UIC Law Review

Volume 10 | Issue 2 Article 5

Winter 1977

# Malpractice: The Design Professional's Dilemma, 10 J. Marshall J. of Prac. & Proc. 287 (1977)

Todd L. Herbst

# MALPRACTICE: THE DESIGN PROFESSIONAL'S DILEMMA

After years of relative legal obscurity, the professional practitioner has recently become the subject of increased legislative and judicial attention. Once a rare target of lawsuits, the professional finds himself an increasingly, if disquietingly, popular source of litigation. With the costs of judgments and settlements escalating, and malpractice insurance becoming prohibitively expensive—when available, many professionals have become acutely aware of the need for legislative and judicial protection. While the legal profession has always kept abreast of its own malpractice situation and has, especially of late, devoted disproportionate attention to the problems of medical practitioners, the position of the design professional[1] has received relatively little attention. When one considers that without the product this professional provides, none would be able to comfortably practice their skills, the design professional's situation acquires considerable additional significance.

The malpractice problem can be divided into and is predominated by two basic issues: first, what are the grounds for bringing a malpractice action against a design professional and second, when does the action accrue and how long may a potential plaintiff wait before pursuing his available remedies? During the past ten years, Illinois case law has developed significantly—along with the latent awareness of the problems associated with professional malpractice. It is the purpose of this article to explore the development of the design professional's malpractice liability and to suggest a possible method of approaching some of the more serious problems which may arise in this area of the law.

## CAUSES OF ACTION

### *Who is an "Architect"?*

In Illinois, architects are licensed and regulated under chapter 10½ of the Illinois Revised Statutes.[2] Section 1 requires that any person practicing "architecture" obtain a certificate of regis-

1. Within the context of this article, the term "design professional" is intended to designate any practitioner who renders services of actual design and planning, or who acts as a consultant to or an analyst for one who does, and who is licensed to do so by the state. An architect, engineer and surveyor would be included under this definition whereas a draftsman, specification writer, laborer or the like would not.

2. Commonly known as "The Illinois Architectural Act," ILL. REV. STAT. ch. 10½, § 19 (1975).

tration from the state[3] while section two defines the generic term.[4] The Act provides that an architect shall be certified only after he has met the educational requirements established by the Department of Registration and Education[5] and has passed an examination designed "to ascertain the qualifications and fitness of applicants for certificates of registration as registered architects."[6]

In discussing an earlier similar statute, the Illinois Supreme Court in the case of *People v. Rodgers Co.*,[7] explained the rationale behind the licensing requirement, *i.e.*, "[t]he real purpose of the statute is the protection of the public against incompetent architects, from whose services damage might result to the public by reason of dangerous and improperly constructed buildings and by badly ventilated and poorly lighted buildings."[8] In compliance with this expressed intent of the Illinois legislature, the courts have consistently held that "architects must exercise reasonable care in the performance of their duties and may be liable to persons who may foreseeably be injured by their failure to exercise such care."[9] The skill and ability an architect is bound to exercise is that which is ordinarily required of architects. Any failure by an architect to so perform establishes a prima facie case of negligence and can lead to a malpractice action. Under section 13, an architect can lose his registration as a result of his failure to exercise such reasonable care.[10]

There has never been any question that an architect in a malpractice action can be found liable for negligence in design or specification.[11] Problems in establishing liability may arise,

---

3. ILL. REV. STAT. ch. 10½, § 1 (1975).
4. ILL. REV. STAT. ch. 10½, § 2 (1975):
Architect means 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 services 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 addition to or alteration thereof.
5. ILL. REV. STAT. ch. 10½, § 8 (1975).
6. ILL. REV. STAT. ch. 10½, § 4a(1) (1975).
7. 277 Ill. 151, 115 N.E. 146 (1917).
8. *Id.* at 155, 115 N.E. at 148.
9. *See, e.g.*, Miller v. DeWitt, 37 Ill. 2d 273, 283, 226 N.E.2d 630, 637 (1967).
10. ILL. REV. STAT. ch. 10½, § 13 (1975):
The Department of Registration and Education may refuse to renew, may suspend or may revoke any certificate of registration for any one or any combination of the following causes:
(a) gross incompetency;
(b) recklessness in the design, planning or supervision of construction of buildings or their appurtenances.
11. *See* Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); Voss v. Kingdon & Naven, Inc., 60 Ill. 2d 520, 328 N.E.2d 297 (1975). *See*

however, when a cause of action is brought against an architect based upon a theory of negligent supervision. Because of the peculiar problems inherent in construction accidents, Illinois has adopted a Structural Work Act[12] which specifically addresses this question.

### *Structural Work Act*

The Illinois Structural Work Act was designed to provide a comprehensive guide as regards the way structural work is to be designed, erected and supervised,[13] as well as the manner in which litigation arising in connection therewith is to be conducted.[14] Under the Act it is the responsibility of the person "having charge of" the work to insure compliance with the statutory provisions.[15] Willful failure to do so subjects that party to criminal liability.[16]

What is meant by the person "having charge of" the work has long been a troublesome question since the Act itself does not define the term. The case of *Miller v. DeWitt*[17] has probably done the most to interpret the phrase and in so doing, precipitated a partial revision of the standard form American Institute of Architects Owner-Architect Agreement.[18]

---

*also* Comment, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221, 1235 (1973): "Thus, while attempts have been made to recover from a design professional without the need to prove negligence, the general rule appears to remain that where the function is design, the plaintiff will have to prove negligence."

12. ILL. REV. STAT. ch. 48, §§ 60-69 (1975).

13. ILL. REV. STAT. ch. 48, § 60 (1975).

14. *Id.* at § 69.

15. The relevant statutory language states that "[a]ny owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof." *Id.*

16. *Id.*

17. 37 Ill. 2d 273, 226 N.E.2d 630 (1967). *See* notes 23-32 and accompanying text *infra*.

18. The American Institute of Architects [hereinafter referred to as the A.I.A.] is a national society whose primary membership consists of registered architects. Part of the service it provides is the preparation and periodic updating of standard form contracts to be used by the attorneys of design professionals and others involved in the planning and construction or alteration of structures. *See, e.g.*, AMERICAN INSTITUTE OF ARCHITECTS, THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Aug. 1976 ed.). All future references to standard form contracts prepared by the American Institute of Architects can be found in AMERICAN INSTITUTE OF ARCHITECTS, AIA BUILDING CONSTRUCTION LEGAL CITATOR (1973). Because all related materials comprise the "Contract Documents," to which every contract refers, all documents must be considered when interpreting the language of any particular one.

The 1963 STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, (AIA Document B131, Sept. 1963 ed.), gave the architect general supervisory powers. Article 18 of the General Conditions of the 1963 STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR, (AIA Document A107, Sept. 1963 ed.), provided: "The Architect shall be the

In 1965, when *Miller* was decided, the standard form agreement[19] gave the architect general supervisory powers which included the right to stop the work whenever the architect deemed it necessary. The court first noted that "the general duty to 'supervise the work' merely creates a duty to see that the building when constructed meets the plans and specifications contracted for."[20] The majority, proceeding on the inarticulated premise that the power to stop the work is not part of the ordinary supervisory controls and duties of an architect, then ruled that "the architects' right to stop the work if it were being done in a dangerous manner makes them persons 'having charge' within the meaning of the [Structural Work Act]."[21] Thus, the term "having charge of" the work was given meaning as regards the liability of architects.

