CONSTRUCTION DAMAGES AND REMEDIES

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VII - Design Professional Liability to the Client

Introduction

The design professional is the high priest of the construction process, involved at the borning of a project -- before permits, bids, turned earth. Projects may be conceived by need, but the vitality of a project begins with its design. Memorable buildings are described first by reference to the vision and depth of the designer, and second to the craft of the builder.

The relationship between the design professional and his owner client is unique in the construction industry. It is a professional relationship, one in which trust and confidence are reposed. The design professional is required to subordinate his interests to those of his client.[1]

The design professional's job is in many ways the most difficult in the construction industry. Construction is a collaborative process. It requires cooperation from all participants. But collaboration must have a nucleus, and that nucleus is the project design. The design professional's plan must be clear enough for the other participants to understand, estimate and properly sequence so that the desired product is achieved within the allocated time for completion.

[1] JUSTIN SWEET, SWEET ON CONSTRUCTION LAW §2.1 (1997)

The design professional must use skill and attention to ensure proper communication concerning the design and its implementation. This communication may be by drawing or sketch, as well as by letter, email, or project web site. The manner and form of project communication are limited only by the creativity of those in charge of the process.

A design professional is most effective in communicating his design plan when he understands his audience and comprehends its point of view. The design professional must be cognizant of the economic pressures a project imposes upon the owner and the project's contractors. He must use these economic levers in a positive way for the project's benefit. This is an acquired expertise – it is not regularly taught as part of the professional school curriculum.

The design professional tends to have a different economic outlook about a project from that held by other project participants, including the client owner. Alone among the project participants, the design professional owns property rights in the intellectual property created for a project. The design professional is often granted independent evaluative powers over the conduct of various parties and the effect of various events upon the prosecution of the project work. Because the design professional does not normally benefit financially from project cost savings, his project outlook can be quite different from that of bidding contractors. This is especially true when a design professional is called upon to evaluate the effect of a delay upon the project's progress schedule caused by his or the owner's actions.

On many projects, the design professional alone approves contractor submittals and substitutions, certifies progress payments, recommends time extensions (compensable and non-compensable), and passes upon the acceptability and completion of contractor work. When this power to rule upon the scope and acceptability of the work of others is coupled with the owner's power of the purse, the design professional's role can approach that of the project sovereign. As observed by one court, the design professional in such a situation assumes the power of economic life over contractors and subcontractors working at the project.[2] It is no wonder that many contractors treat the design professional solicitously. Even when benevolent, "he must be praised, decorated, tolerated."[3]

As American construction law has developed, it has recognized the design professional's unique status within the construction process. Courts have acknowledged the professional relationship binding, and the standard of care owed by, a design professional to his client owner. Because design professionals are held to a professional standard, expert testimony is normally required in order to show that the design professional did not satisfy the standard of care that other professionals similarly situated would have exercised.[4]

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[2] *See* United States v. Rogers & Rogers, 161 F. Supp. 132, 136 (S.D. Cal. 1958).
[3] Marcus Tullius Cicero, commenting upon the proper decorum to be observed around Octavian (in Latin: laudandus, ornandus, tollendus).
[4] *See* Noble v. Worthy, 378 A.2d 674, 676-77 (D.C. 1977); Seaman Unified Sch. Dist. No. 345, Shawnee County v. Casson Constr. Co., 594 P.2d 241 (Kan. Ct. App. 1979); Hotel Utica, Inc. v. Ronald G. Armstrong Eng'g Co., 404 N.Y.S.2d 455 (App. Div. 1978); Annotation, *Expert Testimony – Architect's Malpractice*, 3 A.L.R. 4TH 1023 (1981); *see also* authorities cited at West's 272 NEGLIGENCE, k1672;

Courts have also acknowledged that the professional negligence standard imposed by law may be modified by contract.[5] In the absence of express contractual provisions to the contrary, liability and responsibility are not imputed to the design professional merely by the existence of a construction design defect.[6] Likewise, absent specific contract language, a design professional does not impliedly warrant, to his

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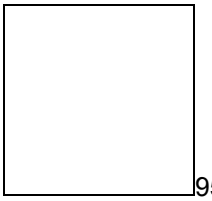
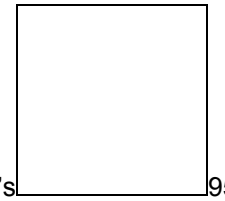
 95 CONTRACTS, k349(1). *But see* M.J. Womack, Inc., v. State House of Representatives, 509 So.2d 62 (La. Ct. App. 1987) (expert testimony was unnecessary to establish that an architect was negligent in failing to check existing blueprints of State Capitol before designing renovations to the building, since the nature and existence of the architect's negligence was within the common sense grasp of lay jurors).

[5] *See, e.g.,* Town of Breckenridge v. Golforce, Inc*.,* 851 P.2d 214 (Colo. Ct. App. 1992) (higher USGA design standards within design professional contract upheld); *see also* authorities cited at West's  95 CONTRACTS, k349(1). In discussing the design professional's role, courts have noted that there is a difference between a design professional's responsibility to his client owner and the duties the designer owes to other construction participants. *See e.g.*, the discussion concerning the design professional's tort responsibilities in Chapter VIII of this text.

[6] *See, e.g.,* Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978):

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

client or anyone else, a perfect design or a satisfactory result.[7] On the other hand, the design professional owes a duty to the public (as well as to his client) to exercise due professional care to design a safe building.[8]

This chapter examines the design professional's contractual and professional responsibility to his client and the damages that may be recovered by the

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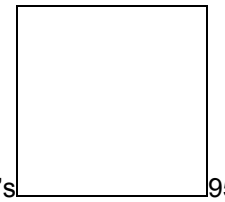
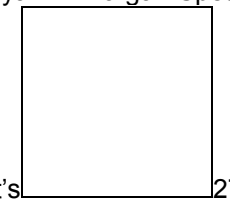
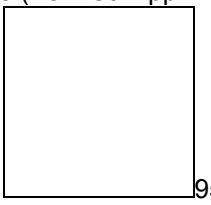
See also authorities cited at West's  95 CONTRACTS, k205.25.

