vulnerable to extreme criticism and a general degradation of the architect's status as a professional.

### *Implied Warranty*

Similar to the development of express warranties, the evolution of tort liability shows a shift from the common law concept of negligence to implied warranties<sup>82</sup> culminating in strict liability.<sup>83</sup> The natural domain of implied warranties is the law of sales.<sup>84</sup> The crux of judicial impetus has involved the distinction between the providing of services, the sale of goods and a combination of both.<sup>85</sup>

It is clear that absent a special agreement to the contrary, an architect only implies that he possesses ordinary good taste, skill and ability in the exercise of his profession. He also impliedly warrants that the work will be done properly, without neglect and with a certain exactness of performance.<sup>86</sup> As

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addressing the issue is *Day v. National U.S. Rad. Corp.*, 241 La. 288, 128 So. 2d 660 (1961) which held an architect not negligent in approving an equipment brochure submittal that failed to include proper safety valves. The court implied in its ruling that the architect is not responsible for an exhaustive review of submittals and that the contractor is still responsible for providing components delineated in the specifications. *Id.*, at 308-09, 128 So. 2d at 667-68. See also *Waggoner v. W & W Steel Co.*, 657 P.2d 147 (Okla. 1982) (architect not responsible for review of shop drawings with regard to temporary connections during erection).

82. Implied warranties were a development of the common law, which sought to permit recovery by a plaintiff under certain circumstances without proof that the defendant failed to exercise reasonable care. See Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221, 1225-26 (1973).

83. See *infra* notes 119-52 and accompanying text. This move was based on the inability of consumers to meet the strict rules required to allege and prove an implied warranty action.

84. See Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1126 (1960) (strict liability to the consumer).

85. See Note, *The Application of Implied Warranties to Predominately "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970).

86. In some cases, the courts have attempted to apply an implied warranty to transactions that contemplated the rendition of professional services. What was actually imposed was nothing more than a "warranty" that the performer would not act negligently, *Bloomsburg Mills Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 164 A.2d 201 (1960), or a warranty of workmanlike performance imposing only the degree of care and skill that a reasonably prudent, skilled and qualified person would have exercised under the circumstances, *Union Marine & General Ins. Co. v. American Export Lines*, 274 F. Supp. 123 (S.D.N.Y. 1966); *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833 (Alaska 1967), or an implied warranty of competence and ability ordinarily possessed by those in the profession. *Wolfe v. Virusky*, 306 F. Supp. 519 (S.D. Ga. 1969). The courts were imposing nothing more than a negligence standard expressed in warranty language.

stated previously it is abundantly clear that the architect performing traditional "professional" services will be held liable only in those situations in which the architect is negligent in the rendering of his "professional" services.<sup>87</sup>

The focus on cases holding that there is no implied warranty in the rendering of architectural services<sup>88</sup> is the relation of the skilled professional to his work and the nature of his work. Like doctors, lawyers and engineers, architects deal in an inexact science and are continually called upon to exercise their skilled judgment to anticipate and resolve random factors that are incapable of precise mathematical resolve or structured rules of design. These factors are often beyond the architect's realm of control or influence. It is for that reason that the courts have rarely imposed a standard of perfection on professionals who perform strictly service functions. Until the uncertainty element has been eliminated, architects and other professionals should not have to bear the burden for the unpredictable or unforeseeable.<sup>89</sup> Under such circumstances, the purchaser of the architect's services is more able to bear the risk of unforeseen difficulties.<sup>90</sup> The courts have almost universally accepted this rationale and have not allowed actions in implied warranty unless there is a clear reason for doing so. The burden of proof is justifiably on the person seeking an imposition of the liability.<sup>91</sup>

There have been a few notable exceptions expressing the minority view to this rule, all of which seemingly stem from the

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87. See *supra* notes 59-69 and accompanying text.

88. See, e.g., *Gravelly v. Providence Partnership*, 549 F.2d 958 (4th Cir. 1977) (injury due to fall down spiral staircase held actionable only in negligence); *Johnson-Voiland-Archuleta v. Roark Assocs.*, 40 Colo. App. 269, 572 P.2d 1220 (1977) (implied warranty of fitness for particular purpose not applicable to engineer's services); *Audlane Lumber & Builders Supply, Inc. v. Britt Assocs.*, 168 So. 2d 333 (Fla. App. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1965) (no implied warranties in design of roof trusses); *W.H. Lyman Constr. Co. v. Village of Gurnee*, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980) (no implied warranty as to accuracy and sufficiency of soil borings that did not disclose adverse subsurface conditions); *Borman's Inc. v. Lake State Dev. Co.*, 60 Mich. App. 175, 230 N.W.2d 363 (1975) (no implied warranty for design of drain system); *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 372 N.E.2d 555 (1977) (no implied warranty for design of snow melting pipes in ramp endangering ramp's structural integrity); *Milau Assocs. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247 (1977) (no implied warranty for damage to textiles caused by "water hammer" in sprinkler system); *Smith v. Goff*, 325 P.2d 1061 (Okla. 1958) (supervisory architect not liable for implied warranty when contractor's work was insufficient); *Ryan v. Morgan Spear Assocs.*, 546 S.W.2d 678 (Tex. Civ. App. 1977) (no implied warranties for design of foundation systems).

89. See *Coombs v. Beede*, 89 Me. 187, 36 A. 104 (1896) (adoption of implied warranty to architectural services would impose strict liability on architects for latent defects in the structures they design).

90. *City of Mounds View v. Waljarvi*, 263 N.W.2d 420 (Minn. 1978).

91. *Ryan v. Morgan Spear Assocs.*, 546 S.W.2d 678 (Tex. Civ. App. 1977).

misinterpretation of the law by the court in the case of *Hill v. Polar Pantries*.<sup>92</sup> In that case the defendant, an operator of a frozen food plant, furnished plans and specifications for a similar plant to the plaintiff. The insulation system of the floor failed, and the plaintiff sued to recover damages. Although the case did not involve an architect, the court relied on architect cases and treated the designer as if he were an architect. The court held that Polar Pantries impliedly warranted the sufficiency of the plans supplied to the plaintiff.<sup>93</sup> The mistake in this case was in distinguishing the oft-imposed client's implied warranty of sufficiency of the plans and specification to the contractor, which would estop the client from recovering from the contractor due to defects in the plans if the contractor strictly follows the plans and specifications, from the never imposed architect's implied warranty to the client and contractor. The client's warranty of sufficiency to the contractor is not one given by the architect in his position as an independent contractor. Unfortunately, this misinterpretation has led to liability in the few minority cases imposing an implied warranty on the architect.<sup>94</sup>

The defined relationship between the architect, owner and contractor also limits the implied warranties offered by a contractor. In the preparation of the plans and specifications the architect is an independent contractor hired and governed by the terms embodied in the contract with the owner. Upon completion, the plans and specifications are delivered to the owner who then contracts with a building contractor to construct the building. At that point, the owner impliedly warrants the sufficiency of plans to the contractor who must then construct the building according to the plans and specifications.<sup>95</sup> In the ab-

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92. 219 S.C. 263, 64 S.E.2d 885 (1951).

93. *Id.* at 271, 64 S.E.2d at 888.

94. *See, e.g.*, *Detweiler Bros. v. John Graham & Co.*, 412 F. Supp. 416 (E.D. Wash. 1976) (implied warranty actionable if in privity with complaining party); *Federal Mogul Corp. v. Universal Constr. Co.*, 376 So. 2d 716 (Ala. 1979) (under certain circumstances, architect could be held liable for implied warranty that plans are sufficient to make structure reasonably fit for its intended purpose); *United States Fidelity & Guarantee v. Jacksonville State Univ.*, 357 So. 2d 952 (Ala. 1978) (architect held to impliedly warrant that the plans and specifications were sufficient to prevent water leakage); *Broyles v. Brown Eng'g*, 275 Ala. 35, 151 So. 2d 767 (1963) (engineer who submitted plans and specifications for drainage of a tract of land in a housing subdivision held to impliedly warrant their sufficiency for purpose in view); *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 164 A.2d 201 (1960) (architect held to impliedly warrant sufficiency of plans for roof when roof had to be replaced).

95. *See, e.g.*, *United States v. Spearin*, 248 U.S. 132 (1918) (contractor not liable for defective sewer placement when plans gave dimensions, material and location); *Kelley v. Bank Bldg. & Equip. Corp.*, 453 F.2d 774 (10th Cir. 1972) (deficient design of glass curtain wall and "storefront" systems responsibility of owner-architect even though contractor acquiesced to the

sence of any contract provisions to the contrary, the contractor's implied warranties are that the contractor will do nothing to hinder the performance of the other party<sup>96</sup> and that the work will be performed in a reasonably skillful and workmanlike manner.<sup>97</sup> The test involved is one of reasonableness, the standard ordinarily being the quality of work that would be done by a worker of average skill and intelligence.<sup>98</sup> Architect-builders may easily find themselves held accountable for expanded implied warranty liability if the architect is also the builder-vendor of new homes, performing a sales/service hybrid.

The antithesis of implied warranties is the common law doctrine of *caveat emptor*, which was traditionally applied when there was no express warranty, fraud or misrepresentation on the part of the seller.<sup>99</sup> *Caveat emptor* developed when the buyer and seller held equal bargaining positions and could deal at arm's length on equal footing. The courts have found, however, that the doctrine as applied to new houses, is "an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent

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use of material and system specifications); *Kurland v. United Pac. Ins.*, 251 Cal. App. 2d 112, 59 Cal. Rptr. 258 (1967) (failure of specified air conditioning system to maintain thirty degree differential as warranted in subcontractors surety bond not recoverable under bond); *Georgetown Township High School v. Hardy*, 38 Ill. App. 3d 722, 349 N.E.2d 88 (1976) (collapse of school addition not actionable against contractor if he performs in accordance with plans and does so in a workmanlike manner); *St. Joseph Hosp. v. Corbetta Constr.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (1974) (contractor not responsible when specified paneling failed to comply with required flame spread ratings).