Even at the time of the *Miller* decision, the architect was not customarily on the job site every day, let alone all day. Pursuant to contract or custom, a superintendent of construction was normally hired and given authority to run the job. In light of *Miller*, it was conceivable that should the superintendent err, such error causing injury, damage, or death, the architect could be the one found responsible in a liability action. As a direct result of the *Miller* ruling, therefore, all subsequent standard form A.I.A. contracts were revised in order to eliminate, by way of remaining silent on the point, the architect's power to stop the work.[22]

*Miller v. DeWitt*

The 1965 appellate court opinion in the case of *Miller v. DeWitt*,[23] and its final resolution by the Illinois Supreme Court in

---

Owner's representative during the construction period. He has authority to stop the work if necessary to insure its proper execution. . . ."

Subsequent to the Illinois Supreme Court disposition of the *Miller* case, *see* text accompanying notes 23-32 *infra*, the 1970 revision of the General Conditions of the STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR, (AIA Document A107, Sept. 1970 ed.), remained silent as to the architect's right to stop the work and paragraph 9.6, the closest equivalent to former article 18, was revised to state: "The architect will have authority to reject Work which does not conform to the Contract Documents."

19. STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, (AIA Document B131, Sept. 1963 ed.); STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR, (AIA Document A107, Sept. 1963 ed.). THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Sept. 1963 ed.), stated in pertinent part: "[The Architect] shall have authority to stop the work whenever such stoppage may be necessary in his reasonable opinion to insure the proper execution of the Contract."

20. 37 Ill. 2d at 284, 226 N.E.2d at 638.

21. *Id.* at 286, 226 N.E.2d at 639.

22. *See* THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Aug. 1976 ed.) and note 18 *supra*.

23. 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965).

1967,[24] remains the landmark decision regarding the obligations, duties and liability of architects in the State of Illinois and has been influential within the field of design professional malpractice.

The Owner-Architect Agreement in *Miller*, taken from an A.I.A. standard form,[25] required the architects to provide both design and supervisory services. Separate provision, however, was made for a clerk-of-the-works and a superintendent of construction to remain on the job site all day. By common practice, the superintendent was held to have detailed and constant control over the method and manner of the work. Article 15 of the construction contract between the builder and the school board (the owner-client) impliedly gave the architects the power to change or stop the work "in an emergency endangering life or property."[26] Article 38 gave the architects express power to "stop the work whenever such stoppage [was] necessary to insure the proper execution of the Contract."[27] It is important to note that prior to the *Miller* case, the right of the architect to stop the work was regarded as a mere facet of the architect's general supervisory powers and was never intended to make him the party "having charge." This has been dramatically underscored by the deletion of all right-to-stop-work language from A.I.A. standard form contracts following the ruling in *Miller*.[28]

---

24. 37 Ill. 2d 273, 226 N.E.2d 630 (1967). All further citations to *Miller* are to the Illinois Supreme Court decision.

Defendant architects were retained to design an addition to an existing school gymnasium and supervise the construction thereof. Pursuant to the defendants' plans, the alteration proceeded and required the removal of a bearing wall and the columns contained therein. Because the function of the columns was to provide vertical support for the roof, it was necessary to "shore" them up so as to assure the continued integrity of the roof. "Shoring" is a procedure whereby a secondary support system is built around or next to the primary system so that such primary system can be safely removed without a structural collapse. While removing the columns, the roof collapsed resulting in injury to the plaintiffs. The architects' alleged failure to properly supervise the shoring operation formed the basis for the negligence claim.

25. *See* note 19 *supra*.

26. 37 Ill. 2d at 282, 226 N.E.2d at 636.

27. *Id.* at 282, 226 N.E.2d at 637. It appears that this language was taken directly from THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Sept. 1963 ed.).

28. *See* note 18 *supra*. Since the 1970 revision of Document A201, all subsequent editions of the standard form construction contract have remained silent as to the architect's right to stop the work. The most recently revised form of THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, completed in August of 1976, provides in paragraph 2.2.13 (the closest equivalent to former article 38):

> The Architect will have authority to reject Work which does not conform to the Contract Documents. . . . However, neither Architect's authority to act under this Subparagraph 2.2.13, nor any decision made by him in good faith either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the Architect to the Contractor, any Subcontractor, any of their agents or employees, or any other person performing any of the Work.

Initially, the court had noted that the general duty of architectural supervision merely entailed assuring technical compliance with plans and specifications.[29] It was, in the court's opinion, the contractual delegation to the architects, primarily through article 38, of the power to stop the work when an unsafe condition existed that extended the defendants' duty beyond that of verifying technical compliance. Because of the complexity of the work involved, the court intimated that the architects were negligent in failing to inspect and supervise the work.[30] Since the architects' lax supervision was responsible for their ignorance, the architects could not claim lack of knowledge as a defense: "[I]f the architects knew or in the exercise of reasonable care *should have known* that the shoring was inadequate and unsafe, they had the right and *corresponding duty* to stop the work until the unsafe condition had been remedied."[31]

What the *Miller* court actually did was to equate a "right" with a "duty", find that the duty had been breached, and thereby hold that the architects were liable for the resulting injuries. As noted by the dissent: "[T]he architects 'had the right' to insist upon a safe and adequate use of [shoring methods]. True, but to parlay that 'right' into a duty is neither consistent with generally accepted usage nor contemplated by the contract."[32] This expansion of contract language has been directly criticized by an Arizona appellate court in *Reber v. Chandler High School District #202*,[33] which commended Justice House's dissent. The *Miller* court's interpretation of the language in the Owner-Architect Agreement, therefore, remains a questionable proposition, although never expressly overruled by an Illinois court.

Implicitly however, the *Miller* ruling has been distinguished. In the second half of the decision, which deals with architects' liability under the Structural Work Act,[34] Justice Underwood stated: "[W]hat we heretofore have said regarding the architects' right to stop the work if it were being done in a dangerous manner makes them persons 'having charge' within the meaning of the act."[35] Subsequent cases have carefully distinguished between the retention of ordinary supervisory powers and the authority to control the manner and method of construction and work.[36]

---

29. 37 Ill. 2d at 284, 226 N.E.2d at 638.
30. *Id.* at 286, 226 N.E.2d at 639.
31. *Id.* at 285, 226 N.E.2d at 638 (emphasis added).
32. *Id.* at 293-94, 226 N.E.2d at 643 (House, J., dissenting).
33. 13 Ariz. App. 133, 138, 474 P.2d 852, 854-55 (1970).
34. ILL. REV. STAT. ch. 48, §§ 60-69 (1975). *See* notes 12-16 and accompanying text *supra*.
35. Miller v. DeWitt, 37 Ill. 2d 273, 286, 226 N.E.2d 630, 639 (1967).
36. *See* Voss v. Kingdon & Naven, Inc., 60 Ill. 2d 520, 527, 328 N.E.2d 297, 301 (1975) and text accompanying notes 43-49 *infra*. *See also* Mc-

In an attempt to focus the *Miller* equation, it must be noted that it is the specific contractual right of the architect to stop the work which identifies him as the person "having charge." The current form A.I.A. documents[37] are silent as to the architect's right to stop the work and expressly reserve that power to the owner.[38] Omission of this language is apparently sufficient to render the architect a mere inspector and not a guarantor of job safety with respect to the construction methods employed.[39] As such, the *Miller* equation of right to stop the work with duty to stop the work with person in charge has been tacitly qualified.

