

Contractor Termination Lawsuits: The Architect's Risks and How to Manage Them

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Introduction

Your project is behind schedule, over budget, does not meet the owner's expectations, or some combination of the above. More often the owner and contractor resolve their differences, but sometimes they do not and the contractor is terminated. Most contracts contain specific procedures for declarations of default by either party, but since construction contracts typically require the contractor to continue work during the pendency of disputes, most contract terminations are owner declared.

Once the owner declares a contractor in default of a construction contract and the contractor denies fault, litigation is nearly certain. This is universally true despite the wide array of possible responses, actions, and events following a declaration of default, and almost without regard for the size of the project. Whether the litigation is brought by the Owner, the Contractor, a sub-contractor, or a completing surety, the aggrieved party often includes the design professional on its list of pockets to raid. This article will examine why the architect is named as a defendant in these suits and identify some of the common theories of liability advanced by different construction-project participants. Finally, the paper will discuss practices that the architect can incorporate in its contracts and day-to-day business operations to lessen, and possibly avoid, litigation altogether.

1. Why is the architect sued when a project goes wrong?

The answer to this question, simply and obviously, is money. If the owner is the party filing suit, it is probably because the project has cost more, is behind schedule, or both. If the suit is filed by a contractor, a subcontractor, or surety, it is probably because the owner is looking to them for money (or in the case of the surety, the surety paid a bond claim and stepped into the owner's shoes). In the past it was difficult for owners, contractors, and sureties to make a claim against an architect. Two legal doctrines – the economic-loss rule and contractual privity – shielded architects from liability. These defenses were so effective that, only a handful of decades ago, many architects did not carry professional liability insurance. Unfortunately, those protective days are gone, and

design professionals now find themselves in court and arbitrations with increasing frequency.

2. Legal Theories Advanced

A. Breach of Contract

In a traditional design-bid-build delivery, only the project owner has a contract with the architect that may form the basis of a breach of contract claim. Other construction project participants are generally precluded from bring breach of contract claims and instead must rely on semi-contracts (asserting a third-party beneficiary theory of recovery) or assert tort claims, or claims for breach of imposed duty. While the owner could (and often does) sue the architect for a breach of the contract, the architect's performance of the contract is entwined with the standard of care—a distinctly tort concept usually involving professional negligence.

Many states have formulaic, but specific, recitations of the standard of care to which design professionals must adhere. More often than not, the standard is based upon the care and skill ordinarily possessed and exercised by similarly situated professionals.¹ When a design professional's "actions meet the standard of those skilled and experienced in that profession, the [design professional] has met his responsibility."² Unfortunately for the design professional, the existence and breach of duty are typically considered to be questions of fact, precluding an early exit from the owner's litigation even when only contractual claims are asserted.

B. Tort claims

Historically, the law prohibited strangers to the contract from pursuing tort claims against architects. Scores of older cases held that because the architect's contract was with the owner, the architect owed few, if any, duties to other project participants such as contractors, subcontractors, and sureties. Because of the lack of a duty owed, those third parties could not recover purely economic losses unless they also suffered bodily injury or property damage. Courts reasoned that "the line between physical injury to property and economic loss reflects the line of demarcation between tort theory and contract theory."³

¹ *Lowes Home Centers, Inc. v. Laxson*, 655 So. 2d 933, 945 (Ala. 1994); *Greenhouse v. C.F. Kenner Assocs. Ltd. P'ship*, 723 So. 2d 1004 (La. Ct. App. 1998); *Clark v. City of Seward*, 659 P.2d 1227 (Alaska 1983).

² *The Collins Co. Inc. v. City of Decatur*, 533 So. 2d 1127, 1134 (Ala. 1988).

³ *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).

Thus, the economic loss doctrine shielded design professionals from liability to third parties because of a lack of contractual privity with those third parties. Today, few jurisdictions require privity of contract for a third-party's tort claim against an architect.

The most common tort claim that third parties assert against design professionals following a contractor's termination is negligence, or some variation of it. Contractors, subcontractors, and sureties sometimes claim that the design professional was negligent in observing or inspecting work in place; approving payments from the owner to the contractor; providing contract administration services on the project; confirming delivery and payment for supplies; untimely or vaguely responding to requests for information concerning the design documents; or authorizing the release of retained funds. Now, as before, the issue courts face is whether the design professional owed a duty to the claimant. Where contractual privity and the economic loss doctrine used to make the analysis straightforward and predictable, courts today conduct a complex examination of (1) whether the claimed injury to the third party was foreseeable due to the design professional's negligence or (2) whether the design professional made a misrepresentation that the third party justifiably relied upon as expressed by Section 552 of the Restatement (Second) of Torts.⁴ Both examination issues are discussed below.

i. Is it foreseeable that the complaining party would be adversely impacted?