[7] The vast majority of courts hold that without a specific agreement, no claim exists against a design professional for breach of an implied warranty relating to the designer's work or services. Gravely v. Providence P'ship, 549 F.2d 958 (4th Cir. 1977) (Virginia law); K-Mart Corp. v. Midcom Realty Group of Connecticut, 489 F.Supp. 813 (D.C. Conn. 1980) (Connecticut law); Palmer v. Brown, 273 P.2d 306 (Cal. Ct. App. 1954); Johnson-Valand-Archuleta, Inc. v. Roark Assocs., 572 P.2d 1220 (Colo. Ct. App. 1977); Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., Inc., 168 So.2d 333 (Fla. Dist. Ct. App. 1964), *cert. denied*, 173 So.2d 146 (Fla. 1965); Mississippi Meadows, Inc. v. Hodson, 299 N.E.2d 359 (Ill. App. Ct. 1973); Klein v. Catalano, 437 N.E.2d 514 (Mass. 1982); Iborman's Inc. v. Lake State Dev. Co., 230 N.W.2d 363 (Mich .Ct. App. 1975); City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978); Bd. of Trustees v. Kennerly, Slomanson & Smith, 400 A.2d 850 (N. J. Super. Ct. 1979); State v. Gathman-Matotan Architects & Planners, Inc., 653 P.2d 166 (N. M. 1982); Rochester Fund Muns. v. Amsterdam Mun. Leasing Corp., 746 N.Y.S.2d 512 (App. Div. 2002); Sears, Roebuck & Co. v. Enco Assocs., 370 N.Y.S.2d 338 (Sup. Ct. 1975), *aff'd*, 385 N.Y.S.2d 613 (App. Div. 1976); Ressler v. Nielsen, 76 N.W.2d 157 (N.D. 1956); Smith v. Goff, 325 P.2d 1061 (Okla. 1985); Scott v. Potomac Ins. Co., 341 P.2d 1083 (Or. 1959); Ryan v. Morgan Spear Ass'n, Inc., 546 S.W.2d 678 (Tex. Ct. App. 1977); *see also* authorities cited at West's  272 NEGLIGENCE, k1205(4);  95 CONTRACTS, k205.25. *But see* Broyles v. Brown Eng'g Co., 151 So. 2d 767 (Ala. 1963) (holding that an engineer engaged to perform drainage design should expect to be charged with a "guaranty as to the sufficiency and adequacy of the plans and specifications"); Tamarac Dev. Co. v. Delamater, Freund & Assocs., P.A., 675 P.2d 361 (Kan. 1984) (upholding claim against architect for implied warranty of workmanlike result).

client/promissee for breach of the design professional's standard of care or contractual undertaking.[9] The contractual scope of the design professional's undertaking, married to the standard of care of design professionals similarly situated in the community where services are provided, defines the design professional's liability yardstick.[10]

Liability for Cost Estimates

Owners commonly want their design professionals to provide a budgetary estimate of the cost of the construction work. Many design professionals are reluctant to do so. Design professionals argue that they cannot provide accurate cost estimates because they lack control over most of the cost components, including cost of equipment, materials and labor, timing of commencement of the work, level of contractor skill, and most construction delays. Design professionals often view cost

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[8] JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS § 15.10B (4th Ed. 1989); *see also* Greenhaven Corp. v. Hutchcraft & Assocs., Inc., 463 N.E.2d 283 (Ind. Ct. App. 1984); authorities cited at West's 95 CONTRACTS, k196.

[9] The "default" setting for the "client" of the design professional discussed in this chapter is the owner, consistent with the traditional owner/architect or owner/engineer contractual model. The obligations and damages described herein, however, follow the contractual relationship. The design professional may have a "client" arrangement with other promisee/recipients of his professional services, and the rules discussed in this chapter would also apply to that arrangement.

[10] *See* ALLEN FOSTER, RICHARD D. CONNER, ET AL., CONSTRUCTION AND DESIGN LAW § 4.6(a) 2 (1991): "The classic statement of the professional standard of care is that a design professional must possess that degree of skill and learning ordinarily exercised by other professionals of good standing in the community and must apply that knowledge with the diligence ordinarily exercised by reputable designers

estimates as mere guesses because many project events that affect project cost are beyond the design professionals' control.

If the design professional does provide an estimate of construction costs, he may be held to have agreed to an additional contractual obligation, called a cost condition. If that condition is not met, *i.e.*, if the construction bids exceed the design professional's estimate, or the actual cost of construction exceeds the estimate, the design professional may expose himself to liability to the project owner for damages, including the loss of his fee.[11]

Whether the arrangement between the owner/client and the design professional contains a cost condition is a question of fact. If the design professional provides the owner with something less than a true cost estimate, courts have held that a cost condition is not created.[12] When the design professional's engagement does not include an obligation to design a structure within a specified budget or to estimate the construction costs of a proposed project, construction at a cost greater than anticipated

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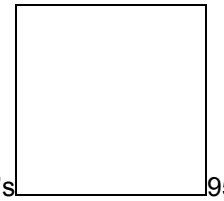
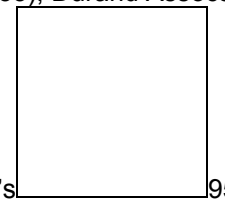
under similar circumstances." *See also* authorities cited at West's  95 CONTRACTS, k280(4).

[11] Rosenthal v. Gauthier, 69 So.2d 367 (La. 1953); Durand Assocs. v. Guardian Inv. Co., 183 N.W.2d 246 (Neb. 1971); *see also* authorities cited at West's  95 CONTRACTS, k280(1), k321(1).

by or acceptable to the owner is no defense to the design professional's action to recover his fee.[13]

A true cost condition is normally created only by an express agreement establishing a maximum cost of the project. In *Kahn v. Terry,*[14] the owner terminated the architect for the architect's alleged failure to furnish plans for a portion of an improvement within an allegedly agreed-upon fixed construction budget. The design contract, however, provided that a fixed limit of construction cost would not be established merely by the architect's furnishing a project budget, unless such fixed limit was agreed to in writing and signed by the parties.[15] The court held that the absence of a specific agreement to a fixed construction cost nullified the owner's defense, entitling the architect to compensation for its services.