Although the major thrust of the *Miller* decision was to make an architect liable for negligent supervision of the methods and manner of construction, notwithstanding what was believed to be the general supervision language of the contract, the court's rationale has been largely unemployed in subsequent practice due to carefully drafted contracts. Further, even though *Miller* held that the architects were liable, it did allow them a third party action against the general contractor actually responsible for the shoring.[40] This was done under the Illinois rule "in favor of allowing a third party who was not actively negligent to obtain indemnification from an employer who was actively negligent."[41] The court additionally noted that even if liability attaches to those "having charge of" the work pursuant to a willful violation of the Structural Work Act, "this does not mean that persons found liable thereunder are necessarily active wrongdoers."[42] Thus, the possibility for indemnification under Illinois law exists even when litigation occurs under the Structural Work Act and the architect's liability is based upon a theory of negligent supervision.

---

Govern v. Standish, 33 Ill. App. 3d 717, 719-20, 341 N.E.2d 739, 741 (1975) and text accompanying notes 50-68 *infra*. There is an acknowledged difference between having the power to "stop" work (*i.e.*, order it to cease entirely) and possessing the authority to direct that the work be done in a given manner.

37. *See* note 28 *supra*.

38. The most recent form of THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Aug. 1976 ed.), provides in paragraph 3.3, *Owner's Right to Stop the Work*:

> 3.3.1 If the Contractor fails to correct defective work as required [by the General Conditions] or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated . . . .

39. *See, e.g.*, Voss v. Kingdon & Naven, Inc., 60 Ill. 2d 520, 527, 328 N.E.2d 297, 301 (1975).

40. 37 Ill. 2d at 288-92, 226 N.E.2d at 640-42.

41. *Id.* at 289, 226 N.E.2d at 640.

42. *Id.* at 291, 226 N.E.2d at 641.

*Subsequent Cases*

Not until 1975 did the Illinois Supreme Court again confront the issue of whether a design professional has charge of the work by the mere retention of power to stop the work. In *Voss v. Kingdon & Naven, Inc.*,[43] the defendant was an engineering firm retained by the city of Pekin, Illinois, to act as an analyist, a consultant and a supervisor on a sewer project undertaken by the city. The plaintiff was an employee of the contracting firm which had been hired to execute the work. He was injured when a scaffold he had stepped on collapsed, presumably due to the fact that a vertical support had been improperly removed. In an action to recover damages for his injuries the plaintiff alleged that the defendant was in charge of the work pursuant to section 69 of the Structural Work Act.[44]

Section 8-8 of the Owner-Contractor Agreement, which had been drawn by the defendant, expressly gave the engineers the power to stop the work at their discretion. In a trial on the merits, the defendant argued that it was not in charge of the work as defined in section 69 of the Structural Work Act and received a directed verdict. On appeal, however, the directed verdict was reversed and the defendant appealed.

The Illinois Supreme Court stated that the term "having charge of" was not an easy one to define and was capable of many interpretations.[45] Quoting from *Larson v. Commonwealth Edison Co.*,[46] a pre-*Miller* decision dealing with the interpretation of contract language, the court pointed out:

> ' "To have charge of" does not necessarily imply more than to care for or to have the care of.' [*People v. Gould*, 345 Ill. 288, 323, 178 N.E. 133, 148 (1931)] . . . [T]he thrust of the [Structural Work Act] is not confined to those who perform, or supervise, or control, or who retain the right to supervise and control, the actual work from which the injury arises, but, to insure maximum protection, is made to extend to owners and others who have charge of the erection or alteration of any building or structure.[47]

Drawing a clear parallel between *Voss* and *Miller v. DeWitt*,[48] the court stated, quoting from *Miller*, that " 'the architects' right to stop the work if it were being done in a dangerous manner makes them persons "having charge" within the meaning of the act.' "[49] Because the granting of a directed verdict was im-

43. 60 Ill. 2d 520, 328 N.E.2d 297 (1975).
44. ILL. REV. STAT. ch. 48, § 69 (1975). *See* note 15 *supra*.
45. 60 Ill. 2d at 525, 328 N.E.2d at 300.
46. 33 Ill. 2d 316, 211 N.E.2d 247 (1965).
47. 60 Ill. 2d at 525-26, 328 N.E.2d at 300 (citing Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 321-22, 211 N.E.2d 247, 251 (1965)).
48. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
49. 60 Ill. 2d 520, 527, 328 N.E.2d 297, 301 (1975) (citing Miller v. DeWitt, 37 Ill. 2d 273, 286, 226 N.E.2d 630, 639 (1967)).

proper, the Illinois Supreme Court affirmed the reversal and remanded for a new trial.

Even more recently, in the case of *McGovern v. Standish*,[50] the Illinois Supreme Court had the opportunity to determine whether an architect who possesses only supervisory powers is in charge of the work and thereby liable for injuries resulting from a failure to comply with the provisions of the Structural Work Act. The opinion is an extremely significant one in that the court set forth specific interpretive guidelines and established definite limitations on applying the *Miller* decision. In so doing, the court also placed the entire question of design professional malpractice in much sharper focus.

The plaintiff in *McGovern* was injured when he fell from a scaffold while working on a construction project for which the defendant was the architect. Under the Structural Work Act, section 69 provides that any willful failure by the person "having charge of" the work to comply with the provisions of the Act, which failure results in an injury to a workman, shall subject such person to an action for damages brought by the injured party.[51] Since defendant was the architect of the project and made periodic inspections at the job site, plaintiff sought to subject him to liability as the person "having charge of" the work. In the trial court, the jury returned a judgment in favor of the plaintiff. Subsequent to the appellate court's reversal thereof,[52] the plaintiff appealed.

In affirming the appellate court's decision, the Illinois Supreme Court agreed with the contention that the Structural Work Act provides a cause of action to an injured workman against the person in charge of the work, but concluded, in agreement with the appellate court, that the architect was not that person.[53] In reaching its decision, the court carefully reviewed the architect's contracts[54] and the job site operating procedures.[55]

50. 65 Ill. 2d 54, 357 N.E.2d 1134 (1976).
51. ILL. REV. STAT. ch. 48, §§ 60-69 (1975).
52. 33 Ill. App. 3d 717, 341 N.E.2d 739 (1975).
53. 65 Ill. 2d at 69, 357 N.E.2d at 1142.
54. The contracts for professional services between the owner and architect appear to have been taken from the 1967 STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, (AIA Document B131, Sept. 1967 ed.) and the 1967 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Sept. 1967 ed.). The documents provided, *inter alia*, that the architect was to "guard the Owner against defects and deficiencies in the work of the Contractors," that the owner alone had the power to stop the work and that "[t]he general administration of the Architect is to be distinguished from the continuous on-site inspection of a Project Inspector." *Id.* at 63-64, 357 N.E.2d at 1138-1139.

Mention is made of a set of "Special Conditions of the contract" between the owner and defendant-architect which provided in pertinent part that "the contractor shall submit to the architect a description of the methods, sequence of erection, and type of equipment proposed for

Based thereon and closely following the rule of *Miller v. DeWitt*,[56] the court held that a person is in charge of the work when he has the authority to control the details of performance or order work done in a dangerous manner stopped at his discretion. Ordinarily, such authority is delegated by contract, but the *Miller* court recognized the fact that course of dealing can be equally determinative. In *McGovern*, there was neither a contractual provision nor a customary procedure.