96. *See, e.g.*, *Laburnum Constr. Corp. v. United States*, 325 F.2d 451 (Ct. Cl. 1963) *citing* *United States v. Spearin*, 248 U.S. 132 (1918) (owner impliedly warrants that if contractor follows specifications he will be able to complete project within specified time period subject to implied condition that neither party will hinder); *W.H. Lyman Constr. v. Village of Gurnee*, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980) (engineer withheld approval of necessary change for several months).

97. *See, e.g.*, *Wimmer v. Down East Prop., Inc.*, 406 A.2d 88 (Me. 1979) (no difference between contractor who builds for landowner and one who builds for builder-vendor); *Gosselin v. Better Homes, Inc.*, 256 A.2d 629 (Me. 1969) (implied warranty that work will be performed in workmanlike manner extended to builder-vendor); *Baerveldt & Honig Constr. Co. v. Szombathy*, 365 Mo. 845, 289 S.W.2d 116 (1956) (every construction contract has an implied agreement that it will be done in a skillful and workmanlike manner).

98. *See, e.g.*, *Shiffers v. Cunningham Shepherd Bldrs. Co.*, 28 Colo. App. 29, 470 P.2d 593 (1970) (no requirement of perfection in construction for builder-vendor); *Waggoner v. Midwestern Dev.*, 83 S.D. 57, 154 N.W.2d 803 (1967) (builder-vendor held to negligence standard in regard to water leakage in basement).

99. *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 105 (4th ed. 1971).

purchaser but to the industry itself."<sup>100</sup>

The wall of *caveat emptor* was first breached in the case of *Kellogg Bridge Co. v. Hamilton*.<sup>101</sup> In *Kellogg Bridge Co.*, Justice Harlan stated that the law will imply a warranty of fitness for the purpose intended when a buyer has reason to rely upon, and does rely upon, the judgment of a seller who manufactures a product.<sup>102</sup> In England the citadel was breached in two cases, *Miller v. Cannon Hill Estates*<sup>103</sup> and *Perry v. Sharon Development Co.*,<sup>104</sup> in which the plaintiffs, who had contracted to buy housing under construction, found upon occupying the completed houses that they were defective. In each case the court rejected the argument of *caveat emptor*. The court in *Perry* stated:

[i]n the first place, the maxim *caveat emptor* cannot apply, and the buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and insofar as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly.<sup>105</sup>

The English courts thus held that a mass developer is in a position superior to the buyer of a home. This reasoning was then applied by an Illinois court in *Weck v. A:M Sunrise Construction Co.*,<sup>106</sup> which held the defendant construction company liable for breach of an implied warranty of fitness for intended purposes, and that the building should be constructed in a reasonable and workmanlike manner under a contract entered into when the building was approximately seventy-five percent complete.<sup>107</sup>

A similar case was *Glisan v. Smolenske*,<sup>108</sup> in which the court, citing the reasoning of the English cases and *Weck*, also held that implied warranties will be applicable to a contract for an uncompleted house.<sup>109</sup> The logical extension to this doctrine came the next year in *Carpenter v. Donohoe*,<sup>110</sup> in which it was recognized that applying

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100. *Humber v. Morton*, 426 S.W.2d 554, 562 (Tex. 1968).

101. 110 U.S. 108 (1884).

102. *Id.* at 116.

103. 1 All E.R. 93 (1931).

104. 4 All E.R. 390 (1937).

105. *Id.* at 395-96.

106. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

107. *Id.* at 395-96, 184 N.E.2d at 734.

108. 153 Colo. 274, 387 P.2d 260 (1963).

109. *Id.* at 277, 387 P.2d at 261.

110. 154 Colo. 78, 388 P.2d 399 (1964).

[A] different rule . . . to the purchaser of a house which is near completion than . . . to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.<sup>111</sup>

This line of cases<sup>112</sup> reached its apex in *Weeks v. Slavick Builders, Inc.*<sup>113</sup> The court in *Weeks* extended liability to three different time periods in which implied warranties operate, holding that the warranties apply prior to construction, during construction and after completion.<sup>114</sup> Thus, the builder-vendor was placed on the same footing as the supplier of a chattel. Extension of this theory may eventually result in the imposition of strict liability in tort on the builder-vendor. California courts have already crossed the line and have held the builder-vendor liable to the buyer for implied warranties on components of the home, regardless of the lack of statutory provisions imposing implied warranties.<sup>115</sup>

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111. *Id.* at 83, 388 P.2d at 402.

112. *See also* *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) (implied warranty against flooding of heating and air conditioning ducts); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 410, 115 Cal. Rptr. 648, 525 P.2d 88 (1974) (buyer is required to give notice of breach of warranty within a reasonable time); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (purchaser entitled to rescission when water seepage rendered home uninhabitable after occupation); *Schipper v. Levitt*, 44 N.J. 70, 270 A.2d 314 (1965) (duration of liability determined by standard of reasonableness); *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957) (first American case adopting implied warranties of quality for house purchased during erection); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970) (implied warranty applied for adequacy of septic tank and field purchased before completion); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967) (implied warranty of reasonable workmanship and habitability survives delivery of deed); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (implied warranty considered in tort and not in contract and does not merge in final transaction); *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970) (implied warranty applied for structural defects even though contract for sale was entered into before completion); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1968) (implied warranty for things that vitally affect structural stability of house continues past occupation).

113. 24 Mich. App. 621, 180 N.W.2d 503 (1970), *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970).

114. *Id.* at 627-28, 180 N.W.2d at 506. *See Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976) (liability extended to second buyer of home for latent defects not discoverable by reasonable inspection). *Accord*, *Moxley v. Laramine Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981). *See also* Note, *Builders Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607 (1980).

115. *Aced v. Hobbs-Sesack Plumbing Co.*, 12 Cal. Rptr. 257, 360 P.2d 897 (1961). *Aced* stood for the proposition that although the implied warranty provisions of the Sales Act, and inferentially similar provisions of the Uniform Commercial Code, apply only to sales contracts, warranties may be implied in other contracts not covered by these statutory provisions. In



The issue arises as to what happens when the owner contracts for a specific building, but leaves the design and construction to a third party. The design-build question was confronted by the Supreme Court of Minnesota in *Robertson Lumber Co. v. Stephens Farmers Cooperative Elevator Co.*<sup>116</sup> In this case, the defendant contracted with the plaintiff to design and build a grain storage building which subsequently collapsed. The court extended the doctrine of implied warranty of fitness for a specific purpose to a design-builder when he held himself out as competent to take the contract, and where the owner had no expertise, furnished no plans, designs, specifications, details or blueprints, and indicated reliance on the experience and skill of the design-builder.<sup>117</sup> Thus, as in express warranties, a design-build architect is held to a higher standard than either the architect or contractor individually in implied warranties.<sup>118</sup>

### *Strict Liability*

Historically, express and implied warranties have posed major conceptual problems for the courts. The origin of an action in warranty was born in tort<sup>119</sup> and eventually evolved into an action in contract. The original concept of warranty required one party to act in reliance upon an express or implied representation, a tort theory of liability. The present action in warranty still strives to extract this representation from the terms of the contract or the actions of the parties; such a task is often possible.

The current codification of warranty law, the Uniform Commercial Code (UCC) and its predecessor the Uniform Sales Act, do not contain any language dealing with this conflict. The codes look only to the contract between the seller and the imme-

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holding that a contract to furnish labor and materials for a radiant heating system was not a sales contract, the court nevertheless held there was no justification for refusing to imply a warranty of suitability for ordinary purposes. *Id.* at 262, 360 P.2d at 902.

The *Aced* court apparently extended the implied warranty of workmanship in *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950), and *In re Talbott's Estate*, 184 Kan. 501, 337 P.2d 986 (1959), to also include an implied warranty on materials. California is the only state that has held that a contractor impliedly warrants the materials he uses.

116. 274 Minn. 17, 143 N.W.2d 622 (1966).

117. *Id.* at 24, 143 N.W.2d at 626.

118. The key is that the owner has not placed himself between the architect and the contractor and thereby avoids impliedly warranting the sufficiency of the plans. *See also* *Audlane Lumber & Bldrs. Supply, Inc. v. Britt Assocs., Inc.*, 168 So. 2d 333 (Fla. 1964); *Hoye v. Century Bldrs.*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

119. *See supra* notes 52 and 53.

diate buyer.<sup>120</sup> This presents two problems. First is the timely notice that must be given to the seller after the buyer knows or should have known of the breach.<sup>121</sup> This may be a reasonable requirement for a business, but without legal advice an unwary consumer can easily fall into the trap of "unreasonable delay." The second problem is that of disclaimers which defeat any express warranties or representations and, under the appropriate circumstances, disclaim implied warranties.<sup>122</sup> The retail buyer is the obvious victim. He is in no position to bargain on equal footing with the merchant, and often receives the disclaimer as part of the bill of sale.