A cost condition may be implied. In *Sea Ledge Properties, Inc. v. Dodge*,[16] the design professional promised, then failed, to procure for the owner a contractor who would construct the project for the stipulated sum. The owner hired a contractor who completed the work at a higher price. The owner was entitled to enforce the promise as

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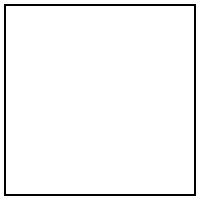
[12] *See, e.g.,* White v. Kanrich, 20 Cal. Rptr. 37 (Ct. App. 1962); Jay Dee Shoes, Inc. v. Ostroff, 59 A.2d 738 (Md. 1948); Griswold & Rauma, Architects, Inc. v. Aesculapius Corp., 221 N.W.2d 556 (Minn. 1974).
[13] Getzschman v. Miller Chem. Co., 443 N.W.2d 260, 270 (Neb. 1989); *see also* authorities cited at West's  95 CONTRACTS, k312(1).
[14] 628 So. 2d 390 (Ala. 1993).
[15] *Id.*
[16] 283 So. 2d 55 (Fla. Dist. Ct. App. 1973)

a cost condition and to recover from the design professional the difference between the stipulated sum and the reasonable cost to complete the work.[17]

In an unusual twist to this problem, a design builder was treated as if it were an owner.[18] The design builder sought several million dollars of damages against its subcontractor/design professional on the project. The design professional was held liable for the completeness and accuracy of the preparation of certain design information which was submitted to the design-build contractor for use in bidding. The court affirmed verdicts based not only on express contracts for professional services, but also on an implied warranty sufficient to impose liability on the design professional for bidding errors.[19]

A design professional's liability to the project owner arising from cost-estimating is not limited to the initial estimate. In *Williams Engineering, Inc. v. Goodyear*,[20] the design professional's liability arose from its failure to monitor costs going forward from the initial estimate to the remaining costs of construction during the course of the project. The owners were unaware of the escalation of the project cost until after the work had been completed. The court noted that on cost-plus, fast track projects (such as the one at issue), owners are more in need of reliable estimates of construction costs than on projects which use the traditional design-bid-build delivery method.[21]

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[17] *Id.*
[18] C.L. Maddox, Inc. v. Benham Group, Inc., 88 F.3d 592 (8th Cir. 1996).
[19] *Id.*
[20] 496 So.2d 1012 (La. 1986).

The American Institute of Architects' standard form owner-architect contract documents address the issue of the design professional's estimate of the project construction cost.[22] Under the AIA contract language, if a project must be designed within a specified maximum construction cost, the architect is given some control over the materials, equipment, component systems, and types of construction used in the project. If the lowest bid exceeds the fixed limit, the owner has several options. The owner could increase the fixed budget limit, authorize re-bidding, negotiate with bidders, or allow and permit the architect with owner cooperation to revise the project scope and quality to reduce the project's cost.[23] If the owner chooses the last option, the architect is to modify the contract documents at no additional charge to the owner. After the architect redesigns the project, the architect will be entitled to his fee, regardless of whether the project is constructed.[24]

Loss of the Design Professional's Fee

Where a maximum cost condition has been established, a majority rule and a minority rule have evolved to govern the payment of the design professional's fee in the event the actual construction cost exceeds the stated limit.[25] The majority rule provides

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[21] *Id.*

[22] AIA Document B141, Standard Form of Agreement between Architect and Owner (1987 edition) provided in ¶5.2.2 that if a fixed limit of cost condition were established as a condition of the contract, it had to be expressed in a signed written agreement. In the 1997 edition of the B141, the express requirement of a written agreement in order to create a cost condition was deleted, but otherwise the framework of the 1987 edition remains.

[23] AIA Document B141, Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services ¶ 5.2.4 (1997 edition).

[24] *Id*. at ¶5.2.5.

[25] Annotation, *Effect on Compensation of Architect or Building Contractor of Express Provision in Private Building Contract Limiting the Cost of the Building*, 20 A.L.R.3D 778 (1968).

that the design professional cannot recover its fee if the actual cost substantially exceeds the estimated cost.[26] The minority rule holds that the design professional cannot recover its fee if the actual costs exceed the estimated cost in any way.[27]

A design professional's responsibility for a cost condition may be excused if the owner contributes to the cost overrun by changing the design.[28] The owner may also be deemed to have waived the cost condition by its conduct, for example, by proceeding with construction in the face of anticipated cost overruns without making changes to reduce such overruns, or by limiting the bidding to certain favored contractors.[29]

Other Damages

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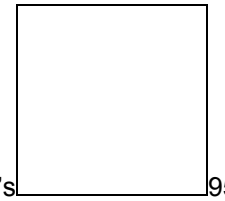
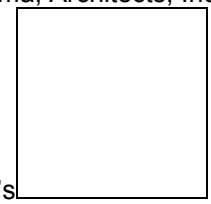
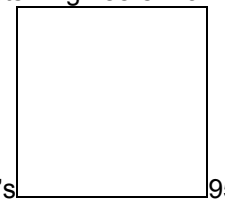
[26] *See* authorities cited at West's  95 CONTRACTS, k321(1), k280(4).
[27] *See* authorities cited at footnotes 25 and 26, *supra.*
[28] Anshen & Allen v. Marin Land Co., 17 Cal. Rptr. 42 (Ct. App. 1961); Griswold & Rauma, Architects, Inc. v. Aesculapius Corp., 221 N.W.2d 556 (Minn. 1974); *see also* authorities cited at West's  95 CONTRACTS, k280(4).
[29] *See* Jacquin-Florida Distilling Co. v. Reynolds, Smith & Hills, Architects-Engineers-Planners, Inc., 319 So. 2d 604 (Fla. Dist. Ct. App. 1975); *see also* authorities cited at West's  95 CONTRACTS, k305(2), k280(4) .