In determining who was in charge of the work, the *McGovern* court adopted a bifurcated approach. It first considered what the words of the Act have been interpreted to mean and then examined what effect the *Miller* decision had on that determination. The court cited with approval two propositions expressed in *Larson v. Commonwealth Edison Co.*:[57] "[s]ince the term 'having charge of' is one of common usage and understanding, it has not been specifically defined by this court. . . . Nevertheless, before a defendant may be found to be in charge of the work, there must be a showing that he had some direct connection with the construction operations."[58] Not only was the absence of a specific definition acknowledged, but the necessity of a "direct connection" with actual construction work was affirmed as a prerequisite to an individual's being found in charge of the work and thereby potentially liable under the Structural Work Act. The court further indicated that the potential defendant "must have been in charge of the *particular operations* which involved the violation from which the alleged injury arose."[59] Thus, the original *Miller* equation of the right to stop the work with the person "having charge of" the work was modified to require that the person "having charge of" the work not only

---

use in the erection of structural steel work; all work must be done to the complete approval of the architect . . . ." *Id.* at 65-66, 357 N.E.2d at 1140. Since the court paid no further attention to this provision, it seems reasonable to assume that there was something else in the record to either rebut or qualify the implications of its language. If not, then the inescapable question arises of whether this provision does not, in fact, give the architect control of the "manner and method of construction" which the courts consistently regard as highly probative. If it does, then there is an irreconcilable inconsistency in the court's reasoning. *See* text accompanying note 66 *infra*.

It is also worth noting that the most recent STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, (AIA Document B141, Jan. 1974 ed.) expressly provides in subparagraph 1.1.14 that "[t]he Architect shall *not* be responsible for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work . . . ." (Emphasis added).

55. Testimony at trial clearly established that the architect neither gave orders relating to actual construction procedures nor sought to exercise any control thereover.

56. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

57. 33 Ill. 2d 316, 211 N.E.2d 247 (1965).

58. 65 Ill. 2d at 66-67, 357 N.E.2d at 1141 (citing Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 323-24, 211 N.E.2d 247, 251-52 (1965)).

59. 65 Ill. 2d at 67, 357 N.E.2d at 1141 (emphasis added).

have some immediate connection with the physical construction but also with that particular aspect of the construction which gives rise to the statutory violation and injury claim. From the general and somewhat vague rule of the *Miller* decision, the court moved to the specific and unequivocally definite.

After considering its earlier decision in *Miller*, the court stated, "we do not read *Miller* as holding that the right to stop the work, without more, is conclusive in resolving the question of whether a person has charge of the work within the meaning of the Act."[60] This qualification of the *Miller* opinion is of major importance. It arguably represents an acknowledgement by the court of the overbreadth of *Miller* and the questionable equation therein of the right to stop the work with the person having charge thereof. In an apparent attempt to justify the *Miller* holding on this new, clearer enunciation of the *Miller* doctrine, the *McGovern* court pointed out that the defendants in *Miller* had the right to stop the work "if it were being done in a dangerous manner."[61] Though inarticulated, the court seemed to equate this right with a power to control the manner of construction, thus providing the something "more" which the new interpretation of *Miller* requires. Because the defendant in *McGovern* failed to fulfill the requirements of both parts of the bifurcated test, he could not be found liable as the person "having charge of" the work under the Act.[62]

Apart from the specific applications of fact to law and the conclusions based thereon, the court made several general findings which are of keen interest and will undoubtedly affect future malpractice actions brought under the Structural Work Act against supervising architects. Perhaps most significant was the court's recognition that there is no general rule which will summarily answer the question of whether a particular defendant was the person "having charge of" the work (and thereby liable) under the Act.[63] Equally important was the court's articulation of the fact that an architect's "right to reject defective materials and workmanship and require its correction"[64] is not the equivalent of a blanket right to stop work being done in a dangerous manner. Similarly, the owner's right to stop the work on certification of the architect is not enough, in and of itself, to impose

60. *Id.* at 68, 357 N.E.2d at 1141.
61. *Id.* at 68, 357 N.E.2d at 1141.
62. *Id.* at 69, 357 N.E.2d at 1142.
63. "[S]uch a determination must rest upon an assessment of the totality of circumstances." *Id.* at 68, 357 N.E.2d at 1141.
64. *Id.* at 68, 357 N.E.2d at 1141. This language is substantially similar to that used in subparagraph 2.2.13 of the most recent GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, (AIA Document A201, Aug. 1976 ed.).

liability on the architect.[65]

Ultimately, the court reached and addressed the pivotal question, raised but unanswered in *Miller*, which has troubled lower courts ever since: whether the mere retention of ordinary supervisory powers is enough to make an architect the person in charge of the work. The *McGovern* court clearly distinguished between the power to verify technical compliance with plans and specifications and the "right to control or direct the manner or methods by which the construction [will] be accomplished."[66] This difference has finally found clear, unequivocal expression:

> [A]s a general rule, even the 'duty to "supervise the work" merely creates a duty to see that the building when constructed meets the plans and specifications contracted for.' (*Miller v. Dewitt*, 37 Ill. 2d 273, 284.) The right to inspect the work, also given the defendant, is but *ancillary* to the defendant's right to supervise. These rights, as afforded the defendant in this case, cannot alone form a basis for a finding of coverage under the Act.[67]

*McGovern* clearly indicates, and is substantial authority for the proposition that the design professional cannot, in the absence of some agreement or act enlarging the scope of his usual services, be held liable for the misfeasance of other persons involved in the construction of a given structure. The decision is of undeniable benefit to design professionals because of the precision with which it phrases the relevant considerations and the clarity with which it addresses them. Almost as though echoing the fears of the profession, instilled by previous litigation, the court concluded, "[w]ere the defendant to be held in charge of the work on these facts, he would in essence be subjected to liability as a result of his *status* as a supervising architect alone."[68]

In a number of other states, however, the courts have not entirely agreed with the basic *Miller* reasoning which all Illinois courts continue to follow. In the case of *Reber v. Chandler High School District #202*,[69] the Owner-Architect Agreement provided that the architect was to furnish, "general supervision to guard the Owner against defects and deficiencies in the work of contractors, but he [the architect] does not guarantee the performance of their contracts."[70] Because the general contractor failed to observe proper procedures, an employee was seriously injured during a structural collapse while steel was being erected. The

65. 65 Ill. 2d at 69, 357 N.E.2d at 1142.
66. *Id.* at 69, 357 N.E.2d at 1142.
67. *Id.* at 69, 357 N.E.2d at 1142 (emphasis added).
68. *Id.* at 70, 357 N.E.2d at 1142 (emphasis added). *See also* text accompanying note 84 *infra*.
69. 13 Ariz. App. 133, 474 P.2d 852 (1970).
70. *Id.* at 138, 474 P.2d at 855.

injured employee sought to hold the owner and the architect liable under a negligent supervision theory.

Recognizing the fact that there are varying degrees of supervision, the Arizona appellate court held that, "liability for negligent exercise of retained supervisory powers can attach only when there is a showing that a *duty* has been created by the reservation of '. . . the right to exercise day-by-day control over the manner in which the details of the work are performed.' "[71] In effect, the *Reber* decision requires that the party named as defendant must have control over the method or manner of doing the actual details of the work, as opposed to merely verifying, by means of an inspection, that the work as performed conforms to the controlling plans and specifications.[72] Further, the contract distinguished between the "general supervision" of the architect and the "continuous on-site inspection by a clerk-of-the-works." This distinction was held to furnish clear proof of the parties' intent to limit the architect's function in terms of supervision to one of assuring technical compliance with the contract documents, and nothing more.