One of the earliest cases involving foreseeability in this context involved a surety's argument that its injury was a foreseeable consequence of the design professional's conduct.⁵ In deciding whether a third party's conduct has a foreseeable impact, the court in *United States v. Rogers & Rogers* set forth the following factors:

- The extent to which the transaction was intended to affect the third party;
- The foreseeability of harm to the third party;
- The degree of certainty that the third party suffered injury;
- The closeness of the connection between the design professional's conduct and the third party's injury;
- The moral blame attached to the design professional's conduct; and
- The policy of preventing future harm.⁶

⁴ The *Restatements of the Law* are a set of treatises published by the American Law Institute that are not binding in and of themselves but are highly persuasive as they reflect the consensus of the American legal community.

⁵ *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S. D. Cal. 1958).

⁶ *Id.* at 135.

Interestingly, in *Rogers & Rogers*, the court placed significant weight on the architect's control over the project, noting that the architect had the power to stop the contractor's work on the project.⁷ The fact that modern construction practices and relationships rarely grant the architect such power over a project has not slowed the application of the foreseeability analysis to hold architects liable for negligence. Whether the cause is a lingering misperception of the design professional's level of control or an unreasonable expectation that a design professional's involvement is akin to a guarantee of adequate construction, design professionals continue to be frequently targeted when a project fails to proceed as planned.

In response to the changing realities of the construction industry and court decisions in the wake of *Rogers & Rogers*, AIA standard forms have undergone several revisions. Today, the AIA standard form contract explicitly limits the architect's control over the project by making the contractor solely responsible for the construction means, methods, techniques, sequences, or procedures except where the contractor makes the architect aware of problems with means or methods.⁸ Although the AIA documents attempt to avoid holding the design professional liable for construction errors, the *Rogers & Rogers* decision remains influential in jurisdictions where suits against the design professional are permitted.

Despite the wording of the standard AIA contracts, some courts continue to focus on the foreseeability analysis; but others have taken a different approach. In some jurisdictions, the courts evade the historical requirement privity of contract by resorting to a misrepresentation theory adopted from the Restatement, which is discussed below.

ii. Misrepresentation: The Restatement's exception to the economic loss doctrine.

In the absence of contractual privity, older case law applied the economic loss doctrine to prohibit a surety's recovery from a design professional. However, the Restatement provides an exception to the economic loss doctrine for negligent misrepresentations. Under the Restatement, regardless of the lack of bodily injury or property damage, a party who, in the course of its business provides information to others

⁷ *Id.* at 136.

⁸ AIA Standard Form of Agreement between Owner and Architect A201-2007, § 4.2.2.

may be liable for pecuniary loss if the other party justifiably relies on information when the provider failed to exercise reasonable care or competence in obtaining or communicating information.⁹

Several states have adopted this approach. But applying it often raises other questions. For instance, is the architect in the business of providing information? The answer depends on the scope of work the architect undertook to provide. If the architect's certifications are not the "end and aim" of the work the owner hired the architect to provide, the information supplied may be ancillary or incidental to the actual work the architect was hired to perform.¹⁰ Nevertheless, as the design professional accepts more responsibility, oversight, or control for additional business revenue, it can expect that the "end and aim" of its work may be considered more administrative than construction related. When that happens, the design professional's role as an information conduit or relay may not be considered ancillary to the construction work, resulting in liability.

3. Who sues the Architect?

A. Owner

On a typical project, the architect's only contract is with the owner. This defined relationship makes it obvious to whom the architect owes an obligation, and when drafted well, defines the scope of those obligations. Because of the contractual relationship, the alleged duty owed by the architect and the party to whom that duty is owed is seldom in dispute. The nature of breach of contract claims depend on the language of the document and can cover a wide range of disputes from the payment for the architect's design services to the timing for the delivery of design documents. As mentioned above, the manner in which the architect carries out the obligations of the contract is often governed by the standard of care. Some of the most common claims that owners bring against architects are based on the architect's obligations on the project as the work is completed by the contractor. Several are listed below.

i. Payment Certifications

The AIA documents require, and design professionals routinely certify the contractor's requests for progress payments. The primary purpose of the certification is to confirm that the contractor has not billed for more work than it has actually performed. If the design professional approves draw requests that result in overpayments to the

⁹ RESTATEMENT (SECOND) OF TORTS § 552.