Denying the design professional his fee because of a failure to meet a cost condition is but one risk the design professional faces when cost-estimating for the owner. The design professional may also be found liable to the owner for losses incurred by the owner arising from the design professional's failure to perform to his professional standard of care in estimating construction costs.[30]

The proper measure of damages for underestimating construction costs varies among jurisdictions.[31] The design professional may be held liable for the difference between the estimate and the actual cost of the work.[32] The Colorado Supreme Court has awarded an owner a similar recovery, less 10% of the estimate, which the court deemed to be a normal, not unexpected overrun.[33] In *Kostohryz v. McGuire,*[34] the Minnesota Supreme Court awarded an owner a more limited damages recovery – the excess of the structure's cost over its market value -- rather than the difference between the estimate and the actual cost.

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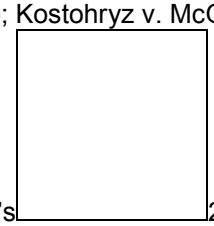
[30] Kellogg v. Pizza Oven, Inc., 402 P.2d 633 (Colo. 1965) (the architect made no attempt to re-check his original estimate; there was sufficient testimony that if had done so, he would have discovered a 40% error); Kostohryz v. McGuire, 212 N.W.2d 850 (Minn. 1973); *see also* authorities cited at West's  272 NEGLIGENCE, k1205(4), k1672.

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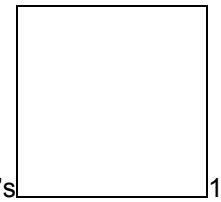
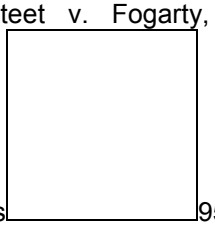
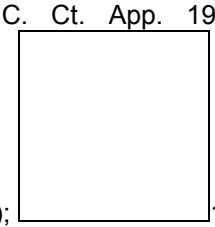
[31] *See* authorities cited at West's  115 DAMAGES, k120(2)(3), k123.
[32] *See* Kaufman v. Leard, 248 N.E.2d 480 (Mass. 1969).
[33] Kellogg v. Pizza Oven, Inc., 402 P.2d 633 (Colo. 1965).

Unless waived or limited by the owner-design professional contract (as in AIA Document B141 ¶ 1.3.6 (1997 edition)) consequential damages arising from the design professional's failure to accurately estimate costs may also be recovered by the owner. Such damages may include delay damages incurred during the project-redesign period or expenses incurred by the owner in reliance on the original cost estimate.[35]

Costs of Correcting Defective Design

A design professional may be liable to his client owner for any foreseeable damages arising from defective drawings and specifications.[36] Actionable defective performance by design professionals generates claims arising from:

- Inaccurate site plans
- Inadequate or insufficient details

[34] Kostohryz v. McGuire, 212 N.W.2d 850 (Minn. 1973).
[35] Peteet v. Fogarty, 375 S.E.2d 527 (S.C. Ct. App. 1988); *see also* authorities cited at West's  95 CONTRACTS, k321(4);  115 DAMAGES, k120(2)(3), k123.
[36] *See, e.g.,* Grossman v. Sea Air Towers, Ltd*.,* 513 So.2d 686 (Fla. Dist. Ct. App. 1987); State v. Wolfenbarger & McCulley, 690 P.2d 380 (Kan. 1984); City of Charlotte v. Skidmore, Owings & Merrill, 407 S.E.2d 571 (N.C. Ct. App. 1991); Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc*.,* 677 S.W.2d

- Failure to design to owner's purpose
- Ambiguous sketches which cause extra work
- Selection of unsuitable materials
- Violation of building codes

The design professional has a duty to correct his design errors, both before and during the construction stage.[37] In *State v. Lundin*,[38] a New York court held: "The architect's duty to design a proper building is a continuous one that does not end until the building is completed."[39] Design professionals are obligated to report any serious problems with

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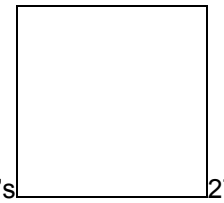
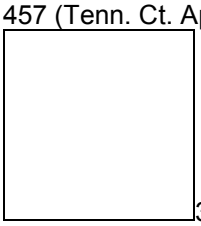
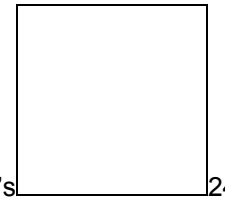
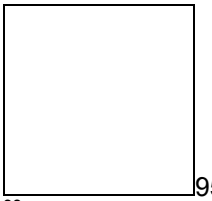
457 (Tenn. Ct. App. 1984); *see also* authorities cited at West's  272 NEGLIGENCE, k1672;  360 STATES, k109..

[37] *See* authorities cited at West's  241 LIMITATION OF ACTIONS, k46(6), k55(3)(5);  95 CONTRACTS, k196.

[38] 459 N.Y.S.2d 904, 906 (App. Div.), *aff'd,* 459 N.E. 2d 486 (N.Y. 1983).

[39] *Id.*

the design before construction is completed if they reasonably should have known of the design problem.[40]

An owner's cost overruns arising from undisclosed or inaccurately described soil or subsurface conditions may expose the design professional to further liability.[41] The design professional's liability to the project owner may arise from a failure to properly discover the nature and condition of the site or from the failure of the design to accommodate the actual site conditions.[42]

A design professional may also be liable if his design is incomplete. Although the design professional does not impliedly warrant a complete set of drawings free from all

[40] Comptroller ex. rel. VMI v. King, 232 S.E.2d 895, 901 (Va. 1977); *see also* authorities cited at West's 95 CONTRACTS, k196. .

[41] *See* Housing Vermont v. Goldsmith & Morris, 685 A.2d 1086 (Vt. 1996) (project architect was liable to a developer for malpractice in the creation of a site grading plan that proved insufficient for construction purposes and that resulted in significant cost overruns. The site plan had to be redesigned and the work corrected at substantial additional cost); *see also* authorities cited at West's 272 NEGLIGENCE, k1672.