Almost in a passing reference, the Arizona court mentioned the Illinois Structural Work Act.[73] The court noted that the act was expressly designed to protect "persons employed or engaged" in construction activity from negligence on the part of the supervising individual. This protection is extended to the worker, and its correlative duty is imposed upon the person "having charge," by statute and apart from any contractual provisions. As stated by the *Reber* court, "[t]he Illinois [Structural Work Act] indeed is a good example of a legislature's ability to express its intent to protect workmen, from which a duty of supervision with respect to discharging such intent may be inferred."[74]

### *Other Statutes*

In conjunction with the case law pertaining to when a design professional is liable under a malpractice action, there are two particular statutes, in addition to the Structural Work Act, which merit consideration.

Obviously, the most expeditious way for a design professional to eliminate the hazard of a malpractice action is to require indemnification from the party employing him. In this manner the party responsible for the professional's employment would

71. *Id.* at 137, 474 P.2d at 854 (citing E.L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 456, 466 P.2d 740, 750 (1970) ).
72. *Id.* at 138, 474 P.2d at 854.
73. *Id.* at 139, 474 P.2d at 856-57.
74. *Id.* at 141, 474 P.2d at 857.

be required to bear the risk, as well as the loss, of any mishaps emanating therefrom. Under section 61 of chapter 29—"An Act in relation to indemnity in certain contracts"[75]—any contractual attempt by a design professional to indemnify himself from liability for his own misfeasance is arguably unenforceable as being against public policy. Although the act limits its application to contracts for the "construction, alteration, repair, or maintenance" of structures, an architect's agreement to render design services is colorably a part of any of the enumerated contracts. But the actual effect of the section is uncertain since there are presently no cases on point.

In August of 1969, the Illinois General Assembly passed into law section 58 of chapter 51[76] entitled "An Act regarding claims in relation to work or service on real property and any product incorporated therein to become part thereof."[77] The act appears to establish a six year period, commencing to run on the date of design or completion of the building, whichever occurs later, during which time the absence of any damage to property or injury to persons is to be taken as presumptive proof of reasonable care in the design and/or construction of the structure. Since its enactment in 1969, there has been no litigation involving this particular statute, and thus the exact nature of the presumption is unclear. Nevertheless, one may reasonably postulate that the presumption is *irrebuttable* since an architect is ordinarily presumed to exercise reasonable care by virtue of his training and state certification. This usual presumption of reasonable care has always been *rebuttable*[78] and hence to hold that the same is true under the presumption created by section 58 would effectively void the Act of real meaning and treat it as a mere codification of accepted and followed principle. It seems more reasonable to regard section 58 as a legislative response to the design professional's dilemma—how long does a design have to succeed without incident before it will no longer pose the threat

75. ILL. REV. STAT. ch. 29, § 61 (1975):
With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

76. ILL. REV. STAT. ch. 51, § 58 (1975):
Any work or service on real property or any product incorporated therein to become part of said real property which does not cause injury or property damage within 6 years after such performance, manufacture, assembly, engineering or design, shall be presumptive proof that such work, service or product was performed, manufactured, assembled, engineered or designed with reasonable care by every person doing any of the said acts . . . .

77. *Id.*

78. Miller v. DeWitt, 37 Ill. 2d 273, 283, 226 N.E.2d 630, 637 (1967).

of litigation to its designer? Section 58 appears to conclusively answer the question with a six year test period.

Of course, section 58 leaves open to the prospective plaintiff the opportunity of proving willful or wanton misconduct or gross negligence, but any alleged misfeasance short of this heavy burden will arguably not succeed in overcoming the presumption, assuming of course that it is conclusive.

As a final note, some mention must be made of attempts to subject architects to liability under a theory of strict products liability, thus abrogating the need of proving negligence.[79] There have not, as of yet, been any cases in the United States in which a design professional has been held liable under a products liability rationale. However, at least one court has seen fit to find a builder liable under this theory in a case where his "product" (a newly constructed house) was faulty and caused injury.[80] While this particular decision has been called part of "a further and more radical trend by an extreme minority of courts,"[81] it may be regarded as a clear indication of a developing judicial attitude which favors perpetual liability for persons connected with real estate. Certainly if a builder can be held liable under strict products liability theory, how distant is the step on which his architect stands?

As of today, however, a prospective plaintiff must still prove negligence in order to succeed in a malpractice action.[82] Notwithstanding this requirement, at least one commentator has argued that decisions such as *Miller v. DeWitt*[83] impose upon the design professional a duty of going beyond reasonable care "and amount, in effect, to liability without proof of negligence—strict liability."[84]

## When the Cause of Action Accrues

### *Statutes of Limitations*

Having established the grounds upon which a malpractice action against a design professional can be based, the next inquiry must be as to when that cause of action accrues and when

79. *See generally* Note, *Products Liability—Real Property—Builders-Vendors*, 8 Duq. U.L. Rev. 407 (1970); Comment, *Products and the Professional: Strict Liability in the Sales-Service Hybrid Transaction*, 24 Hastings L.J. 111 (1972); Comment, *Liability of Design Professionals —the Necessity of Fault*, 58 Iowa L. Rev. 1221 (1973).

80. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

81. 8 Duq. U.L. Rev. 407, *supra* note 79, at 415.

82. *See* authorities cited in note 79 *supra*.

83. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

84. 58 Iowa L. Rev. 1221, *supra* note 79, at 1243.

the applicable statute of limitations may or may not be employed as a defense. Illinois has had an interesting experience with these considerations and its resolution may well influence many states that have not yet confronted the problem.

There are two particular statutes of limitations in Illinois which are germane. Section 15 of chapter 83 provides that any action to recover for personal injuries "shall be commenced within two years next after the cause of action accrued."[85] Similarly, section 16 of chapter 83 provides that any action to recover for real or personal property damage "shall be commenced within 5 years next after the cause of action accrued."[86] Since the vast bulk of litigation involving design professionals stems from personal or property injury, these two statutes are of paramount importance.

When an architect or engineer has been named as the defendant in a lawsuit, the term "cause of action accrued" is a particularly troublesome one to define. There are two possible interpretations of this term: 1) a cause of action accrues when the design giving rise to the failure occasioning the injury was completed or realized (known as the "occurrence type"); or 2) a cause of action accrues when the failure causing the injury was manifested, *i.e.*, the date of the actual injury (known as the "discovery type"). Most courts have relied upon the latter approach and have generally held that the cause of action accrues when the alleged breach of duty causes the plaintiff to suffer physical pain[87] or property loss.[88]

If one follows the date of discovery line of reasoning, it becomes apparent that regardless of when a structure was completed, as long as an individual who in some way suffers an injury by way of a structural defect files an action within the statutorily prescribed time limit, the architect must defend. Thus, a design professional remains perpetually liable for every structure, whenever completed, with which he was connected.[89]

In 1963, perhaps with the intent of limiting the apparent infinite liability of architects, the Illinois legislature added section

85. ILL. REV. STAT. ch. 83, § 15 (1975): "Actions for damages for an injury to the person . . . shall be commenced within two years next after the cause of action accrued."

86. ILL. REV. STAT. ch. 83, § 16 (1975): "[A]ctions on unwritten contracts, expressed or implied . . . or to recover damages for an injury done to property, real or personal . . . shall be commenced within 5 years next after the cause of action accrued."

87. *See, e.g.*, Reat v. Illinois Cent. R.R. Co., 47 Ill. App. 2d 267, 271, 197 N.E.2d 860, 863 (1964).

88. *See, e.g.*, Society of Mt. Carmel v. Fox, 31 Ill. App. 3d 1060, 335 N.E.2d 588 (1975).

89. *See* 8 DUQ. U.L. REV. 407, *supra* note 64. *See also* Sears, Roebuck & Co. v. ENCO Associates, Inc., 54 App. Div. 2d 13, 385 N.Y.S.2d 613 (1976).