¹⁰ *RLI Ins. Co. v. Indian River School Dist.*, 556 F. Supp. 2d 356, 362 (D. Del. 2008).

contractor for work in place, the overpayment may result in losses to the owner if the costs to complete the project exceed the remaining budget. Even where the contract is silent with regard to the certification of payments, courts have found that architect certifications are for the benefit of the owner, and it is foreseeable that a dereliction of the architect's duty to certify the payments would harm the owner.¹¹

ii. Contractor “front loads” Payment Applications

During the early stages of a project, it may be difficult for a design professional to accurately quantify the work in place. Site-preparation work, materials costs, equipment issues, and unforeseen conditions may conspire to deplete contract funds faster than anticipated. But not every instance in which the expenditure of contract funds substantially outpaces the work in place is the result of changes, overruns, or unforeseen conditions.

In order to reduce the expense of borrowing funds to “carry” a project, some contractors may submit pay requests beyond what the work in place will allow. These front-loaded payments may enable a contractor to buy a piece of equipment, stockpile materials, or forego expensive financing for the project. In some cases, the contractor's motives are less pure. Contractors in desperate straits may front-load pay requests on a current project to complete prior projects. This practice of “robbing Peter to pay Paul” can eventually catch up with the ever-optimistic contractor, sometimes resulting in default on the project. Unfortunately, the owner frequently looks to the design professional responsible for certifying pay requests if the prematurely-expended contract funds bear little relation to the work in place and the owner suffers a loss as a result.

iii. Errors in contract observation or inspection

The duties imposed on design professionals to observe or inspect construction progress may arise out of custom and practice, the architect's knowledge and expertise, or the contract itself. Courts have recognized the owner's right to sue the design professional where it is alleged that the design professional failed to adequately observe the work, failed to make an adequate number of inspections, and improperly authorized payment for defective work.

In most cases, the design professional's duties—or lack thereof—are specifically described in the contract with the owner. Some of the language from the AIA documents attempt to limit the design professional's exposure. For instance, A201-2007, section 4.2.2 says, with regard to the Architect's Administration of the Contract, the architect will become “generally familiar” with the work, but the architect will not make “exhaustive or continuous on-site inspections to check the quality or quantity of the Work.” In the current standard

¹¹ *Westerbold v. Carroll*, 419 S.W.2d 73 (Mo. 1967).

form, the only “inspections” required are the architect’s inspections to determine dates of substantial completion and of final completion.¹² Still, many lawyers argue over the degrees of differences in words like observation, supervision, and inspection.

Despite intentionally limiting the extent of their inspection services by contract, design professionals may still find themselves in court because courts do not always honor the contract language intended to limit the architect’s responsibility. Two Texas cases provide a good comparison and highlight the distinctions based on the party bringing the claim against the architect. In *Hunt v. Ellisor & Tanner, Inc.*,¹³ the court ignored the contract language requiring the architect to make only periodic site visits and held the design professional liable to the **owner** for failing to discover construction defects where the architect’s contract required the architect to “endeavor to guard the owner” against defects and deficiencies.”¹⁴ In *Black + Vernoooy Architects v. Smith*, an intermediate appellate court reversed itself in finding that an architect owed no duty to the **owners’ guests** that were injured when a residential balcony collapsed. The court recognized that neither the architect’s contract with the owner nor the common law imposed a duty upon architects to third parties.¹⁵ That the architect had the ability to reject the contractor’s work did not amount to the right to control the work. Though a detailed written description of the design professional’s observation and inspection obligations is best, courts may find a duty owed by the design professional even where only a general description is included in the contract.

Moreover, some courts have found that the design professional’s duty arises out of industry custom, independent of any contract. New Jersey’s Superior Court found persuasive an expert’s testimony that an architect was negligent in not calling in engineers to evaluate structural failure and settlement.¹⁶ According to the testifying expert in that case, architects were “generalists” and industry customs and standards require an

¹² A201-2007, § 4.2.9; Jonathan J. Sweet, Sweet on Construction Industry Contracts: Major AIA Documents: § 12.02 (5th ed. 2009).