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[42] Zontelli & Sons, Inc. v. City of Nashwauk, 373 N.W.2d 744 (Minn. 1985) (engineer negligently underestimated the amount of unsuitable material to be removed from the project site); Nat'l Cash Register Co. v. Haak, 335 A.2d 407 (Pa. Super. 1975); A.E. Inv. Corp. v. Link Bldrs., Inc., 214 N.W.2d 764 (Wis. 1974) (plaintiff was a tenant of the building designed by the defendant architect); Reiman Constr. Co. v. Jerry Hiller Co., 709 P.2d 1271 (Wyo. 1985) (architect failed to design the building to accommodate the findings of the soils engineer's report).

mistakes,[43] most design professionals (and courts) acknowledge that an incomplete design is not the norm, and can be expensive to rectify once construction has commenced.[44] A design professional who fails to adequately or sufficiently detail the materials to be used in the improvement or structure designed may be liable to the owner for the costs to correct the resulting mistake or deficiency.[45]

A design professional may be held liable to the owner if the work, completed in accordance with the design professional's plans, fails to satisfy the owner's purpose.[46] In *Bloomsburg Mills, Inc. v. Sordoni Construction Co*.,[47] an architect was hired to design a building that would maintain a constant and specific temperature and humidity. To accomplish this required a built-up roof with a vapor seal, which would prevent leakage of moisture from the outside and condensation from the inside. The architect's roof

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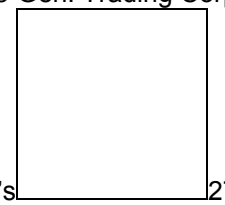
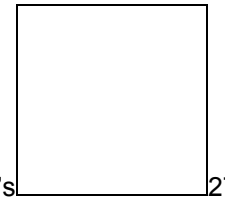
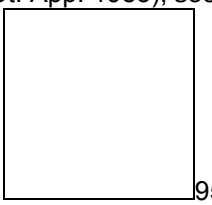
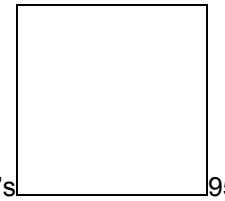
[43] *See* discussion at notes 6, 7 and 10, *supra*. "As a general rule, an architect's efficiency in preparing plans and specifications is tested by the rules of ordinary and reasonable skill usually exercised by one of that profession. . . ." Klein v. Calalano, 437 N.E.2d 514, 525 (Mass. 1982).

[44] *See* Gen. Trading Corp. v. Burnup & Sims, 523 F.2d 98 (3d Cir. 1975); *see also* authorities cited at West's  272 NEGLIGENCE, k1205(4), k1672.

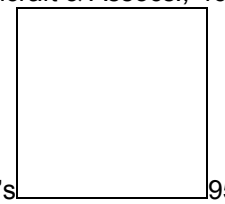
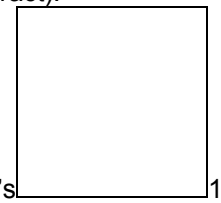
[45] *See* Pearce & Pearce, Inc. v. Kroh Bros. Dev. Co*.,* 474 So.2d 369 (Fla. Dist. Ct. App. 1985); *see also* authorities cited at West's  272 NEGLIGENCE, k1205(4), k1672;  95 CONTRACTS, k284(4.

[46] *See* authorities cited at West's  95 CONTRACTS, k196.

[47] 164 A.2d 201 (Pa. 1960)

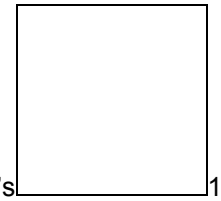
design specified an improper vapor seal plus fiberglass material inadequate for the intended use. The building would not maintain the constant temperature and humidity required, and the owner ultimately had to install a new roof. The architect was found liable for the cost of the new roof, less credit for the remaining useful life of the original roof.[48]

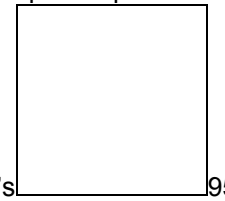
Many courts hold that a design professional's contract with an owner contains an implied obligation that the completed improvement will be suitable and capable of being used by the owner for the purpose for which it was designed.[49] If the design is unsuitable, the architect will be charged with the cost of redesign, and some portion of the retrofit costs.[50] If the improvement cannot be economically retrofitted, the design professional will be responsible for any diminution in value.[51] The design professional may also be held responsible for the cost of replacing defective materials unsuitable for

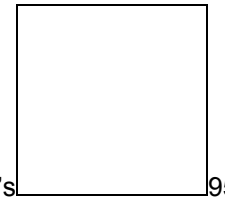
[48] *Id.*
[49] St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51, 64 (Ill. App. Ct. 1974); Greenhaven Corp. v. Hutchcraft & Assocs., 463 N.E.2d 283, 285 (Ind. Ct. App. 1984); *see also* authorities cited at West's  95 CONTRACTS, k196. *But see* Strauss Veal Feeds, Inc. v. Mead & Hunt, Inc., 538 N.E.2d 299 (Ind. Ct. App. 1989) (the scope of the implied duty is limited by the express terms of the design professional-owner contract).
[50] *See* authorities cited at West's  115 DAMAGES, k120(2)(3), k123.
[51] *See* authorities cited at note 49, *supra.*

their intended purpose, so long as the design professional had a role in the selection of the materials.[52]

Design professionals are expected to know the location of the structures they are designing and are obligated to design in accordance with applicable building codes.[53] The implied suitability obligation discussed above includes the design professional's duty to prepare drawings and specifications that conform to applicable building codes and other local ordinances. But the design professional's duty to prepare drawings and specifications in conformance with building codes can be modified by express provisions of the design professional's contract with the project owner.[54] If the design professional and the owner agree that the plans prepared by the design professional

[52] *See* Brushton-Moira Cent. Sch. Dist. v. Alliance Wall Corp., 600 N.Y.S.2d 511 (A.D. 1993) (insulated wall panels recommended by the architect were inappropriate for owner's building); St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51 (Ill. App. Ct. 1974); Scott v. Potomac Ins. Co., 341 P.2d 1083 (Or. 1959) (architect was liable when he did not have sufficient knowledge of the material he approved for use in the building and made no independent effort to ascertain the suitability of the material for its intended use or purpose); authorities cited at West's  115 DAMAGES, k45, k123..