29 to chapter 83. This section provided, *inter alia*, that no action to recover for personal injury, property damage or wrongful death arising out of a defective or unsafe condition of an improvement to realty could be brought against those responsible for it "unless such cause of action . . . accrued within four years after the performance or furnishing" of design or construction services.[90] In effect, section 29 allowed the design professional to rely on the absence of legal notice for nine years after the structure had been completed to signify an end to his potential liability for design defects.[91]

However, this period of relative security for the architect lasted less than six years. In August of 1969 the Illinois legislature repealed section 29[92] pursuant to the 1967 Illinois Supreme Court holding in *Skinner v. Anderson*.[93] The *Skinner* court concluded that section 29 violated article IV, section 22 of the Illinois

90. Act of August 20, 1963, ch. 83, § 29 [1963], Ill. Laws 1963 (now ILL. REV. STAT. ch. 83, § 24f (1975)):

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real estate, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, unless such cause of action shall have accrued within four years after the performance or furnishing of such services and construction.

91. In the case of a personal injury suit, the waiting period would be six years; four years under section 24f plus the two years within which to bring suit under section 15. In the case of a property damage action, the discovery period would remain at four years but pursuant to section 16, the claimant would have five years within which to bring suit thus constituting a total waiting period of nine years.

92. Act of August 20, 1963, ch. 83, § 29 [1963] Ill. Laws 1963 (now ILL. REV. STAT. ch. 83, § 24f (1975)).

93. 38 Ill. 2d 455, 231 N.E.2d 588 (1967). Defendant architect was retained in 1956 by the plaintiff's father to design a house. The dwelling was built as designed but defendant failed to provide for ventilation in the room that contained the air conditioning machinery. Over the years, escaping gases had seeped into the adjoining boiler room and ultimately caused the boiler to discharge toxic gases which, in 1965, resulted in the death of plaintiff's husband and daughter and serious injury to plaintiff herself. Defendant architect was sued on a negligent design theory. Defendant moved to dismiss based on section 29 of chapter 83 which provided, *inter alia*, that no action to recover for bodily injury or wrongful death "arising out of the defective and unsafe condition of an improvement to real estate," would be permitted unless it accrued within four years "after the performance or furnishing of such [design] services and construction." The motion to dismiss was granted.

On appeal, the court reversed, determining that the statute was unconstitutional:

> Section 22 of article IV states: 'The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say for: —* * * Granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever.'
>
> The effect of section 29 of the Limitations Act is to grant to architects and contractors a special or exclusive immunity.

*Id.* at 459, 231 N.E.2d at 590.

Constitution which prevents the general assembly from granting any corporation, association or individual a special or exclusive privilege or immunity of any type. Thus, once again, design professionals were subject to perpetual liability for any design defect which might manifest itself as long as: 1) the claimant sued pursuant to the applicable statute of limitations; 2) within the statutorily prescribed time; and 3) the cause of action was measured from the date of discovery.

Probably as a second attempt to alleviate the problem, the legislature enacted section 58 of chapter 51 in October of 1969, which, as previously noted,[94] apparently relieves the architect from responsibility if his design succeeds without incident for a period of six years or more.

### *Case Law*

The first Illinois case to specifically interpret when the cause of action accrues in a malpractice action against an architect was *Board of Education v. Joseph J. Duffy Co.*[95] Agreeing with the defendant architect's position that the cause of action accrues as of the date of occurrence and not as of the date of discovery, the court stated that "the period of limitations commences when the negligent act takes place, and is not tolled by the plaintiff's ignorance of his injury."[96] Hence, the initial interpretation given to the application of the statute of limitations against design professionals in malpractice actions was that of date of occurrence, clearly what the profession hoped for by way of fixing its potential liability within calculable parameters. Once again, however, the design professional's security was short-lived.

In August of 1975 an Illinois appellate court handed down its opinion in *Auster v. Keck*[97] and, in effect, reversed the *Duffy* interpretation of when the cause of action accrues. This case,

94. *See* notes 76-77 and accompanying text *supra*. This section, not yet litigated, purports to establish a conclusive presumption of reasonable care in design and construction. The presumption becomes operative after the passage of six years measured from the date of such design or construction during which no defects are manifest.

95. 97 Ill. App. 2d 158, 240 N.E.2d 5 (1968). The defendant architectural partnership of Perkins and Will was retained by the plaintiff to design and supervise the construction of a school complex. Following completion in 1959, the plaintiff began discovering numerous design and construction defects. In 1966, plaintiff brought suit against Perkins and Will and defendant Duffy, the builder.

Perkins and Will answered that the action which was based on negligent design (there was a second count based on breach of contract as regarded supervision which was ultimately sustained) was barred under chapter 83, section 16 which required that any action for damage to property be brought within five years after the cause of action accrued.

96. *Id.* at 161, 240 N.E.2d at 7.

97. 31 Ill. App. 3d 61, 333 N.E.2d 65 (1975), *rev'd on other grounds*, 63 Ill. 2d 485, 349 N.E.2d 20 (1976).

along with *Society of Mount Carmel v. Fox*,[98] delivered the following month, constitute the present state of the law in Illinois with respect to design professional malpractice actions.

*Auster v. Keck*

In 1969 the plaintiffs became second purchasers of a home which had been designed by defendant architect in 1960 and built shortly thereafter. Soon after the plaintiffs took possession, the ceiling began to collapse and in 1972 the plaintiffs filed a malpractice action against the architect. Based on section 16 of chapter 83,[99] which provides that any action to recover damages for injury to property must be filed within five years after the cause of action accrues, defendant moved to dismiss. Because the construction had in fact been completed more than five years prior to the suit, the trial court agreed with the architect and dismissed the action.

On appeal, the court succinctly stated the interpretation problem inherent in the "cause of action accrued" language of section 16: "[W]hen did said statute begin to run—when the alleged architectural malpractice occurred or when the victims discovered it as the ceiling collapsed?"[100] Following discovery rule logic, the court chose the latter approach. In arriving at this decision, the *Auster* court traced the gradual acceptance of the discovery rule in Illinois courts and carefully indicated, through a citation to *Coumoulas v. Service Gas, Inc.*,[101] that the application of the discovery rule is limited to cases in which the plaintiff expressly claims that he had no knowledge of the defect prior to the date of alleged discovery and that such discovery occurred less than five years prior to the date of his complaint.[102] This requirement assures the court that only a plaintiff who is genuinely ignorant of a pre-existing defect can seek redress beyond the usual five year period and also prevents tardy or reticent, but informed persons from arbitrarily extending the time within which they may file for damages. In addition, the decision overturned the *Duffy* holding and conclusively established

98. 31 Ill. App. 3d 1060, 335 N.E.2d 588 (1975).
99. *See* note 86 *supra*.
100. 31 Ill. App. 3d at 62, 333 N.E.2d at 66 (citing Rozny v. Marnul, 43 Ill. 2d 54, 72-73, 250 N.E.2d 656, 665 (1969) ). *Rozny v. Marnul*, a 1969 Illinois Supreme Court case, represents the initial application of the discovery rule in the state. Notwithstanding that the particular defect was discovered more than five years after it was actually committed, the court held that the cause of action accrued "when [the plaintiffs] knew or should have known of the defendant's error" and that suit must be brought within five years of that time. *Id.* at 72, 250 N.E.2d at 666.
101. 10 Ill. App. 3d 273, 275-76, 293 N.E.2d 187, 189 (1973).
102. Auster v. Keck, 31 Ill. App. 3d 61, 65, 333 N.E.2d 65, 68-69 (1975) (citing Coumoulas v. Service Gas Inc., 10 Ill. App. 3d 273, 275-76, 293 N.E.2d 187, 189 (1973) ).