¹³ *Hunt v. Ellisor & Tanner, Inc. Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933 (Tex. App. 1987).

¹⁴ *Id. See also Watson, Watson, Rutland/Architects, Inc. v. Montgomery County Bd. of Educ.*, 559 So. 2d 168, 174 (Ala. 1990).

¹⁵ The contract between the owner and the architect in this case contained language requiring the architect to “endeavor to guard the Owner against defects and deficiencies.” That language has been deleted in the current AIA B101-2007 in favor of a subjective standard requiring the architect to visit the site and report to the owner known deviations from the Contract Documents and defects and deficiencies observed in the Work. See § 3.6.2.1.

¹⁶ *Vitale v. Seibert*, 2009 WL 4724861 (N.J. Dec. 11, 2009).

architect to call in other experts (in that case structural or soil engineers) when necessary. A federal district court in Ohio found that an architect may be liable where he failed to notice and correct obvious departures from good construction practices that also violated contract-based supervisory requirements.¹⁷ As odd as these manufactured descriptions of duties may sound, the concept is not far from the standard of care familiar to design professionals in most every state.

iv. Failure to Report Construction Defects and Require Correction of Defective Work

A design professional sometimes contracts with the owner to make site observations and confirm the adequacy of the work in place. Under these circumstances, the design professional's duty to report defective work is axiomatic. But some courts hold that the design professional is bound to report defective work **and** see that it is corrected even when there is no contractual obligation.¹⁸ It may not matter that the architect's contract explicitly states that the architect is not responsible for construction means, methods, techniques, sequences, or procedures.¹⁹

For example, in a New York case, the owner sued the project architect over a defective roof.²⁰ Even though the architect's contract with the owner provided that the architect was not responsible for the contractor's work, it did obligate the architect to keep the owner informed of the progress of the work. The court found the architect liable to the owner because the architect knew of the roofing contractor's defective work but did not tell the owner of the defective work when the architect reported on the work's progress.²¹

v. Deficient Design Documents

Where the architect's design is flawed or specifications are in error, the owner may have a claim against the architect for breach of contract, negligence, or a hybrid of the two. As mentioned above, these claims are governed by the standard of care familiar to most

¹⁷ *First Nat'l Bank of Akron v. Cann*, 503 F. Supp. 419 (N.D. Ohio 1980).

¹⁸ *See Berkel & Co. Contractors v. Providence Hosp.*, 454 So. 2d 496, 502 (Ala. 1984) (finding that architects bear responsibility to act in situations where they are the only party in a position to prevent a loss); *Kleb v. Wendling*, 385 N.E.2d 346 (Ill. 1978) ("Mere detection of defective workmanship does not relieve an architect of its duty to prevent defects.").

¹⁹ *U.R.S. Co. v. Gulfport-Biloxi Regional Airport Auth.*, 544 So. 2d 824 (Miss. 1989).

²⁰ *Bd. of Educ. V. Sargent, Webster, Crenshaw & Folley*, 146 A.D.2d 190, *appeal denied*, 551 N.E.2d 107 (1989).

²¹ *Id.*

architects.²² When a design professional’s “actions meet the standard of those skilled and experienced in that profession,” the design professional has met his responsibility.²³ Unfortunately because questions of duty and breach are typically treated as questions of fact, a design professional may have little success in obtaining an early dismissal of claims based on allegations of deficient design documents even where the claims lack merit.

Additional traps await when contract documents require the architect to deliver drawings, plans, specifications, or buildings that are compliant with every conceivable rule-making authority. In a recent example, the project owner sued the architect when numerous change orders for alterations to the original design were required to comply with building codes.²⁴ According to the parties’ agreement, the architect agreed to provide plans and specifications that complied with all applicable laws, statutes, rules and regulations. In doing so, the court found that the architect committed himself to a higher duty than that required by the traditional standard of care and his plans fell short of that elevated duty. In other states, the contract between the owner and the architect includes an “implied agreement” that (1) the plans are suitable for the purposes for which they were prepared,²⁵ and (2) that the architect has a duty to draw plans and specifications that are compliant with building codes, zoning codes, and other local ordinances.²⁶ Though it is certainly common for architects to agree to contractual provisions promising adherence to building codes, agreements to comply with all laws, statutes, rules, and regulations can be problematic where architects are ill-equipped or ill-advised to know what all of those requirements might be.