To deal with these and other problems, the drafting committee for the Restatement of Torts (Second), after much consternation over the "illusory contract mask,"<sup>123</sup> drafted section 402A,<sup>124</sup> which imposes strict liability in tort. This section, adopted by almost all of the states, allows the courts to forego the usual search for negligence and warranties by making a manufacturer of a product strictly liable for physical, but not economic, harm caused by the defective product regardless of fault or privity. Section 402A was intended to provide a means for the injured party to recover from the otherwise insulated manufacturers who usually do not have direct contact with the consumer.<sup>125</sup> This break in the marketing chain effectively eliminated the contractual doctrine of implied warranty by inter-

120. U.C.C. art. 2 (1981) (as modified by § 2-318).

121. *Id.* at § 2-607(3).

122. *Id.* at § 2-316.

123. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960).

124. This section provides:

- (1) One who seeks any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Comment m states that there is nothing to stop someone from treating this as a "warranty" as long as he realizes that it is a very different kind of warranty from those found in the sale of goods and is not subject to the various contract rules. *Id.* at 355-56.

125. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 100 (4th ed. 1971).

rupting privity between the parties.<sup>126</sup> As pointed out by a California court, the doctrine of strict liability is hardly more than that which exists under implied warranty when stripped of the contractual doctrines of privity, disclaimer, requirements or notice of defect, and limitations through inconsistencies with express warranties.<sup>127</sup>

The key word for architects and engineers is the word "product." With rare exceptions, the courts have held that professional services are not covered by section 402A. *LaRossa v. Scientific Design Co.*<sup>128</sup> is indicative of this distinction. In ruling that the defendant's services were not actionable under a strict liability theory, 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. The reason for the distinction is succinctly stated by Traynor, J., in *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15, 20-21 (1954): "[T]he general rule is applicable that 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. . . . Those who hire [experts] . . . are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance."<sup>129</sup>

For these reasons, the courts have held that architects and professionals providing services are generally not liable in the absence of proof of negligence.<sup>130</sup>

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126. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 15 (1978).

127. *Shepard v. Alexian Bros. Hosp.*, 33 Cal. App. 3d 606, 615, 109 Cal. Rptr. 132, 137 (1973).

128. 402 F.2d 937 (3d Cir. 1968). In *La Rossa*, the plaintiff sued the defendant designers in a wrongful death action based on their design of a chemical plant. During the startup of the plant, the plaintiff's husband was exposed to carcinogenic vanadium dust, which she alleged had triggered or activated a latent cancerous condition in her husband. *Id.* at 938-39.

129. *Id.* at 942-43.

130. See, e.g., *Stuart v. Crestview Mutual Water Co.*, 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (1973) (no action against engineer under strict liability); *Swett v. Gribaldo, Jones & Assocs.*, 40 Cal. App. 3d 573, 115 Cal. Rptr. 99 (1954) (soil engineer liable only for negligence or intentional misconduct); *City of Mounds View v. Waljarvi*, 263 N.W.2d 420 (Minn. 1978) (nature of profession will leave action only in negligence); *Board of Trustees v. Ken-*

An interesting recent case is *K-Mart Corp. v. Midcon Realty Group of Connecticut*.<sup>131</sup> In this case a portion of the plaintiffs' store collapsed, and they brought suit to recover damages against the architect, contractor and the lessor of the premises. K-Mart alleged that as a result of the sale by the architect of the working drawings, plans and specifications which were allegedly unreasonably dangerous to users of the building, the architect should be held accountable in strict liability for the property damage sustained. The court skirted the usual product versus service issue, focusing instead on the portion of section 402A which states that the product must reach the ultimate consumer without substantial change in the condition in which it was sold. The court reasoned that assuming what the architect sold as his "product" was the plans and specifications from which the owner then had a contractor build the building, the owner and contractor were the intended and actual recipients and users of the architect's "product," whereas K-Mart was only the recipient of the owner's and contractor's "product," that being the building.<sup>132</sup> Thus, K-Mart was a user and consumer of the owner's and contractor's product and not the architect's. The court construed this as a transformation and substantial alteration of the product.<sup>133</sup> If the court considers this transformation determining, it would appear that the court would then be required to find that a design-build architect's "product" to be the building and not the plans thus, in essence, holding them liable in strict liability for their plans and specifications.

In *Lowrie v. City of Evanston*,<sup>134</sup> the Illinois appellate court confronted the argument that a building was a product. In *Lowrie*, a person died as a result of injuries sustained in a fall from a multi-level open-air garage. The court reached the conclusion

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nerly, *Slomanson & Smith*, 167 N.J. Super. 311, 400 A.2d 850 (1979) (strict liability inapplicable to one rendering engineering services); *Queensbury Union Free Sch. Dist. v. Jim Walter Corp.*, 91 Misc. 2d 804, 398 N.Y.S.2d 832 (1977) (architect not liable under strict liability theory because cause of action is available against those engaged in the manufacture, distribution or sale of product); *Van Ornum v. Otter Trail Power*, 210 N.W.2d 188 (N.D. 1978) (arbitrary standard of care for architect disallowed). *But see Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982) (strict liability applied for design and distribution of navigational charts). Common law strict tort liability as opposed to codified (§ 402A) strict liability in tort has always been available if the party reforms services that could be labelled ultrahazardous or which pose a danger of invasion of land of others. *Doundoulakis v. Town of Hempstead*, 51 A.D.2d 302, 381 N.Y.S.2d 287 (1976), *rev'd*, 42 N.Y.2d 440, 368 N.E.2d 24 (1977).

131. 489 F. Supp. 813 (D. Conn. 1980) (action against architect for collapsed roof).

132. *Id.* at 816-17.

133. *Id.* at 817.

134. 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977).

that a single building such as a garage was not within the province of section 402A as contemplated by the drafters of the Restatement.<sup>135</sup> It also noted that other remedies, based on theories of negligence and implied warranties, are available against parties responsible for defective construction.<sup>136</sup> In *Immergluck v. Ridgeview Houses, Inc.*,<sup>137</sup> the plaintiff sued to recover damages for injuries incurred in a fall from a window of a sheltered care facility. Relying on *Lowrie*, the court found that because there was difficulty of access to a remote manufacturer or no mass production over which the risk of harm or injury could be spread, this single type of building was not within the province of section 402A.<sup>138</sup>

Although the courts held that a single structure did not originally come within the scope of section 402A, the courts carved out an exception to the general rule when the defendant was the builder-vendor of mass produced single-family detached homes. The leading case is *Schipper v. Levitt & Sons*.<sup>139</sup> In *Schipper*, the purchaser of a mass-produced home sued the builder-vendor for injuries sustained by a child of the purchaser's lessee. The child was injured by excessively hot water caused by a defective mixing valve. In reversing a judgment of nonsuit, the court held that the builder-vendor was liable to the purchaser on the basis of strict liability. The court stated:

When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is . . . largely superficial, and his opportunity for obtaining meaningful protective changes in the conveying documents prepared by the builder vendor is negligible. . . . The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the

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135. *Id.* at 383-84, 365 N.E.2d at 927. The court refused to arbitrarily confine a restricted definition of "seller" or "product". Rather, the court focused on the public policy reasons underlying strict liability and held that in the case of a seller, strict liability could apply to one who places a defective product into the stream of commerce, whether by actual sale or in some specified manner. *Id.*

136. *Id.* at 384, 365 N.E.2d at 929.

137. 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977).

138. *Id.* at 476, 368 N.E.2d at 805. This exclusion was extended to condominiums in *Heller v. Cadral Corp.*, 84 Ill. App. 3d 677, 406 N.E.2d 88 (1980).

139. 44 N.J. 70, 207 A.2d 314 (1965).

developer's skill and implied representation.<sup>140</sup>

The focus in *Schipper* was on the relationship between the parties and that relationship's similarity to the underlying policy of section 402A. The equal footing basis of *caveat emptor* is also not applicable because the bargaining positions are disproportionate.

Based on the dicta in *Schipper*, the court in *Del Mar Beach Club Owners Association v. Imperial Contracting Co.*<sup>141</sup> held that the court could perceive of no overriding reason why the doctrine should not apply to a builder-developer of condominium units. In doing so, they reversed the lower court's decision dismissing the joint venturers and held them potentially liable under a strict liability in tort theory. The design professional's dismissal was upheld.<sup>142</sup>

There appeared to be three justifications for the imposition of strict liability on the designer in the design-build situation. First, it may be impossible to trace the defective item through the chain of distribution to the source of the defect.<sup>143</sup> Second, what may be a catastrophic loss for an individual can be borne by a corporation which is able to redistribute the loss through its entire business.<sup>144</sup> Third, it would deter occurrence of the most common causes of worker injuries.<sup>145</sup> This focuses on the economic reasons and not technological factors. If it were economical not to have accidents, so the argument goes, then there would be less accidents. Again, this ignores the owner as the prime candidate if the reasons were solely economic

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140. *Id.* at 91, 207 A.2d at 325-26. A California court held a builder-vendor strictly liable in a case involving almost identical facts. *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). *See also* *Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. App. 1978) (law of products liability applies not only to sale of goods, but also to sale of newly constructed homes); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Hawaii 1982) (manufacturer of a prefabricated building which is mass produced and assembled at job site is seller of a "product" for purposes of strict liability); *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971) (leaky gas fitting was within definition of product allowing strict liability action against contractor).

141. 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (1981).

142. *Id.* at 915, 176 Cal. Rptr. at 893-94.

143. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944). *See Note, Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221, 1244 (1973) [hereinafter cited as *Necessity of Fault*].

144. In a sense, architects have already been subjected to a form of strict liability in the construction supervision area. *Miller v. De Witt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) seems to completely ignore the owner as the prime candidate to absorb and redistribute the costs of any injury to the construction of his building. *See Necessity of Fault, supra* note 143.

145. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

deterrence.<sup>146</sup>

The above mentioned cases generally dealt with one defective item in the entire home. The question arises as to how the courts would deal with the same situation if it was not a mass-produced home. In *Abdul Warith v. Arthur G. McKee & Co.*,<sup>147</sup> the plaintiff was injured when a defectively designed skip bridge, a component of a blast furnace, failed. The skip bridge had no protective devices to warn of a descending skip car, and the plaintiff's hand was injured when the plaintiff was pinned between the rail and the wheels of a skip car. Part of the plaintiff's claim was based on section 402A, asserting that McKee, as builder, designer and supervisor of the skip bridge construction, was a "seller" and the skip bridge was a "product."<sup>148</sup>

The court in *Abdul Warith* interpreted *La Rossa, Stuart and City of Mounds View v. Waljarvi*<sup>149</sup> as holding that strict liability will attach when the design professional actually assembles or erects the allegedly defective item.<sup>150</sup> This "justification" led to an extremely broad interpretation of the terms "seller," "product" and the mass-production requirement of section 402A. After dismissing each defense argument, however, the court did not decide whether the bridge was a product and upheld a summary judgment for the defendant on other issues of defective design.<sup>151</sup> The case is confusing in its reasoning and, therefore, its precedential value is limited.

Whenever any new tort concept is set forth, the courts, relying in part on commentators, attempt to extend the reach of the theories behind the tort until the scope of its liability is extended to lengths that are unjustifiably burdensome. The extension of strict liability to design professionals rendering a service has been no exception to this trend.<sup>152</sup> The approach, however, has been through the back door. The question asked is "why not," rather than "why should we," and tends to ignore the realities of any technical profession. Until the uncertainties of design and the individual personalized creative nature of the design function decrease, the application and extension of strict liability is unjustifiable. Liability should be limited to allega-

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146. *Necessity of Fault*, *supra* note 143, at 1246-47.

147. 488 F. Supp. 306 (E.D. Pa. 1980), *aff'd*, 642 F.2d 440 (3d Cir. 1981).

148. *Id.* at 309.

149. 263 N.W.2d 420 (Minn. 1978).

150. 488 F. Supp. at 311, n.3.

151. *Id.* at 309-14.

152. *Cf. Comment, Architect Tort Liability*, 55 CALIF. L. REV. 1361, 1379-91 (1967) (in proposing a complicated subjective test commentator seemingly ignores the historical basis for strict liability in tort).

tions of negligence requiring proof of a breach of a specific standard of care.

#### INSURANCE

During the design and construction processes, many different types of insurance coverages are available to protect the interests of the design professionals, contractors, owners and the general public. A design professional participating in a design-build venture faces additional potential risks and must be aware of the various methods by which potential monetary liabilities can be foreseen and handled through the use of a carefully maintained package of insurance coverage. This is critical because the scope and type of available contractor-oriented coverage is more complicated than the architect's usual professional liability coverage, and such coverage demands a greater understanding of the potential exposures which are present throughout the construction process. The basic coverage available to the design professional and the contractor create overlaps in coverage as well as gaps in which no coverage exists.

Insurance coverage for the design professional and contractor falls into one of three general categories: professional liability, business liability and personal liability.<sup>153</sup> For purposes of this article, only the professional and business liability coverages are important. The most common form of insurance carried by a design professional is the professional liability policy, which defends and indemnifies the insured against malpractice suits arising from either faulty services rendered or the failure to perform services expected of them under the circumstances. Professional liability policies are written on either an "occurrence"<sup>154</sup> or a "claims made"<sup>155</sup> basis, with the overwhelming majority being "claims made" policies.

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153. R. MEHR & E. CAMMACK, *PRINCIPLES OF INSURANCE* 285 (7th ed. 1980) [hereinafter cited as R. MEHR & E. CAMMACK].

154. An "[o]ccurrence is currently defined as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended by the insured." *Id.* at 285.

155. A claim is a demand for money or services made against the insured. Examples include the service of processing a lawsuit, institution of arbitration proceedings, or even a letter from the owner holding the insured responsible for problems on the job coupled with a demand that the insured fix the problem or pay for the damages. See *Williamson & Vollmer Eng., Inc. v. Sequoia Ins. Co.*, 64 Cal. App. 3d 261, 270, 134 Cal. Rptr. 427, 431 (1976) (claim is not synonymous with "accident" or "occurrence"). *But see J.G. Link & Co. v. Continental Cas. Co.*, 470 F.2d 1133, 1137 (9th Cir. 1972), *cert. denied*, 414 U.S. 829 (1973) (notice to insured architect responsible for design and construction of funeral home that floor squeaked was sufficient to constitute a "claim", under an ambiguous insurance contract).



An "occurrence" policy covers events that happen during the policy period. The insurer is obligated to defend and indemnify the insured for any claims that arise from these occurrences at any time in the future as long as the policy is in force at the time of the occurrence.<sup>156</sup> A "claims made" policy obligates an insurer to defend or indemnify the insured only for those claims actually made against the insured during the policy period.<sup>157</sup> Professional liability policies do not lend themselves to "occurrence" coverage since the occurrence of the error and the resulting claims often occur over a long period of time. "Claims made" coverage allows the insurer to analyze and underwrite risks more accurately without concern about unknown claims that may arise years later at inflated costs.<sup>158</sup>

The professional liability policy provides indemnification to the insured for those damages that the professional would be legally obligated to pay and which normally arise out of the performance of professional services as a result of an act, error or

156. R. MEHR & E. CAMMACK, *supra* note 153, at 296.

157. The applicable provisions of a General Accident Insurance Company of America Architects and Engineers Professional Liability Policy read as follows:

I. Coverage: Claims Made Provision.

The Company will pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages by reason of any act, error or omission committed or alleged to have been committed by the Insured, or any person or organization for whom the Insured is legally liable provided always that:

- (a) Claim if first made against the Insured during the policy period by reason of such act, error or omission, and
- (b) The Insured's legal liability arises out of the performance of professional services as described in the Declarations, and
- (c) The Insured has no knowledge of such act, error or omission on the effective date of this Policy.

General Ins. Co. of Am., Architects and Engineers Professional Liability Policy (available from insurer).

Many policies also include a discovery clause, which provides coverage for any future claims if the insured provides written notice to the insurer of circumstances which may give rise to a claim or lawsuit in the future.

158. The courts have upheld "claims made" provisions in *Zarpas v. Morrow*, 215 F. Supp. 887, 888 (D. N.J. 1963) (engineers errors and omissions); *San Pedro Props. v. Sayre & Toso*, 203 Cal. App. 3d 750, 21 Cal. Rptr. 844, 847-48 (1962) (surveyors errors and omissions); *Lehr v. Professional Underwriters*, 296 Mich. 693, 296 N.W. 843, 844 (1941) (chiropractor's errors and omissions); *Rotwein v. General Accident Group*, 103 N.J. Super. 406, 247 A.2d 370, 375 (1968) (architects and engineers errors and omissions); *Reid v. Dayton Title*, 31 Ohio Misc. 275, 278 N.E.2d 384 (1972) (title abstractor's errors and omissions); *Gereboff v. Home Indemnity*, 119 R.I. 814, 383 A.2d 1024, 1026-27 (1978) (accounting errors and omissions). *But see Jones v. Continental Cas. Co.*, 123 N.J. Super. 353, 303 A.2d 91, 92, 94-96 (1973) (struck down "claims made" clause because retroactive coverage applied only if the insured had carried an earlier policy with that company).

omission.<sup>159</sup> This generally encompasses allegations arising out of negligence, although under the specific circumstances of the case, other allegations may be afforded indemnification. An allegation such as breach of contract arising out of a contractual obligation assumed by the architect that enlarges the duties of the architect beyond the common law is excluded from coverage. The same holds true for damages awarded under express warranties, implied warranties, or strict liability in tort because, as was noted previously, they are not legal obligations normally arising out of the delivery of professional services. Other standard exclusions include liability arising from the insured's participation in a partnership or joint venture, claims by a business enterprise in which the insured holds an equity interest, the failure to advise or require or fail to maintain insurance coverage, failure to complete drawings, specifications or schedules on time, failure to act upon shop drawings on time, unless the failure is a result of an act, error or omission, express warranties or guaranties, estimates of probable construction costs being exceeded or any intentional acts of the insured.<sup>160</sup> Additionally, a contractor's portion of a design-build project is a standard exclusion since the duties of a contractor and their resultant liability do not normally arise out of the performance of architects' and engineers' professional services.<sup>161</sup> In a broad sense, this protection offers the design professional coverage for his professional performance, but not for the faithful performance of his obligation.

The design professional and the contractor can also protect themselves from the financial hazards of legal liability arising out of their personal and business activities not specifically arising out of acts, errors or omissions in the design phase. This is accomplished through the use of various forms of business liability insurance, known as general liability coverage. The most common forms of this type of coverage are Owners', Landlords' & Tenants' Liability (OL&T),<sup>162</sup> Manufacturers' and Contractors' Liability (M&C),<sup>163</sup> and Comprehensive General Liability

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159. See *supra* note 157.

160. See *supra* note 157.

161. See *supra* note 157.

162. The OL&T form covers the liability exposure arising out of bodily injury or property damage due to the ownership, maintenance or use of the insured's premises. It also covers off premise damages arising out of the insured's business operation. R. MEHR & E. CAMMACK, *supra* note 153, at 286.