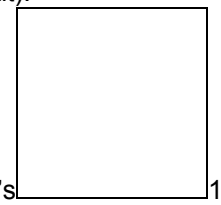
[53] St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51 (Ill. App. Ct. 1974); *see also* authorities cited at West's  95 CONTRACTS, k196.

[54] *See* authorities cited at West's  95 CONTRACTS, k280(4).

need not necessarily conform to applicable codes or ordinances, this express agreement trumps the design professional's implied duty to provide conforming plans.[55]

The damage the project owner incurs as a result of the design professional's defective performance depends on the specific type of defective performance and the circumstances of the particular project. Generally, however, the damages recoverable from the design professional[56] include the costs of redesign, [57] cost to repair defective or non-complying work,[58] diminution in value of the improvement[59] and consequential

[55] *Id.;* Greenhaven Corp. v. Hutchcraft & Assocs*.,* 463 N.E.2d 283, 285 (Ind. Ct. App. 1984) (architect's original plans conformed to fire code's requirement of two remote exits, but owner requested the plan be changed to provide only one exit).

[56] *See* authorities cited at West's  115 DAMAGES, k120(2), k123.

[57] Housing Vermont v. Goldsmith & Morris, 685 A.2d 1086 (Vt. 1996)

[58] Grossman v. Sea Air Towers, Ltd*.,* 513 So.2d 686 (Fla. Dist. Ct. App. 1987) (the proper measure of damages was the amount necessary to restore a parking deck to its original condition. Costs incurred by the owner to increase the load capacity of the deck were not properly chargeable to the design professionals because those costs would have been the owner's responsibility even in the absence of any fault of the designers); City of Charlotte v. Skidmore, Owings & Merrill, 407 S.E.2d 571 (N.C. Ct. App. 1991) (trial court did not err in instructing jury on cost of repair measure of damages without reference to diminution in value measure of damages where the defects were so significant that the work did not substantially conform to the contract and the decreased value of the improvement erected justified the high cost of the repairs); Brushton-Moira Cent. Sch. Dist. v. Alliance Wall Corp*.,* 600 N.Y.S.2d 511 (A.D. 1993); Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc*.,* 677 S.W.2d 457 (Tenn. Ct. App. 1984); *see also* Reiman Constr. Co. v. Jerry Hiller Co*.*, 709 P.2d 1271 (Wyo. 1985) (case contains good discussion of damages, but was remanded for additional findings of fact as to trial court's computation of owner's cost-of-repair damages); D & O Contractors, Inc. v. Terrebonne Parish Sch. Bd*.,* 545 So.2d 588 (La. Ct. App. 1989). *But see* State v. Wolfenbarger & McCulley*,* 690 P.2d 380 (Kan. 1984) (award of cost for post-construction modification to structure was not a windfall to the project owner because the modification would not have been made but for the original design error).

[59] Italian Econ. Corp. v. Cmty. Eng'rs, Inc*.,* 514 N.Y.S.2d 630 (Sup. Ct. 1987) (owner was entitled to recover both the cost of repairs necessary to bring the building into code compliance and diminution in value of the building subsequent to making the repairs, where the structural repairs made necessary because of the defective design resulted in loss of floor space and windows.

damages.[60] These damages may be recoverable in various combinations as the facts dictate.

Liability for Errors, Omissions or Delays During Contract Administration

The design professional's contract administration duties are often as important to a successful project as his design duties, and carry comparable potential for liability. The design professional's contract administration obligations commonly fall into three broad categories: construction review, claim/dispute resolution and payment certification. The particular duties the design professional performs within these broad tasks, and the obligations he accepts, may expose the designer to liability to the project owner for damages arising from breach of the particular duty or obligation at issue. And, as discussed below in Chapter VIII, in some jurisdictions the design professional also assumes a direct tort responsibility to prime and trade contractors for negligent or deliberate conduct outside of the design professional's standard of care which damages the project contractors.

The designer who has contracted with the project owner to provide the project drawings and specifications is not necessarily obligated to provide construction administration services as well. The designer often does provide these services as the next step in the project process, but the obligation is neither implied nor inherent in the owner-design professional relationship. The scope of project supervision duties and

[60] Grossman v. Sea Air Towers, Ltd., 513 So.2d 686 (Fla. Dist. Ct. App. 1987) (owner of apartment building was awarded loss of rental income resulting from repair work necessitated by architect's defective design); Mercy Hosp. v. Hansen, Lind & Meyer, P.C., 456 N.W.2d 666 (Iowa 1990);.

obligations the design professional undertakes is a matter of contract between the designer and the project owner.[61]

The most common complaint against design professionals based on improper contract administration occurs when defective work gets past the administering design professional. "The design professional should have caught the non-conforming work. It's his fault this happened," is a familiar refrain. But the design professional's contractual obligations usually do not mirror the owner's expectations.

The AIA standard form documents do not require the architect to inspect the contractor's work.[62] AIA Document B141, Standard Form of Agreement Between Owner and Architect with Standard Form of Services ¶2.6.2.1 (1997 edition) provides:

> The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to that stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 2.8: (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against

[61] *See* authorities cited at West's [redacted] 95 CONTRACTS, k280(4).
[62] This has not always been the case. *See* C. Sapers, *Special Commentary: Ruminations on Architectural Practice,* West Group Annual Construction Contracts, January 20, 2001, Washington, D.C.

> defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.

A substantially similar provision is found in AIA Document A201, General Conditions of the Contract for Construction ¶ 4.2.2 (1997 edition). Likewise, a similar provision is found in the Engineers Joint Contract Documents Committee ("EJCDC") Document 1910-8, Standard General Conditions of the Construction Contract (1990 edition) at ¶9.2.