B. Subsequent Property Owners

A number of jurisdictions—whether by judicial decision, legislative action, or both—recognize a duty owed by design professionals to subsequent homeowners. One example is the California case *Beacon Residential Community Association v. Skidmore, Owings and Merrill LLP*.²⁷ In that case, the homeowners’ association, on its behalf and on behalf of

²² *Lowes Home Centers, Inc. v. Laxson*, 655 So. 2d 933, 945 (Ala. 1994); *Greenhouse v. C.F. Kenner Assocs. Ltd. P’ship*, 723 So. 2d 1004 (La. Ct. App. 1998); *Clark v. City of Seward*, 659 P.2d 1227 (Alaska 1983).

²³ *The Collins Co. Inc. v. City of Decatur*, 533 So. 2d 1127, 1134 (Ala. 1988).

²⁴ *School Bd. of Broward County v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059 (Fla. 4th DCA 2014).

²⁵ *Greehaven Corp. v. Hutchcraft & Assocs., Inc.*, 463 N.E. 2d 283, 285 (Ind. Ct. App. 1984).

²⁶ *Id.*; see also *Himmel Corp. v. Stade*, 367 N.E.2d 411, 415 (Ill. App. Ct. 1977).

²⁷ 327 P.3d 850 (Cal. 2014).

future residents, sued the architects that provided architectural and engineering services as well as construction administration and construction contract management services. The contract between the architects and the owner specifically provided that only the parties to the agreement could enforce the agreement's obligations. Despite the contractual language, the California intermediate appellate court framed the question not whether the architects owed a duty of care to future residents, but rather the scope of the duty owed. The California Supreme Court affirmed the lower court's ruling in finding that the architects owed future homeowners a duty of care even where the architects do not build the project or exercise ultimate control over construction.

C. Contractor

Since an architect and contractor do not typically have a contractual relationship, most claims asserted by a contractor against an architect are based on either a third-party beneficiary theory or tort theory. Third-party beneficiary claims have only limited success, mostly because of contract language. Tort claims, on the other hand, have proven viable in a number of states. Depending on which state's law governs the claims, the economic loss doctrine may provide the architect with a successful defense.

i. Third-Party Contract Beneficiary

Contractors without a contractual relationship with the architect argue that they are an intended beneficiary of the architect's contract with the owner. To succeed on a third-party beneficiary claim, the contractor must prove (1) that there is a valid contract between the owner and the architect and (2) that the clear intent of that contract is to benefit the contractor.²⁸ The second element sinks many claims because many form contracts—including the AIA Standard Form—explicitly disclaim any intent to benefit any third-party. Even where the contract is silent regarding the benefits, many courts reject the theory where the facts suggest that the contractor is merely an incidental beneficiary rather than an intended beneficiary. Accordingly, the third-party beneficiary theory often receives hostile treatment from the majority of courts when asserted by contractors against design professionals.

ii. Tort Theories

For a contractor to maintain a tort action against an architect there must be a duty owed by the architect to the contractor. Because a contractual duty seldom exists, the contractor argues that because it is—or at least should be—foreseeable that the contractor would rely on the architect's professional services, that a duty should be implied. Those

²⁸ See *Bernal, Inc. v. Kessler-Greystone, LLC*, 70 So. 3d 315, 320 (Ala. 2011).

professional services may include the architect's actions during contract bidding, the architect's design, or the architect's conduct during construction, especially with respect to payment certifications.

(1) During bidding

In the bidding process, unsuccessful contractors have alleged intentional torts—like defamation and intentional interference with contracts—against architects who either control the bidding process or make recommendations regarding bidders to the owner. For example, in *Chaves v. Johnson*, the plaintiff (an architect) won a bid for architectural services in connection with a city project.²⁹ The defendant, another architect, submitted a lower bid and was annoyed that the project was awarded to the plaintiff. He sent a letter to the city council with his opinions disparaging the plaintiff's experience and fee schedule. The city council later terminated the plaintiff's contract and he filed suit alleging defamation and tortious interference with contract rights. The trial court disregarded the jury's verdict and found for the defendant on both counts.