163. The M&C form covers liability to members of the public who may be injured at the insured's place of business, and for liability arising out of the operation of the business anywhere, not only at the insured's premises. It is designed for the manufacturer and the contractor. R. RIEGEL & J. MILLER,

(CGL).<sup>164</sup> The CGL policy provides the broadest coverage and is the most commonly purchased policy. It provides coverage for all hazards included in an OL&T and a M&C policy, plus hazards excluded from both these policies.<sup>165</sup>

The CGL policy is written on an "occurrence" basis and is custom-designed for the insured's needs by the addition or deletion of coverage provided by various smaller policies. These coverages include, but are not limited to, the following: owners', landlords' & tenants' liability (OL&T);<sup>166</sup> manufacturers' and contractors' liability (M&C);<sup>167</sup> elevator liability;<sup>168</sup> products and completed operations liability (P&C);<sup>169</sup> contractual liability;<sup>170</sup> and contingent liability.<sup>171</sup> The CGL policy, which almost always excludes acts normally performed while rendering professional services, can also be written with a broad form endorsement which covers a broad range of potential liability exposures faced by firms, but usually not purchased because all of the added coverages do not usually apply to the professional's

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INSURANCE PRINCIPLES AND PRACTICES 697 (5th ed. 1966) [hereinafter cited as R. RIEGEL & J. MILLER].

164. CGL coverage encompasses all the coverage provided by the OL&T and M&C coverages, and is most appropriate for business whose liability exposures demand automatic treatment for all general liability exposures. The CGL form provides such protection because it covers any newly acquired exposure eligible for coverage under the contract arising after the policy's inception. R. MEHR & E. CAMMACK, *supra* note 153, at 289-90.

165. *Id.* at 286.

166. Exclusions peculiar to the OL&T form are coverage "for bodily injury or damage: (1) arising out of operations on or from unspecified premises owned, rented or controlled by the insured; (2) arising out of structural alterations which involve changing the size of or moving buildings or other structures, new construction, or demolition problems or operations, and; (3) included within the completed operations hazard or the products hazard." *Id.* at 287-88.

167. M&C covers those activities not covered by the OL&T coverage outside the designated premises. But it excludes coverage for independent contractors off the premises. That potential hazard, however, can be specifically covered by endorsement. *Id.* at 288-89.

168. This form "insures liability arising out of the ownership, maintenance, or use of elevators" or related appliances. R. RIEGEL & J. MILLER, *supra* note 163, at 697-98.

169. This form of insurance applies to the property damage claims of third persons caused by the insured's product. The insurance coverage, however, does not cover damage to the insured's product or the costs involved in repairing or replacing a defective product. *Id.* at 698-99.

170. Liabilities which are assumed under certain types of incidental contracts require special contractual liability coverage, i.e., liability assumed under a leasing agreement for equipment. *Id.* at 699-700.

171. This form "covers liability of the insured arising out of operations performed for him by independent contractors, and arising out of omissions or supervisory acts of the insured in connection with such operations." *Id.* at 702.

business.<sup>172</sup>

Design professionals and contractors purchase comprehensive general liability coverage to protect themselves against all claims brought against them during the course of their work, but such coverage extends only to bodily injury or tangible property damage that has developed out of an occurrence and usually excludes professional liability. Some business risks, such as those foreseeable risks that are normal incidents of conducting business, are excluded from CGL coverage. To some extent they can be covered by an additional endorsement or by the purchase of additional insurance such as a builder's risk policy or professional liability.<sup>173</sup>

Not all risks, however, can be covered.<sup>174</sup> There are three major areas that fall within the gap of professional liability, business liability and personal liability coverage: (1) claims arising out of poor workmanship, (2) the "sistership" problem, and (3) claims arising out of identified problems that have not yet manifested themselves as property damage or bodily injury.

#### *Poor Workmanship and Defective Materials*

To trigger coverage under a CGL policy, a claim must be brought which is within the policy's scope of coverage. The standard policy indemnifies the insured for damages arising out of bodily injury (coverage A) and property damage (coverage B). The majority of disputes arising out of claims for poor workmanship and defective materials center on the concept of property damage and the scope of policy exclusions which eliminate coverage for claims for injury to the insured's own products or

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172. Included in the coverages afforded under a broad form endorsement are:

- (1) contractual liability, (2) personal injury and advertising injury liability, (3) premises medical payments, (4) host liquor liability, (5) fire legal liability, (6) broad form property damage liability, (7) incidental medical malpractice liability, (8) nonowned watercraft liability, (9) limited worldwide liability, (10) additional persons insured (employees), liability, (11) extended bodily injury, and (12) automatic coverage—newly acquired organizations.

R. MEHR & E. CAMMACK, *supra* note 153, at 294.

173. Builder's special risk policies provide protection for property in the course of construction and encompass many coverages, such as fire, vandalism, windstorm, hail, explosion, riot, civil commotion and smoke damage. The policy can be written on a named peril or an all-risk basis. Exclusions include losses resulting from wear and tear, freezing, inventory shortage, mechanical or electrical breakdown, radioactive contamination and war. Pierce, *The Contractor's Claims Against Its Insurance Carrier*, in CONSTRUCTION LITIGATION, 457, 471-482 (Practising Law Institute, 1981) [hereinafter cited as Pierce].

174. *Id.* at 457-83.

work.<sup>175</sup>

The concept of property damage has undergone a complex evolution over the years in response to numerous court decisions eroding the exclusion for damages arising out of poor workmanship. The pre-1966 definition of property damage excluded "injury to . . . work completed by or for the [i]nsured . . . out of which the accident arises."<sup>176</sup> The Washington Supreme Court, in *S.L. Rowland Construction Co. v. St. Paul Fire & Marine Insurance Co.*<sup>177</sup> interpreted this exclusion very narrowly when it held that when wooden headers negligently installed too close to a fireplace ignited, resulting in destruction of the entire building, the accident arose only out of the headers and was thus the only completed work subject to the proper damage exclusion.<sup>178</sup> The CGL carrier had to pay the entire loss less only the cost of the headers. Although this was the minority view, it was accepted in several jurisdictions and opened the door for further erosion of the exclusion as it applied to general contractor's work.<sup>179</sup>

The pre-1966 coverage also sought to exclude the cost to repair or replace a subcontractor's defective work and the supplier's defective products. In *Hauenstein Co. v. Saint Paul-Mercury Indemnity Co.*,<sup>180</sup> the Minnesota Supreme Court held that when plaster applied to a building shrank, cracked, and had to be replaced, the CGL carrier was responsible for the entire replacement costs because defective plaster constituted property damage which diminished the value of the building.<sup>181</sup> Although this case violated the clear underlying intent to exclude the cost of repairing or replacing the damaged product or work, it too was soon followed in many jurisdictions.<sup>182</sup>

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175. Bowers, *General Liability Insurance Coverage for Defective Materials and Workmanship*, in CONSTRUCTION LITIGATION 177 (N.Y. L.J. 1979) [hereinafter cited as Bowers].

176. *Id.* at 178.

177. 72 Wash. 2d 682, 434 P.2d 725 (1967).

178. *Id.* at 689, 434 P.2d at 729.

179. *E.g.*, *L.D. Schreiber Cheese Co. v. Standard Milk Co.*, 457 F.2d 962 (8th Cir. 1972) (insurer had to pay costs to test entire stock of cheese when one batch was bad); *Pittsburgh Bridge & Iron Works v. Liberty Mut. Ins. Co.*, 444 F.2d 1286 (3d Cir. 1971) (carrier had to pick up costs and indemnify the insured for entire failed tramway excluding only costs to replace defective saddles); *Owens Pac. Marine, Inc. v. Insurance Co. of North Am.*, 12 Cal. App. 3d 661, 90 Cal. Rptr. 826 (1970) (cost of boat destroyed by defective heater covered excluding only cost of heater).

180. 242 Minn. 354, 65 N.W.2d 122 (1954).

181. *Id.* at 358, 65 N.W.2d at 125.

182. *See, e.g.*, *Bowman Steel Corp. v. Lumbermens Mut. Cas. Co.*, 364 F.2d 246 (3d Cir. 1966) (diminution in market value of building covered when asbestos felt which was bonded onto metal sheets attached to building proved defective); *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co. of N.Y.*,

The *Rowland* general contractor "loophole" and the *Hauenstein* supplier "loophole" resulted in changes to the basic policy in 1966 which sought to narrowly define the terms that formed the basis for the loopholes. Whereas CGL carriers continued to deny coverage for costs to repair or replace defective work or material when the entire project was built by the insured,<sup>183</sup> the cases were still split as to the suppliers and subcontractors.<sup>184</sup> The 1966 revision did tend to weaken the argument that diminution in value, lost profits and other nonphysical economic damages were covered under the CGL policy.<sup>185</sup> The new line of cases allowed recovery for only physical damages and rejected claims when economic damages were sought.<sup>186</sup>

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281 F.2d 538 (3d Cir. 1960) (insurer had to pay damages for expenses to repair venetian blinds when paint on blinds proved defective); *Geddes & Smith, Inc. v. Saint Paul-Mercury Indemnity Co.*, 51 Cal. 2d 558, 334 P.2d 881 (1959) (insurer liable for damages to home caused by defective aluminum doors); *Dakota Block Co. v. Western Cas. & Surety*, 81 S.D. 213, 132 N.W.2d 826 (1965) (diminution of building's value due to defective blocks used for walls covered).

183. See, e.g., *Hartford Accident & Indemnity Co. v. Case Found. Co.*, 10 Ill. App. 3d 115, 294 N.E.2d 7 (1973) (no obligation to defend for claims of loss of investments, anticipated profits and financial interests due to poor workmanship); *Haugan v. Home Indemnity Co.*, 86 S.D. 406, 197 N.W.2d 18 (1972) (coverage denied to design-builder for claims for damages due to poor workmanship).