These contract provisions attempt to allocate between the design professional and the contractor the project review or "supervision" responsibilities. Under all the standard form contracts, the design professional's role is akin to a "general supervisor," with no control over or charge of construction means, methods or techniques. Under the standard form contracts, it is the contractor who is tagged as the "supervisor" responsible for construction means, methods and techniques.[63] As to the design

[63] *See, e.g.,* AIA Document A201, General Conditions of the Contract for Construction ¶3.3.1 (1997 edition). There are, however, a number of situations where means and methods are bound up within the design. For instance, owners often desire to have their projects built with specific types or brands of materials. When the owner specifies a sole-source product, means and methods attendant to such product become part of the specifications. *See, e.g.,* Edward M. Crough, Inc. v. Dep't of Gen. Servs., 572 A.2d 457 (D.C. App. 1990) (sole-source roofing materials). Owners and designers also frequently prepare specifications containing both design details and performance requirements. If the two are not properly coordinated, the responsibility for the same will be placed upon the owner and designer. W.H. Lyman Constr. Co. v. Vill. of Gurnee, 403 N.E.2d 1325 (Ill. App. Ct. 1980).

professionals, the primary object of these provisions is to impose the duty or obligation upon the architect or engineer to assure the owner that before final acceptance the project will be completed substantially in accordance with the plans and specifications.[64]

Even in the absence of a written contract between the design professional and his client that limits the design professional's obligation to supervise the contractor's work, the design professional has only limited exposure arising from a contractor's defective or deficient work. Without an express contractual obligation, the design professional is not required to monitor the contractor's work closely enough so as to be held responsible for the contractor's defective work.[65] The design professional's responsibilities do, however, normally extend to construction defects so serious or obvious that they should have been detected by the design professional even upon minimal inspection.[66]

As the "general supervisor," the design professional is intended to have minimal exposure to liability for damages caused by contractor-controlled construction methods or techniques. But courts struggle with the obvious conflict between the architect's clear

[64] Diocese v. R-Monde Contractors, 562 N.Y.S.2d 593, 596 (Sup. Ct. 1989).

[65] *See* authorities cited at West's 95 CONTRACTS, k280(4), k284(1).

responsibility for design and the contractually-disclaimed responsibility for observing that the design is accomplished, especially if the design professional undertakes and gets paid for site visits. Courts, like owners, often assume that the architect is doing more than just taking in the air when he conducts a compensated site visit. Although the design professional, pursuant to this type of limited "visitation" obligation,[67] is required contractually only to make periodic visits to the construction site and determine in general if the work is proceeding in accordance with the contract, the design professional nevertheless assumes a duty (i) to exercise reasonable care to determine whether the contractor's work was properly performed and (ii) to order repair or correction of defects or deficiencies he discovers in the contractor's work.[68]

In proper cases, courts do not hesitate to impose responsibility and liability upon design professionals for the cost of repairs to defective work. The fact that exhaustive,

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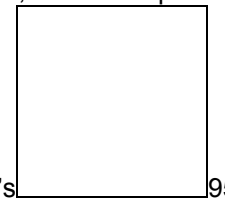
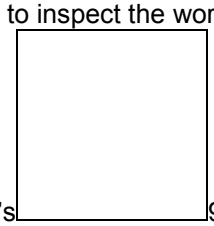
[66] ESO, Inc. v. Kasparian, 594 N.E.2d 557 (Mass. App. Ct. 1992); *see also* authorities cited at West's  95 CONTRACTS, k196, k280(4), k312(1)..

[67] *See* AIA Document A201, General Conditions of the Contract for Construction ¶ 4.2.2 (1997 edition).

[68] Roland A. Wilson & Assocs. v. Forty-O-Four Grand Corp., 246 N.W.2d 922 (Iowa 1976); Diocese of Rochester v. R-Monde Contractors, 562 N.Y.S.2d 593 (Sup.Ct. 1989); Equitable Life Assurance Soc'y v. Nico Constr. Co., 666 N.Y.S.2d 602 (App.Div. 1997) (structural engineer failed to make adequate inspections of the work; defective work performed by the contractor during the period when the engineer failed to inspect the work was chargeable against the engineer); *see also* authorities cited at West's  95 CONTRACTS, k280(4).

repeated on-site inspections are not required[69] does not allow the design professional to close his eyes on the construction site, refrain from engaging in any inspection procedure whatsoever, and then disclaim liability for construction defects that monitoring would have prevented.[70] Contract provisions limiting the design professional's inspection duties do not absolve the design professional from all possible liability or relieve him of the duty to perform reasonably the limited contractual duties he agreed to undertake. While an agreement may absolve the design professional of liability for the contractor's breaches, negligent acts and omissions, the standard contract terms do not absolve the design professional of liability arising out of his own failure to inspect reasonably consistent with his contract and the design professional's standard of care.[71]

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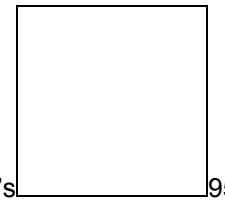
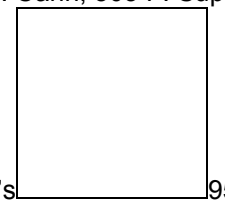
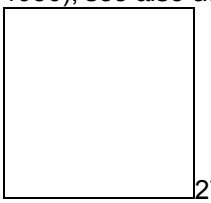
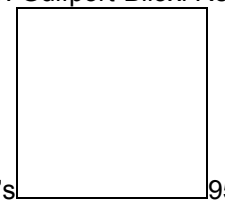
[69] *See* authorities cited at West's  95 CONTRACTS, k284(1).

[70] First Nat'l Bank v. Cann, 503 F. Supp. 419, 436 (N.D. Ohio 1980); *see also* authorities cited at footnote 4, *supra*, and West's  95 CONTRACTS, k196;  272 NEGLIGENCE, k1205(4).