Illinois as a date of discovery state when defining the language "cause of action accrued."

Although on appeal the Illinois Supreme Court upheld the lower court's application of date of discovery logic when interpreting statute of limitations questions in malpractice actions,[108] the nature of the pleadings required by the supreme court merits study. Defendant architect appealed the judgment on the basis that the plaintiff's amended count II[104] failed to state a cause of action. Agreeing with the architects and reversing the judgment against them, the court required what appears to be an unprecedented and potentially impossible standard of proof.

Because the plaintiffs were second purchasers of the residence, they simply alleged that they had no knowledge of the defect prior to its appearance after they took possession.[105] The court noted that the complaint was silent with respect to the knowledge or lack thereof that the *prior* owners had concerning the existence of the defect.[106] This omission was fatal to the plaintiffs' cause of action.[107]

Possible ramifications of this holding must be carefully considered. While discovery rule logic remains in force, the pleadings and corresponding proof[108] that will now be required by the courts present a remote purchaser[109] of realty in Illinois with grave problems. While merely alleging lack of knowledge on the part of all prior owners is a simple matter, the proof that may subsequently be required could prove to be a nearly impossible task of witness location and testimony compilation. Consider the plight of a commercial landlord who is perhaps the fourth or fifth owner of a facility which may well be over ten years old.[110] Should a structural failure and resultant injury occur, the very existence of a cause of action depends on the landlord's ability

103. 63 Ill. 2d 485, 349 N.E.2d 20 (1976).

104. Amended count II of the complaint was directed against the architect and alleged, *inter alia*, that the design of the house was defective and that the plaintiffs had no knowledge thereof prior to their injury. Nothing was said as to the knowledge of the prior owner. *Id.* at 486, 349 N.E.2d at 21.

105. *Id.* at 487, 349 N.E.2d at 21.

106. *Id.* at 488, 349 N.E.2d at 22.

107. *Id.*

108. It is an indisputable axiom of civil procedure that the proofs must conform to the pleadings.

109. A "remote purchaser" is ordinarily one who purchases and takes possession of a structure *after* an initial or subsequent owner-occupant. It is a person who is other than the first purchaser of the structure in question.

110. While the *Auster* opinion applies only to property owners, arguable analogies can be drawn to situations involving real estate leases. The problems inherent in obtaining the required proofs from prior owners—usually a reasonably limited group—multiply greatly if similar proofs will be required of former lessees—ordinarily a far more expansive and numerous group.

to use the discovery rule in applying the statute of limitations.[111] However, in order to do so the landlord must allege and prove lack of knowledge on the part of all previous owners, some of whom may have moved, dissolved their corporation, merged their organization or worst of all, died.[112] Assuming that all former owners can be located, the considerable task of obtaining the required testimony from them remains. Thus, the more remote the plaintiff-purchaser, the greater the logistical problem of proof.[113]

Even though the supreme court upheld the application of the discovery rule to design professional malpractice actions in Illinois, the burden imposed upon a remote purchaser with respect to the proof required to sustain his action seriously weakens the very vitality of the remedy itself. Whatever the ultimate resolution, the final *Auster* ruling is sure to become a fertile source of litigation.

*Society of Mount Carmel v. Fox*

If there was any question concerning the finality of the holding of the lower court in *Auster*, the subsequent ruling in *Society of Mount Carmel v. Fox*[114] dispelled all doubts. The major issue presented to the court in *Fox* involved a determination of the date on which a cause of action accrues when dealing with a claim of architectural malpractice. As in *Auster*, the court applied the discovery rule to determine that a cause of action accrues "when a plaintiff knew or should have known of the error"[115] and not necessarily at the time when the defect did

111. *See* notes 99-100 and accompanying text *supra*.

112. The intrinsic difficulties of proving that a former owner-occupant, now deceased, had no knowledge of any defects (such proof being implicitly required by the *Auster* decision) are best left to the more ambitious areas of the imagination.

113. One possible solution to the potential difficulties posed by the *Auster* holding would be to require every former purchaser of real property to sign an affidavit prior to sale. Such an affidavit essentially would function as a declaration stating that the seller has no knowledge of defects and would be available for use in the event of a potential malpractice action. While this would arguably alleviate the tracking down of prior purchasers and the obtaining of their testimony, the idea of making such an affidavit an ordinary aspect of every closing seems radical. In any event, it would not assist those who are already remote purchasers by definition.

114. 31 Ill. App. 3d 1060, 335 N.E.2d 588 (1975).

115. *Id.* at 1061, 335 N.E.2d at 589. Section 16 of chapter 83 provides that any action to recover for property damage must be brought within five years of the date on which the cause of action accrues. By 1963, the school complex defendant designed had been built and sometime thereafter plaintiff noticed structural defects such as cracks, bulges and movement. Defendant was consulted and advised that the problems were maintenance related. Notwithstanding repeated repairs, the defects persisted and in 1969, subsequent to an independent inspection, plaintiff was informed that the problem was not one of maintenance but of a design flaw. In 1970, plaintiff instituted an action alleging negligence

in fact come into being. By so holding, the court was able to support the plaintiff's contention that the cause of action accrued in 1969, some six years after construction, when it obtained the results of a professional investigation and learned for the first time of the existence of a design flaw.

Quoting from *Rozny v. Marnul*,[116] the court noted the burden that the discovery rule places on the design professional: "The basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue."[117] Counterbalancing the difficulty, though not mentioned by the court, is section 58 of chapter 51[118] which provides a presumption of reasonable care in design after six years of cohesive structural stability without major or unusual problems. Because in this case there were severe structural problems almost from the close of construction, the statute had no application.

*Present Status of the Law*

It seems well settled that a design professional remains liable for his negligence in design or specification and for negligent supervision should such activity go beyond verifying technical compliance with the controlling contract documents. If a structure remains trouble-free and fails to cause injury for a period of six years after completion, there is a presumption, of undetermined persuasiveness, that reasonable care was used in its design and construction. If defects do develop, then an injured party may sue the design professional within the time specified by the applicable statute of limitations, measured from the date of discovery, *i.e.*, the time of the claimant's injury. Thus, under Illinois law today it is entirely possible for an architect or like practitioner to remain perpetually liable for any litigable mishap traceable to a structure with which he was connected. This remains true irrespective of how much time elapses between the rendition of services and the receipt of injury.

---

on the part of the defendant in failing to provide for expansion joints. Defendant answered that the five year statute of limitations began to run, pursuant to section 16 of chapter 83, on or about 1963 when the structural defects were first manifest. Thus, the defendant claimed that the statute ran out in 1968.

The trial court gave summary judgment to the defendant on the basis that the complaint was not filed within the five year limit, measured from the date of completion of construction as prescribed by the statute.

116. 43 Ill. 2d 54, 70, 250 N.E.2d 656, 664 (1969).

117. 31 Ill. App. 3d at 1062, 333 N.E.2d at 590 (citing Rozny v. Marnul, 43 Ill. App. 2d 54, 70, 250 N.E.2d 656, 664 (1969) ).