The appellate court affirmed the ruling that dispensed with the defamation claim finding the statements in the defendant's letter to be opinion. But the appellate court reversed the dismissal of the tortious interference claim. According to the court, the jury found that the defendant's letter caused or induced the city council's decision to terminate the plaintiff's contract in violation of Virginia law. The decision has been criticized in other jurisdictions as penalizing an individual for speaking the truth on a matter of public importance, but remains viable.³⁰ Several states have enacted statutes giving the architect partial or qualified immunity except where the architect's actions are either self-benefitting or intended to harm the bidding contractor.

(2) Deficient Design Documents

Contractors have also asserted claims against architects alleging that deficient design documents increased the cost of a project and led to the contractor–owner dispute. Again, the contractor and architect are generally not in contractual privity, but some courts have refused to let that stand in the way of the contractor's negligence claim.³¹ The foreseeability that the contractor would rely on the architect's design in performing the work enabled several courts to ignore the economic loss doctrine and permit the claims against the architect. As explained by the court in *A.R. Moyer, Inc. v. Graham*, where the

²⁹ *Chaves v. Johnson*, 335 S.E.2d 97 (Va. 1985).

³⁰ See, e.g. *Murphy v. Prosum, Inc.*, 2002 WL 1453645 (Cal. App. 2d Dist. July 2, 2002) (unpublished).

³¹ See *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677, P.2d 1291 (Ariz. 1984).

contractor was totally dependent upon the architect's plans and could not take steps to protect itself against the consequences of the negligence of the architect or engineer, a cause of action for negligence may proceed despite absence of privity.³²

(3) Contract Administration

Few of the architect's contractual duties create more opportunities for litigation than the architect's contract administration responsibilities. Where the architect is responsible for certifying work in place or observing the contractor's work, any delays, errors, or omissions can land the architect in court. Some courts have permitted a contractor's claim that the architect intentionally interfered with the contractor's contract with the owner. Of course, some courts still require a showing of privity or economic loss before allowing these types of claims to proceed, but the number of jurisdictions is shrinking. Through careful and clear contract drafting specifically delineating scope of contract administration responsibilities, the architect may deflect these types of claims. An example of the pitfalls of imprecise descriptions of a design professional's contract administration responsibilities and possible ways to avoid them is included in the Case Illustration below.

D. Subcontractor

Generally speaking, the further a party to a construction project is from the contractual relationship with the architect, the more difficult it will be for a court to find a duty owed by the architect to that party. With this precept in mind, the cases dealing with a subcontractor's direct claim against an architect are relatively sparse. The usual scenario involves a subcontractor's suit against its contractor or a third-party complaint (or cross-claim) when the owner sues the contractor and subcontractor. The same analysis concerning foreseeability applies to the subcontractor's claims against the architect.³³ Subcontractors have succeeded in recovering damages where an architect's delays were found to delay the project; where the architect failed to notice a design defect that caused the subcontractor to incur additional expense; and where allegedly defective design specifications caused delays.

³² *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973).

³³ See, e.g., *Davidson and Jones, Inc. v. New Hanover County*, 255 S.E.2d 580 (N.C. App. 1979) (recognizing that in the absence of contractual privity, architect may be sued by subcontractors for economic loss foreseeably resulting from breach of architect's common-law duty of due care in the performance of his contract with the owner, but subcontractor may not impose contractual duties on architects not expressly assumed in the contract).

E. Surety

Many of the causes of actions asserted by owners against architects can also be asserted by the surety who completes the project following the contractor's termination. Of course, the privity, economic-loss, and misrepresentation theories, and defenses thereto, figure prominently in these claims because the surety is effectively a stranger to the project up until the contractor's termination. Still, many courts have permitted the surety's claims on the theory that it is foreseeable that the completing surety would rely on the architect's certification of progress payments,³⁴ release of retainage,³⁵ errors in contract administration,³⁶ and deficient design documents.³⁷

4. Avoiding Blame and Managing Risks

With an understanding of the circumstances that give rise to potential claims, the design professional has the ability to structure its contracts and business practices to avoid claims. The same contracts that courts construe as imposing a duty on the design professional to the owner, contractor, or surety can also be used to avoid, or at least minimize, a design professional's exposure. In other cases, equitable doctrines, procedural formalities, and statutes can further deflect tort and contract claims. Problems arise, of course, when courts change the rules.

³⁴ *Westerbold v. Carroll*, 419 S.W.2d 73 (Mo. 1967).