184. *Biebel Bros., Inc. v. United States Fidelity & Guar. Co.*, 522 F.2d 1207 (8th Cir. 1975) (coverage denied for damages due to defective roofing materials); *Aetna Ins. Co. v. Pete Wilson Roofing & Heating, Co.*, 289 Ala. 719, 272 So. 2d 232 (1972) (coverage denied for defective roof that was replaced); *Hartford Accident & Indemnity Co. v. Olson Bros., Inc.*, 187 Neb. 179, 188 N.W.2d 699 (1971) (loss due to warping of wood fiberboard roof not recovered). *But see* *Western Cas. & Surety Co. v. Polar Panel*, 457 F.2d 957 (8th Cir. 1972) (lesser of cost of replacement of unaesthetic insulating panels or diminution of building recoverable); *United States Fidelity & Guar. Co. v. American Ins. Co.*, 169 Ind. App. 1, 345 N.E.2d 267 (1976) (substantive losses due to spalling of brick considered property damage under policy); *Ohio Cas. Ins. Co. v. Terrace Enters.*, 260 N.W.2d 450 (Minn. 1977) (settling of building considered accident not excluded by policy).

185. See *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co. of N.Y.*, 281 F.2d 538 (3d Cir. 1960) (flaking and peeling paint which caused blinds to rust and deteriorate was property damage); *Hauenstein v. Saint Paul-Mercury Indemnity Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954) (defective plaster lowered market value of hospital, and therefore caused property damage). See also *Goodyear Rubber & Supply Co. v. Great Am. Ins.*, 471 F.2d 1343 (9th Cir. 1973) (insurer liable for cost of damage to ship far in excess of cost of removing and replacing bad gaskets); *Bowman Steel Corp. v. Lumbermens Mutual Cas. Co.*, 364 F.2d 246 (3d Cir. 1966) (diminution in value to building due to defective steel-clad asbestos covered); *Arcos Corp. v. Am. Mutual Liability Ins. Co.*, 350 F. Supp. 380 (E.D. Pa. 1972), *aff'd mem.*, 485 F.2d 678 (3d Cir. 1973) (damages due to failed weld wire was property damage under policy); *Yakima Cement Prods. v. Great Am. Ins. Co.*, 22 Wash. App. 536, 590 P.2d 371 (1979) (property damage to roof and consequential damages due to delay caused by defective precast concrete panels covered).

186. See, e.g., *Dreis & Krump Mfg. Co. v. Phoenix Ins. Co.*, 548 F.2d 681 (7th Cir. 1977) (loss of use of special structure not considered tangible prop-

Prompted by the judicial interpretations of the 1966 revision, the standard form policy was revised again in 1973. The former definition of property damage was "injury or destruction of tangible property."<sup>187</sup> Since not all courts applied the new definition only to claims of *physical* injury, the definition of covered losses was again revised in 1973 to its present form which reads as follows:

*Physical injury* to or destruction of *tangible property* which occurs during the policy period including the loss of use thereof at any time resulting therefrom, or (ii) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is *caused* during the policy period.<sup>188</sup>

Based on the new limitation, *Wyoming Sawmills, Inc. v. Transportation Insurance Co.*<sup>189</sup> held that a claim for labor cost spent replacing studs in a building was properly denied by the carrier because it did not result from property damage as defined in the 1973 revision. The court accepted the argument that property damage is damage occasioned by the defective studs to other property, such as the balance of the building, and that labor expenses incurred in replacing the studs were covered by the policy.<sup>190</sup>

The 1973 definition of property damage, when coupled with the "business risk" exclusion<sup>191</sup> the "insured's product" exclu-

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erty damage); *Hamilton Die Cast v. United States Fidelity & Guar.* 508 F.2d 417 (7th Cir. 1975) (withdrawal of tennis rackets due to defective frames not covered); *Stone & Webster Eng'g Corp. v. American Motorist Ins. Co.*, 458 F. Supp. 792 (E.D. Va. 1978), *aff'd mem.*, 628 F.2d 1351 (4th Cir. 1980) (replacement of defective supports not property damage); *Hartford Accident & Indemnity Co. v. Case Found. Co.*, 10 Ill. App. 3d 115, 294 N.E.2d 7 (1963) (investments, anticipated profits and financial interests deemed not tangible property damage).

187. See Bowers, *supra* note 175, at 181.

188. Bowers, *supra* note 175, at 185.

189. 282 Or. 401, 578 P.2d 1253 (1978).

190. *Id.* at 407, 578 P.2d at 1257.

191. This exclusion reads as follows:

. . . (m) to loss of use of tangible property which has not been physically injured or destroyed resulting from

(1) a delay in or lack of performance by or on behalf of the named insured or any contract or agreement, or

(2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured. . . .

sion<sup>192</sup> and the "work performed" exclusion<sup>193</sup> effectively bars claims for poor workmanship and defective materials.<sup>194</sup> In other words, if a contractor builds a wall that falls down, the CGL coverage would pay for the damage the wall caused, but not for the replacement of the wall itself. Although there are some exceptions,<sup>195</sup> a builder's risk policy will also usually exclude coverage for losses caused by defective materials or workmanship, as well as those resulting from errors or omissions in design.<sup>196</sup>

### *The "Sistership" Problem*

The "sistership" situation arises when a client wants a number of buildings built, all using the same design, for example, McDonald's restaurants. The so-called "sistership" exclusion,<sup>197</sup> operates to force the insured to shoulder the cost of

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Pierce, *supra* note 173, at 465-66. This exclusion seeks to exclude damage resulting from failure to perform because of design errors; it seeks not to guarantee performance of the insured's contracts and effectively "denies coverage for loss of use of tangible property that has not been physically injured or destroyed unless . . . [i]t results from sudden and accidental physical injury . . . . See *supra* at 465, n.32.

192. The "insured's product" exclusion states: ". . . (n) to property damage to the named insured's products arising out of such products or any part of such product." *Id.* at 467.

193. The "work performed" exclusion states: ". . . (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." *Id.*

194. See, e.g., Biebel Bros., Inc. v. United States Fidelity and Guar., 522 F.2d 1207 (8th Cir. 1975) (cost of defective roofing material not covered); Carboline Co. v. Home Indemnity Co., 522 F.2d 363 (7th Cir. 1975) (warranty for failed maintenance not covered); Hamilton Die Cast v. United States Fidelity & Guar., 508 F.2d 417 (7th Cir. 1975) (defective tennis frames not covered); Pittsburgh Bridge & Iron Works v. Liberty Mut. Ins. Co., 444 F.2d 1286 (3d Cir. 1971) (defective saddle system for tramway not covered); Cotton States Ins. Co. v. Diamond Hous. Mobile Homes, 430 F. Supp. 503 (N.D. Ala. 1977) (defective furnace in mobile home not covered). See also Annot., 91 A.L.R.3d 921 (1979).

195. See, e.g., Teeples v. Tolson, 207 F. Supp. 212 (D. Or. 1962) (shoring up of joints which would have collapsed due to defects in design and engineering are covered). But see Southern Cal. Edison Co. v. Harbor Ins. Co., 83 Cal. App. 3d 747, 148 Cal. Rptr. 106 (1978) ("mudjacking" operations to prevent damage due to design defect not recoverable, damage to superstructure would have been).

196. See generally Pierce, *supra* note 173, at 457-83; Hart, *The Comprehensive General Liability Insurer—Claims By and Against*, in CONSTRUCTION CONTRACT CLAIMS 395-436 (Am. Bar Ass'n 1979); Bowers, *supra* note 175, at 177-92.

197. The "sistership" exclusion states:

. . . (p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the name insured or of any property or which such products or work form a part, if such products, work or prop-



repair in situations where there is an apprehension of danger in one building because of a similar actual failure in another. For example, if a wall in one building were to collapse due to improper erection, and the same procedures were used to erect that wall in the other identical buildings, the cost of remedial repair to the same wall in the other building would not be covered under the CGL policy.<sup>198</sup>

### *Identified Problems That Have Not Yet Caused Damage*

Similar to the "sistership" problem is the situation where a defect, while detected in a building, has not yet resulted in collapse or failure. The basis for the denial of coverage for the remedial repairs is derived from the definition of "occurrence" found in the CGL policy.<sup>199</sup> Generally, there is no "occurrence" until either bodily injury or property damage is suffered.<sup>200</sup> As a result, the contractor is in a quandary when he perceives a problem as to what action to take before disaster strikes. Whatever action he takes, he will probably be precluded from asserting a successful claim. As was noted previously, pure economic loss is now insufficient to constitute property damage, and the contractor will not have any coverage until the wall collapses or causes damage to tangible property.<sup>201</sup> If he waits and does nothing, coverage will be denied because the damage was expected by the insured because of his previous knowledge of the defect. The contractor is forced to remedy the situation immediately or face denial of coverage for all damages resulting from the subsequent collapse.

Although the three gaps in the insurance coverage carried by a well-advised design-build construction contractor exposes the professional to unexpected potential financial loss, steps have been taken by the insurance industry to fill some of the gaps. One such policy, issued by the Evanston Insurance Company,<sup>202</sup> will cover the insured for losses he will be legally obligated to pay as a result of defective work, as long as he has no knowledge of the defect prior to the expiration of the perform-

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erty are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

Pierce, *supra* note 173, at 469.

198. See, e.g., *Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450 (Minn. 1977); *Gulf Ins. Co. v. Parker Prods.*, 498 S.W.2d 676 (Tex. 1973).