118. ILL. REV. STAT. ch. 51, § 58 (1975). *See also* notes 76-77 and accompanying text *supra*.

## THE NEW YORK EXPERIENCE

By way of comparison, the experience with professional malpractice litigation in New York offers a graphic contrast. In 1962 the New York legislature enacted a professional malpractice statute of limitations.[119] In substance, it provides that any cause of action arising out of work performed by a professional must be litigated within three years after such cause of action accrues. As in other jurisdictions, the precise time that the cause of action accrues had been a matter of speculation: does it accrue upon discovery of the defect[120] or upon initial occurrence, *i.e.*, design and completion of construction? In 1974 the question was authoritatively answered in the case of *Sosnow v. Paul.*[121]

Before discussing the *Sosnow* case, some mention of *Inman v. Binghamton Housing Authority*[122] must be made. Prior to *Inman* it was widely held that any action against an architect based on negligence must be grounded on the contract between the architect and his client. Hence, only the client had standing to sue the design professional. In this manner, third party claims against architects or engineers were unknown and a design professional's liability was correspondingly limited. In 1957 the New York Court of Appeals put to rest the fiction of privity and thus vastly widened the ambit of the design professional's liability. Although Illinois never formally adopted the *Inman* decision, the reference to its holding in *Miller v. DeWitt*,[123] and the existence of third party suits against design professionals indicates that the *Inman* reasoning has been impliedly adopted in Illinois as well as elsewhere.

In *Sosnow*,[124] the defendant-architect was retained in 1961 by the plaintiff-owner to design an apartment complex. The project was completed in 1965 and at least three years later the plaintiff began to notice various defects which ultimately occasioned the legal action that was subsequently commenced in 1971. Defendant moved to dismiss based upon the three year statute of limitations provided by the New York Civil Practice Law and

119. N.Y. CPLR § 214:6 (McKinney 1962).
120. *See* note 100 and accompanying text *supra.*
121. 43 App. Div. 2d 978, 352 N.Y.S.2d 502 (1974), *aff'd* 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975).
122. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). Plaintiff was a minor and tenant of defendant's housing project. He was injured when he fell from an open porch and sued defendant Housing Authority, architects and others. While no recovery was allowed, it marked the first time that a third party was permitted to press a claim against a design professional in the absence of any contractual relationship.
123. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
124. 43 App. Div. 2d 978, 352 N.Y.S.2d 502 (1974), *aff'd* 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975). The New York Court of Appeals affirmed the appellate division by issuing a memorandum opinion, thus all further *Sosnow* citation will be to the appellate division decision.

Rules, section 214. The trial court held that the professional malpractice statute of limitations was of the discovery variety and hence the action did not accrue until the plaintiff actually discovered the defects.[125] On appeal, the appellate division reversed, ruling that section 214 was an occurrence type statute and that the time began to run when the professional had completed his services. On further appeal to the New York Court of Appeals, the state's highest court, the appellate division was upheld in a unanimous decision: "The rule in cases where the gravamen of the suit is professional malpractice is now and always has been that the cause of action accrues upon performance of the work by the professional."[126]

In effect, this ruling stipulates a three year period during which a structure is "on trial." As measured from the date of substantial completion, if no litigable injury occurs within three years, then any later defects will not give rise to an action by an owner against the architect.

Of course, this ruling would not directly apply to an action by an injured third party against an architect, as such a person would ordinarily be governed by the *Inman* decision.[127] It is, however, notable that *Inman* requires the presence of a latent defect to give rise to the third party's action. In *Sosnow*, the failure of the architect to specify expansion joints[128] (which was found to be the cause of the structural defects) was not deemed to be latent. Based on this reasoning, third parties may have a very difficult time in proving a "latent defect" and thus avoiding the strict three year rule of *Sosnow*.

In Illinois, the applicable statutes of limitations, when applied to design professionals, are interpreted as discovery type statutes and thus the cause of action accrues upon injury or damage and not as of the date of occurrence or substantial construction. Under section 58 of chapter 51[129] a presumption of reasonable care in design is established if, after six years, no defects are disclosed by a structure. A mere presumption in favor of an architect, however, is not nearly as valuable as an absolute statutory bar on legal action. Thus, New York appears to have

125. 43 App. Div. 2d at 980, 352 N.Y.S.2d at 503.
126. *Id.*
127. *See* note 122 and accompanying text *supra.*
128. An expansion joint is a device inserted between structural components which permits a controlled amount of movement to occur between the components thus separated. Expansion joints are necessary to allow materials sensitive to weather to expand and contract without damage. The absence of such devices would seem to be in the nature of a latent defect in that it would require great changes of temperature to produce the visible signs (*e.g.*, cracks, bulges, movement) which would indicate absence thereof to an untrained individual.
129. *See* notes 76-77 and accompanying text *supra.*

the least liberal statute of limitations in the country with respect to actions against design professionals. Of course the constitutionality of such a statute remains at least arguably questionable under the same theory raised by the plaintiff in *Skinner v. Anderson*,[130] the case in which section 29 of chapter 83 of the Illinois Revised Statutes was found to be unconstitutional.

Following the *Sosnow* decision was the recent New York appellate court case of *Sears, Roebuck & Co. v. ENCO Associates, Inc.*[131] After establishing the proposition that when a claim sounds in malpractice, regardless of its classification, the malpractice statute of limitations[132] shall be applied,[133] the appellate division approved the trial court's application of the *Sosnow* decision: "[A]n action against an architect accrues upon the completion of the building and not upon the discovery of the building's defects . . . ."[134] The clock does not begin to run from the discovery of the defects but rather from the accrual of the cause of action."[135]

The court in *Sears* noted that if it were to apply a date of discovery interpretation to the statute of limitations it would be "imposing an open-ended, inchoate obligation, virtually in perpetuity."[136]

Thus, the New York legislature and courts have combined to provide design professionals[137] with the security of calculable litigation parameters which has both enticed and eluded their Illinois counterparts. This was accomplished by enacting a special statute of limitations and judicially defining "cause of action accrued" to refer to the date of occurrence as opposed to the Illinois preference for date of discovery.

## Conclusion

Every individual in the United States benefits from the services of a design professional. Without shelter, the enjoyment of food, clothing, rest and relaxation would be far less pleasant and

130. 38 Ill. 2d 455, 231 N.E.2d 588 (1967). *See* note 93 and accompanying text *supra*.
131. 54 App. Div. 2d 13, 385 N.Y.S.2d 613 (1976).
132. N.Y. CPLR § 214:6 (McKinney 1962).
133. 54 App. Div. 2d at —, 385 N.Y.S.2d at 614.
134. *Id.*
135. *Id.* at —, 385 N.Y.S.2d at 617.
136. *Id.* at —, 385 N.Y.S.2d at 618.
137. While the statute is worded in terms of "malpractice" without differentiating the professionals to whom it can apply, the recent addition of special section 214-a indicates that the medical profession cannot enjoy the same security given to architects, engineers, accountants and lawyers by the regular provisions of section 214:6. It is worth noting that section 214-a was enacted mainly as the result of numerous court holdings that the date-of-occurrence interpretation given to other professional malpractice litigation brought under N.Y. CPLR 214:6 did not apply to medical malpractice cases because of their extraordinary nature.

questionably useful. Just as the architect protects mankind from nature's hostility, so he now seeks protection from the threatening specter of perpetual liability for injury arising out of the rendition of his professional services. Although not expecting to escape all liability for fault, the design professional does desire legal guidelines that will enable him to establish to a reasonable degree of certainty when he can be relieved of the burden of defending a malpractice charge arising out of a mishap within a given structure. When we secure the services of a design professional, we expect him to create a structure which is cohesive, reliable and enduring. Is the design professional not entitled to similar protection from the legislature and judiciary?

*Todd L. Herbst*