³⁵ *State ex rel. Nat'l Sur. Co. v. Malvaney*, 72 So. 2d 424 (Miss. 1954)

³⁶ *Calandra Development, Inc. v. R.M. Butler Contractors, Inc.*, 249 So. 2d 254 (La. Ct. App. 1971) (recognizing right of surety, but denying recovery on the facts), failure to report and correct defective work See *Berkel & Co. Contractors v. Providence Hosp.*, 454 So. 2d 496, 502 (Ala. 1984) (finding that architects bear responsibility to act in situations where they are the only party in a position to prevent a loss); *Kleb v. Wendling*, 385 N.E.2d 346 (Ill. 1978) ("Mere detection of defective workmanship does not relieve an architect of its duty to prevent defects."). It may not matter that the architect's contract explicitly states that the architect is not responsible for construction means, methods, techniques, sequences, or procedures. *U.R.S. Co. v. Gulfport-Biloxi Regional Airport Auth.*, 544 So. 2d 824 (Miss. 1989)

³⁷ See *Travelers Cas. & Surety Co. v. Dormitory Authority—State of New York*, 734 F. Supp.2d 368, 376-85 and n.23 (S.D. N.Y. 2010) (collecting cases finding no "functional equivalent of privity" and no basis for departure from economic loss doctrine on surety's claim against architect). For additional discussion of several of these circumstances, see Michael Chapman, *The Liability of Design Professionals to the Surety*, 20 FORUM 591 (1985).

A. Contract Drafting

No matter who is the plaintiff, claims against design professionals often arise from an expressed or implied undertaking by the design professional. To refute the implied undertakings, a carefully drafted contract can go a long way towards keeping design professionals out of court or providing solid defenses to claims when litigation cannot be avoided. Contract provisions continue to evolve to limit the design professional's scope of responsibility and amount of liability.

i. Clearly Defined Scope of Work

Design professionals should not undertake work on any project without defining the work that the owner expects to pay for and the architect expects to perform. Without a clearly defined scope of work, any person involved in the project—even those without a business relationship with the architect—can claim that the architect agreed to do (or not do) virtually anything. After all, design professionals rarely intend to be the guarantor of a contractor's work. When written expectations are unclear, the architect can find itself accused of making representations that it never considered or intended.

ii. Avoiding Warranties, Certifications, and Guarantees

Terms used in contracts are sure to be scrutinized—some would say twisted—in litigation. Consider the standard Application and Certificate for Payment, AIA Document G702. An architect that signs off on the standard form may be getting more than he bargained for. AIA Document G702 provides:

In accordance with the Contract Documents, based on on-site **observations** and the data comprising this application, the Architect **certifies** to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is **in accordance** with the Contract Documents, and the Contractor is **entitled** to payment of the AMOUNT CERTIFIED. (bold added for emphasis)

Though the term “observation” is preferred over “inspection,” “visit” might be the most accurate term to describe the architect's actions in conjunction with a certificate for payment. If site visits do not provide ample information for the architect to certify that the work has progressed as indicated and that the quality of the Work is in accordance with the Contract Documents, the architect should not “certify” anything. Furthermore, for the Work to be in accordance with the Contract Documents can be argued to mean as set out on the designer's drawing. It is virtually impossible for **all** work to be accomplished exactly

as drawn. Not only that, it may be impossible to tell on a brief visit if some work is remotely close to the designer's specifications, especially when other work is performed on top of that work.

With these realities in mind, and to the extent possible, architects should attempt to draft their payment certifications to read less like warranties and more like estimates. An example of alternative language that may be used is as follows: In accordance with the Contract Documents, based on the Architect's limited visits to the Project site, it is the Architect's opinion and belief that the Work has progressed as indicated, the Work appears consistent with the Contract Documents, and the Contractor is entitled to payment of the amount certified.

iii. Construction Observation vs. Construction Inspection

On some projects, the architect finds itself in a strange position. The owner probably likes the idea of a knowledgeable professional at the site, even if only a portion of the time, to observe the contractor's work and determine if the work is performed correctly. The architect wants to visit the site to see how work is progressing and to answer the contractor's design-related questions before the work is performed. But without the owner and architect's expectations being clearly defined, the owner may allege (as many have over the years) that the architect was negligent in failing to report deficiencies in the contractor's work. The architect is shocked by the allegation because the owner declined to pay the architect for construction services when the parties negotiated the contract and the architect only agreed to visit the project once a week.