199. See *supra* note 154.

200. See *Deodato v. Hartford Ins.*, 143 N.J. Super. 396, 363 A.2d 361 (1976).

201. See *supra* note 188 and accompanying text.

202. The policy, which is called Design Professionals and Constructors Errors & Omissions Liability, covers loss from faulty workmanship as well as acts, errors or omissions in design professional services and construction management (policy available from insurer).

ance bond or warranties issued by or on behalf of the insured. Although this policy will not cover problems occurring during construction or during the performance bond or warranty period, it will cover those problems that become manifest after that time. This affords some measure of protection for the owner and the professional where no such coverage previously existed.

#### OTHER CONSIDERATIONS

Equally important to the design-builder are other areas in which he does not usually face legal exposure while functioning as an architect, but to which he may be exposed as a design-builder. These areas include liability arising from the responsibility for safety precautions on the job site, the applicability of the provisions of the Uniform Commercial Code and the effect of licensing statutes applicable to contractors.

#### *Site Safety*

The responsibility for injuries to workers or third parties at the job site derives from either a contractual duty imposed on the parties, or through state or local statutes designed to protect workers from unsafe construction practices.<sup>203</sup> The obligation to protect workmen's safety can arise from the architect's duty to prepare plans and specifications that do not create a possibility of danger to the workers. In *Walters v. Kellam & Foley*,<sup>204</sup> the plaintiff fell thirty feet to a concrete floor and sustained serious injuries while trying to retrieve a tool. The plaintiff offered testimony to show negligence on the part of the architect and engineer in allowing an alteration of the plans to relocate a heating unit filter in a vertical instead of a horizontal position. The plaintiff alleged that if the change had not been made, his tool would not have fallen and he would not have been injured. Although the court ruled in favor of the architect, it did state that evidence might have been offered to prove that the alteration represented negligent conduct that proximately caused the injury.<sup>205</sup>

Contractual duties also can serve to define the duty to supervise construction. "General Conditions of the Contract for Construction", AIA Document A201, states that the architect is not responsible for safety precautions in connection with the

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203. See *infra* notes 212-14 and accompanying text.

204. 172 Ind. App. 207, 360 N.E.2d 199 (1977).

205. *Id.* at 211-12, 360 N.E.2d at 206-07.

contractor's work.<sup>206</sup> Absent some form of contractual expansion of those duties,<sup>207</sup> knowledge of the dangerous condition that occasioned the accident<sup>208</sup> or the assumption of the supervision of safety at the job site,<sup>209</sup> an architect acting in his general capacity to provide site observation<sup>210</sup> would not be responsible for injuries to third parties arising from the contractor's breach of accepted safety practices.<sup>211</sup> A design-builder, however, would not have the protection of the site-observation standard and will fall within the various statutory schemes devised by states to protect workmen's safety. Examples of these statutes include the Illinois Structural Work Act<sup>212</sup> and the Wisconsin Safe Place Statute.<sup>213</sup> Both statutes equate the right of control of the work site with the duty to protect the workers from unsafe construction practices.<sup>214</sup>

Another area of potential exposure involving site safety is the standards of the Occupational Safety and Health Act of 1970

206. The document provides that

[t]he architect will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, and he will not be responsible for the contractor's failure to carry out the work in accordance with the contract documents. . . .

AIA Document B141, *supra* note 38, at § 2.2.4.

207. *See, e.g.*, *Caldwell v. Bechtel*, 631 F.2d 989 (D.C. Cir. 1980) (engineering firm contracted to perform "safety engineering services"); *Duncan v. Pennington County Hous. Auth.*, 283 N.W.2d 546 (S.D. 1979) (architect's contract stated that they would obtain compliance with OSHA standards for safety); *Loyland v. Stone & Webster Eng'g Corp.*, 9 Wash. App. 682, 514 P.2d 184 (1973) (architect/engineer had authority to prescribe safety regulations).

208. *See, e.g.*, *Erhart v. Hummonds*, 232 Ark. 133, 334 S.W.2d 869 (1960) (court equated right to stop work if dangerous condition arises).

209. *See, e.g.*, *Clyde Williams & Assoc. v. Boatman*, 176 Ind. App. 430, 375 N.E.2d 1138 (1978) (if architect assumes supervision of safety at site relationship would exist creating duty to supervise project).

210. *See generally* *Lurrie & Stein, Injured Workman: Loss Allocation Among the Direct Participants in the Construction Process*, 23 ST. LOUIS U.L.J. 292 (1979).

211. *See, e.g.*, *Vorndran v. Wright*, 367 So. 2d 1070 (Fla. Dist. Ct. App. 1979) (Florida statute does not impose duty on the architect to determine if safety precautions were complied with); *Day v. National U.S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961) (architects had no power or control over the contractor's method of doing the work); *Brown v. Gamble Constr. Co.*, 537 S.W.2d 685 (Mo. Ct. App. 1976) (architect not responsible for safety precautions of roofer applying glue to roof); *Luterbach v. Mochon, Schutte, Hackworthy, Juerison, Inc.*, 84 Wis. 2d 1, 267 N.W.2d 13 (1978) (no common-law duty which requires supervising architects to ensure construction site safety).

212. ILL. REV. STAT. ch. 48, §§ 60-69 (1981).

213. WIS. STAT. ANN. § 101.01(1)(b)-(d) (1972).

214. In Illinois, § 69 of the Act provides that "[a]ny owner, contractor, sub-contractor, foreman or other person having charge of the [activities

(OSHA)<sup>215</sup> as *per se* evidence of negligence which resulted in injury at the job site. Violation of OSHA standards does not, in and of itself, give rise to a private cause of action for damages.<sup>216</sup> An architect that does not have a contractual duty to the owner to impose safety procedures at the construction site or to supervise the means, methods or techniques of the contractor would not be liable for OSHA violations.<sup>217</sup> This same protection, however, does not hold true for architects functioning as construction managers.<sup>218</sup> The courts are still split as to whether violation of OSHA regulations are admissible as evidence of negligence under state laws.<sup>219</sup>

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covered by the Act] shall comply with all the terms thereof. . . ." ILL. REV. STAT. ch. 48, § 69 (1981).

Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967), was the first case to equate the architect's right to stop work with control of the construction site such that the liability would attach under the Act. The same right to stop work was the determining factor in holding the design professional liable in both Emberton v. State Farm Ins. Co., 71 Ill. 2d 111, 373 N.E.2d 1348 (1978) and Voss v. Kingdom & Naven, Inc., 60 Ill. 2d 520, 328 N.E.2d 297 (1975). When the contract was modified to eliminate the right to stop work, however, the courts in McGovern v. Standish, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976); Meek v. Spinney, Coady & Parker, 50 Ill. App. 3d 919, 365 N.E.2d 1378 (1977), held the architect or engineer not liable under the Act; and Getz v. Del E. Webb Corp., 38 Ill. App. 3d 880, 349 N.E.2d 682 (1976). *See generally* Mills, *The Design Professional—An Unlikely Defendant Under the Structural Work Act*, 23 ST. LOUIS U.L.J. 317 (1979).

In Wisconsin, § 101.11(1) of the statute, in conjunction with § 101.01(2)(c), generally states that a person only owes a duty under the statute if he has a right of supervision and control of the project. WIS. STAT. ANN. §§ 101.01(2)(c), 101.11(1) (1972). An architect making periodic site visits was not held liable under the Act in Hortman v. Becker Constr. Co., Inc., 92 Wis. 2d 210, 284 N.W.2d 621 (1979) and Luterbach v. Mochon, Schutte, Hackworthy & Juerisson, Inc., 84 Wis. 2d 1, 267 N.W.2d 13 (1978).

215. Occupational Safety & Health Act § 2, 29 U.S.C. § 651 et. seq. (1976 & Supp. 1981).

216. *See* Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974) (OSHA does not create a private civil remedy against employer); Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974) (violation did not create private cause of action but was evidence of negligence); Otto v. Specialties, Inc., 386 F. Supp. 1240 (N.D. Miss. 1974) (violation of OSHA standards is not evidence of negligence); Knight v. Burns, Kirkley & Williams Constr. Co., 331 So. 2d 651 (Ala. 1976) (complaint of OSHA violation sufficient to put contractor on notice).

217. Secretary of Labor v. Skidmore, Owings & Merrill, 5 O.S.H. Cas. 1763 (Aug. 26, 1977) (respondent's work was outside scope of federal regulation).

218. *See, e.g.,* Secretary of Labor v. Bechtel Power Corp., 4 O.S.H. Cas. 1005 (Mar. 11, 1976) *aff'd per curiam* 548 F.2d 248 (8th Cir. 1977); Secretary of Labor v. Bertrand Goldberg Assoc., 4 O.S.H. Cas. 1587 (Aug. 12, 1976). Both cases held that although as construction managers they performed no actual physical construction, each retained substantial supervision of the progress of the work and the safety programs at the worksite. During construction, their functions were management functions similar to those of a general contractor.

219. *See* Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974) (evidence of violation of OSHA standards admissible to the extent permit-

### *Uniform Commercial Code*

The provisions of the Uniform Commercial Code (UCC) are not usually applicable to one rendering professional services.<sup>220</sup> The possibility exists, however, that components of the building purchased from equipment suppliers will prove defective and will require some form of compensation from the supplier. The failure to follow the procedures contained in the UCC cost one contractor 1.5 million dollars. In *K & M Joint Venture v. Smith International, Inc.*,<sup>221</sup> the plaintiffs were awarded a sewer project contract which required the purchase of a tunnel boring machine (TBM). K & M contracted the Caldwell Division of Smith International, which represented that the machine was new and fully warranted but had some used accessories. An oral contract was made on the basis of these representations, but was followed up with a quotation that purported to sell the TBM "as is". The machinery was delivered to the site and put into operation. Following repeated breakdowns, the TBM was removed from operation, and plans were requested and received from Caldwell so that repairs could be made. The plans revealed numerous discrepancies between the drawings and the actual machine.

The lower court held for K & M, finding that Caldwell had breached the implied warranty of merchantability and that sufficient notice had been given of the breach.<sup>222</sup> The court held that the UCC does not apply to construction contracts and that K & M should not be held to the higher standard of care of a

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ted by rules of evidence); *Duncan v. Pennington County Hous. Auth.*, 283 N.W.2d 546 (S.D. 1979) (not error to allow OSHA regulations to be introduced as evidence on issue of standard of care architects were obliged to meet); *Knight v. Burns, Kirkley & Williams*, 331 So. 2d 651 (Ala. 1976) (under proper circumstances, OSHA regulations, if properly introduced, may be admissible for jury to consider in determining standard of care); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976) (violation of safety standards may have bearing on conduct of a reasonable man under the circumstances). *But see Otto v. Specialties, Inc.*, 386 F. Supp. 1240 (N.D. Miss. 1974) (under Mississippi law, violations could not be introduced as evidence).

220. *See, e.g., Semler v. Knowling*, 325 N.W.2d 395 (Iowa 1982), in which the court stated:

The extension of the implied warranty doctrine does not catapult contracts for the installation of sewers into the ambit of Article 2 of the Uniform Commercial Code (UCC). This clearly was not a contract for the sale of goods. It was a mixed contract for goods . . . and services . . . . We find this to be predominantly a contract for services and therefore not within the ambit of Article 2.

325 N.W.2d at 398-99. Article 2 deals with "transaction in goods", not services. UCC §§ 2-102, 2-105, & 2-719(2) (1981) (scope, definition of goods, contract modification).

221. 669 F.2d 1106 (6th Cir. 1982).

222. *Id.* at 1111.

merchant dealing with another merchant. Instead, it should be held to the lower standard required of an ordinary consumer.<sup>223</sup>

The court of appeals disagreed and held the contractor to the higher merchant standard that specifically provided that if a buyer intends to claim a breach of warranty, it must give prompt notice of its intentions.<sup>224</sup> In this case, K & M gave notice to Caldwell only of problems with the equipment and that it intended to fix the machine. It at no time stated that a breach of warranty was claimed. Taken as a whole, K & M's actions were insufficient to constitute timely or sufficient notice that a breach of warranty was claimed, therefore K & M's claim was denied.<sup>225</sup>

An architect rarely deals with purchase orders, acknowledgments, or sales contracts for equipment. Although the lower court held that K & M should be held to the "ordinary consumer" requirement as to notice, the appeals court held that, given the experience of the joint venturers, they should be held to the stricter standard of a merchant as defined in UCC § 2-104 and the official comments.<sup>226</sup> The implication to the design-builder is contained in the portion of the definition of "merchant" that gives merchant status to one who, by his occupation, holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. A court may easily equate the design-builder's design and specification of the building systems, as well as the construction of the building, with what the K & M court considered to be the expertise and superior knowledge of the tunneling, joint-venturers. Thus, the design-builder must be very careful in how he deals with the suppliers of the components of the building he contracted to build, lest many of his avenues of possible remedies for malfunctioning equipment

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223. *Id.* at 1115.

224. UCC § 2-607(3)(a) reads: "(3) Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy."

225. K & M Joint Venture, 669 F.2d at 1114-15. *But see* Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262 (D. Me. 1977) (contract predominately for rendition of services although it involves furnishing of equipment, is not "transaction in goods" and is not governed by Article 2 of the UCC); Semler v. Knowling, 325 N.W.2d 395 (Iowa 1982) (contract primarily for services not within ambit of Article 2).

226. 669 F.2d 1115. UCC § 2-104(1) provides in part:

[m]erchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

be shut off.<sup>227</sup>

### Licensing

An architect who performs professional services and intentionally holds himself out as offering the services of a licensed professional is well aware of the difficulty in obtaining that license.<sup>228</sup> Without the license, the contracts entered into are void and unenforceable as a matter of public policy because the legislative intent behind the licensing requirement is for the protection of the public as opposed to revenue producing.<sup>229</sup> The same obligation to protect the public forms the basis for contractor licensing requirements. A contractor who fails to obtain the proper license may very well find himself barred from any recovery under the contract, *quantum meruit*, or equitable remedies.<sup>230</sup>

If a contractor enters into a design-build contract and engages a properly licensed person to perform those architectural functions for which a license is required, he will not be precluded from recovery under the contract.<sup>231</sup> By implication, if the architect provided contracting services, he would either

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227. For other examples where Article 2 was applied to what we would consider to be service transactions, see *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974) (sale and installation of bowling alley equipment); *Aluminum Co. of Am. v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. 1971) (engineering and installation of electrified floor); *Port City Constr. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (1972) (sale of concrete and finishing labor); *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971) (defective gas fitting supplied in the course of general remodeling contract).

228. See generally ILL. REV. STAT. ch. 111, § 91, par. 1201-36 (1981). In Illinois a single four day comprehensive examination is required after the candidate meets specific educational and apprenticeship requirements. With a five year professional degree or with a six year master's degree, three years of apprenticeship under the direction of a licensed architect or engineer are required.

229. See *Wineman v. Blueprint 100, Inc.*, 75 Misc. 2d 665, 348 N.Y.S.2d 721 (1973) (professional holding himself out as "architectural consultant" was precluded from recovery under contract and required to return retainer because he did not have license).

230. See *Architectural Graphics and Constr. Serv., Inc. v. Pitman*, 417 So. 2d 574 (Ala. 1982) (an unlicensed contractor's contract was null and void as a matter of public policy); *Brady v. Fulghum*, 302 S.E.2d 4 (N.C. App. 1983) (lack of license may preclude suit). But see *Kirkendall v. Heckinger*, 403 Mich. 371, 269 N.W.2d 184 (1978) (allowing some equitable relief).

231. See, e.g., *West Baton Rouge Parish Sch. Bd. v. T.R. Ray, Inc.*, 361 So. 2d 300 (La. App. 1978), *rev'd*, 367 So. 2d 332 (La. 1979) (recovery denied when contract was to "perform" architectural services); *Vereinigte Osterreichische v. Modular Bldg. & Dev. Corp.*, 64 Misc. 2d 1050, 316 N.Y.S.2d 812 (1970), *modified*, 37 A.D.2d 525, 322 N.Y.S.2d 976 (1971) (plans and specifications were furnished by licensed professional); *Seaview Hospital, Inc. v. Medicenters of Am., Inc.*, 570 S.W.2d 35 (Tex. Civ. App. 1978) (contract that stated that firm would "furnish" architectural services different than "performing" architectural services).

have to obtain the license himself or obtain the services of one who does.<sup>232</sup>

### CONCLUSION

A modern-day architect has been forced by economic realities and judicial decisions to expand the scope and range of his services. Although most of this expansion has been in the areas of supervision and construction management, the economic lure of design-build has been difficult to ignore. In a design-build arrangement, the architect would have single-point responsibility that makes a single entity responsible to the owner not only for design and construction quality, but also for adherence to cost and time parameters. This helps delineate the liabilities, allowing a design-builder to foresee and plan his various insurance coverages. The major benefit, however, may be under the worker's compensation laws. In a design-build setting, most employees on the construction site are, in one way or another, under the control of the design-build contractor. Most first-party injuries will be compensated under a worker's compensation program, thus relieving the architect of the constant threat of suits by workers over whom he had no control in the normal situation. He may be involved in other types of cases, but those cases will more accurately reflect his role in the project.<sup>233</sup>

The impact of the design-build contract focuses on key variations in the potential liability arising out of the contractual relationship between the contractor, architect, and the owner: (1) the implied warranty given by the owner regarding the sufficiency of the plans and specifications would appear to have little, if any, impact in imposing liability under a design-build concept; (2) since the contractor is also the architect, however, any ambiguities in the plans and specifications raised by subcontractors will be strictly construed against him; (3) an owner cannot be deemed to have waived any patent or latent defects in construction by the inspection that would normally be conducted by the architect as his agent; (4) the design-build contractor must be fully aware of the licensing requirements in his jurisdiction lest he waive some or all rights to payment under the contract; (5) gaps in insurance coverage expose the design-build contractors to potential liability for which they might have

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232. For an overview of the licensing problem, see generally Comment, *Design-Build Contracts in Virginia*, 14 U. RICH. L. REV. 791 (1980).

233. See generally Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221 (1973) (design professionals responsibility for methods used by contractors which result in injury to contractor's employee).



been able to either secure coverage or shift liability in the normal contractual relationship between architect, owner, and contractor; and (6) expanded scope of duties toward the contracting end bring the design-builder within the ambit of statutory schemes to protect third parties either through statutes to protect their safety or requirements embodied in the laws concerning commercial transactions.

Although the risks are greater, the lure of potential profit may be irresistible for architects looking for alternative, but complimentary, sources of income. The design-build model gives incentive to the architect to design and build quality structures for fair prices. He would be building as economically as possible without sacrificing quality because his fees would no longer be tied into a percentage of the construction costs. The alternative of providing solely architectural services may leave him little chance for financial success because opportunities are limited. An understanding of the financial and legal pitfalls will allow the design-build architect to maintain a successful practice while avoiding the disaster which can otherwise befall the owner, the general public, and the architect himself.