The specific language in the contract matters, and care should be taken to ensure that the language reflects the parties' expectations. After all, an architect that agrees to be paid for weekly observations has shouldered a greater burden than the architect who has agreed in his scope of work to make only three visits at predetermined project intervals. The contract should be drafted to accurately reflect the risk that the parties agree to bear. As discussed above, it should come as no surprise that the owner might not be the only one to try to rely on the architect's contract.

B. Defensive Architecture

It is a rare project when the parties know litigation will result while the work is in progress. However, there are some business practices that architects can implement to minimize the potential exposure that a lawsuit might bring. While certainly not an exhaustive list, good documentation, good communications, and staying within the scope of work can provide the foundation for a solid defense. If there is a common thread in lawsuits against architects, it would be an allegation that the architect did, or did not do, something that the other party thinks the architect should have done. Whether the architect

was commenting on shop drawings, approving payment applications, preparing change orders, answering requests for information, visiting the site, or completing a Certificate of Substantial Completion, communications can go a long way toward managing expectations, explaining what was done, and why. But good communication coupled with good documentation is better.

5. Case Illustration

A design professional provided plans and specifications for a commercial development. The project plans called for significant cut and fill work, the maximum thickness of lifts of fill, compaction levels of fill material, and compaction testing of fill at defined intervals. The contract documents did not use AIA form contracts, but did describe the design professional's duties during construction. The design professional contracted for no construction contract administration other than certifying pay requests based on observations of the work in place. The design professional made periodic site visits to observe quantities and work in place.

As the earth-moving work progressed, the design professional made periodic site visits to observe the contractor's progress placing the fill. A geotechnical engineering firm tested the compaction density of each lift of fill and documented the results on a report. Each report—which listed multiple compaction tests—identified the location of each of the tests and the compaction density of the fill material placed by the contractor. The geotechnical engineer copied the design professional on its soil-compaction test reports to the owner. Without exception, the reports demonstrated that the contractor achieved adequate compaction at each test site. The design professional barely reviewed the compaction reports as they came in (if at all) and routed them to the project file.

A year after the project was finished, the owner began to notice cracks in the structures built on the site. Soil settlement was to blame. Predictably, the owner sued all involved, including the earth-moving contractor, the geotechnical engineer, and the design professional. Although the compaction testing reports showed adequate compaction, the owner alleged (1) the contractor placed the fill in lifts that were too thick, causing the compaction tests to be unreliable, and (2) the number of compaction tests listed on the reports demonstrated that the tests were not performed with the frequency required in the plans and specifications. The owner alleged that the architect was negligent because he received a copy of all of the compaction test reports, possessed the expertise to know that there were not enough tests for the area described on the report, and failed to notify the owner of the insufficient testing.

The parties resolved the case before the court decided whether the architect assumed or otherwise owed a duty to the owner to review the geotechnical engineer's

reports when it agreed to observe the work. The architect could have avoided years of the time and expense of litigation with better communication, better contracting, or both. The design professional could have replied to one of the early reports with a statement to the owner that he would be happy to review the geotechnical engineer's reports for an agreed-upon price if the owner wished. Alternatively, the contract could have been more specific define the design professional's duties. The contract could limit observations of the work in place to those observations made at the project site and specifically exclude review of administrative reports.

Conclusion

The scope and expense of the modern construction project virtually guarantee that a contract termination will lead to litigation. The amount of money at stake often dictates the sweep of the litigation and aggrieved parties are prone to include every person that had any project responsibility, including design professionals. With the importance of contractual privity and the application of the economic-loss doctrine waning, plaintiffs have made significant inroads in developing claims and theories of liability against design professionals. Though the theories that courts have adopted to permit these claims vary, the result is that claimants now have additional pockets to look to for compensation for losses sustained during construction projects. Design professionals continue to have defenses, but some courts have shown a willingness to disregard contractual attempts to limit the design professional's scope of work and liability. Without bright lines setting the boundaries of the duties owed to the respective parties, design professionals are often left wondering whether their jurisdiction will honor the parties' contract or find a way to reach a result that the court deems fair.

A design professional's ability to manage and overcome the potential risks of contractor termination is largely determined by a clearly defined scope of services, effective communications and good documentation. The design professional is advised to seek legal assistance familiar with applicable state laws where the project is located for design services contract preparation, maintain effective and ongoing communications with project participants, and thoroughly document all actions and services consistent with good professional practice.