[71] Watson, Watson, Rutland/Architects, Inc. v. Montgomery County Bd. of Educ., 559 So.2d 168, 173 (Ala. 1990); U.R.S. Co. v. Gulfport-Biloxi Reg'l Airport Auth., 544 So.2d 824 (Miss. 1989); *see also* authorities cited at West's  95 CONTRACTS, k196, k312(1).

Defining, by listing particular tasks, the extent of the duty to administer a project's construction is practically impossible. Projects vary greatly, in scope, cost and complexity. Even the minimal supervisory power a design professional assumes under the standard form contracts ordinarily requires the design professional to assure that the completed work conforms to the drawings and specifications. If a designer has the responsibility to assure the owner that the contractor's work so conforms, the designer also has the corresponding duty to inform the owner of non-conforming work. In *Board of Education v. Sargent, Webster, Crenshaw & Folley,*[72] the AIA owner-architect contract disclaimers did not absolve the architect from liability for failing to alert the owner of defects known to the architect during performance of the construction work. When, as a result of a periodic site visit, the architect discovers defects in the work which the owner, if notified, could have taken steps to ameliorate, the imposition of liability upon the architect for failure to notify the owner is based on breach of the architect's contractual duty, and not as guarantor of the contractor's performance.[73]

Similarly, in *Diocese of Rochester v. R-Monde Contractors,*[74] a New York court held that an architect could not rely on the exculpatory language in the owner-architect agreement (similar to AIA Document B141 ¶ 2.6.2.1, quoted above) to immunize itself from liability to the owner for failure to discover and correct defects in the contractor's work. The architect prepared plans for a church renovation. The architect was required to make periodic inspections and determine whether the work conformed to the plans.

[72] 539 N.Y.S.2d 814 (A.D. 1989).
[73] *Id; see also* Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933 (Tex. Ct. App. 1987) (the exculpatory provisions are nothing more than an agreement that the architect is not the insurer or guarantor of the contractor's obligation to carry out the work in accordance with the contract documents).

On the architect's motion for summary judgment, the court rejected the architect's reliance on language excusing the architect from responsibility for defective construction methods or for acts or omissions of the contractor. The architect had the contractual responsibility to inspect the work and guard against defective work. Factual issues precluded finding that there was no failure by the architect to exercise the degree of care required.[75]

The design professional's approval of a contractor's use of materials not in accordance with the project specifications may expose the design professional to liability if the use of the substitute materials damaged the owner in some way, as by reducing the value of the owner's project.[76] And, when particular construction techniques are specified in the plans, the contractor is not responsible when such procedures do not work.[77] In *C.J. Langenfelder & Son, Inc. v. Commonwealth*,[78] the

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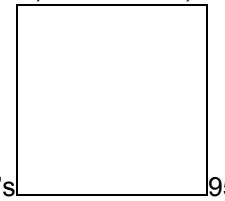
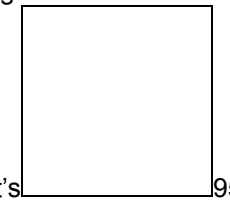
[74] 562 N.Y.S.2d 593 (Sup. Ct.1989).

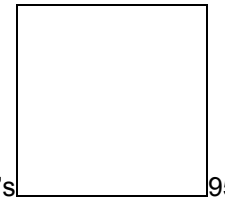
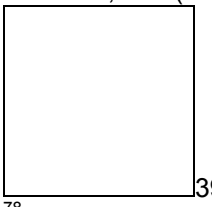
[75] *Id.; see also* Gables CVF, Inc. v. Bahr, Vermeer & Haeker Architect, Ltd., 506 N.W.2d 706 (Neb. 1993); authorities cited at West's  95 CONTRACTS, k312(1).

[76] *See, e.g.,* Bechtold Paving, Inc. v. City of Kenmare, 446 N.W.2d 19 (N.D. 1989); South Union, Ltd. v. George Parker & Assocs., AIA, 504 N.E.2d 1131 (Ohio Ct. App. 1985); *see also* authorities cited at West's  95 CONTRACTS, k312(1).

[77] Midwest Dredging Co. v. McAninch Corp*.,* 424 N.W.2d 216 (Iowa 1988) (contractor not liable for delay resulting from using specified dredging and piping technique); s*ee also* Natus Corp. v. United States, 371

owner and its in-house design staff were held to have impliedly warranted that the contractor's concrete was adequate for the owner's intended purposes, even though the concrete mix design was prepared and submitted by the contractor's concrete supplier. In inspecting and approving the concrete mix design and ingredients and in testing the concrete prior to placement, the owner had exercised such close control that it could not avoid responsibility for any later non-conformity and delay.[79]

Where the design professional's breach of contract or failure to satisfy its standard of care allows the contractor to perform defective or deficient work, or work not in compliance with the project specifications, and the owner is injured as a result, the proper measure of damages recoverable by the owner is commonly the reasonable cost of labor and materials necessary to place the affected work in the condition contemplated by the parties at the time they entered into the owner-designer contract.[80]

F.2d 450, 455 (Ct. Cl. 1967); authorities cited at West's  95 CONTRACTS, k312(1);  393 UNITED STATES, k70(30), k73(22), k74(4).

[78] 404 A.2d 745 (Pa. 1979).

[79] *Id.* at 751.

[80] *E.g.,* U.R.S. Co. v. Gulfport-Biloxi Reg'l Airport Auth., 544 So.2d 824 (Miss. 1989); Bechtold Paving, Inc. v. City of Kenmare, 446 N.W.2d 19 (N.D. 1989) (trial court improperly ordered the engineer to pay the owner whatever amount was necessary for the owner to redo the defective work performed by the contractor rather than a specified amount of damages to make the owner whole based on expert

To establish liability, an owner must offer proof of damages caused by a contractor's defective or non-conforming work, as well as the scope of the design professional's supervisory responsibilities. Courts also require the owner to present expert testimony as to the design professional's failure to exercise due care in performing his supervisory duties and obligations.[81] In *Annen v. Trump*,[82] the project owner claimed that it incurred damages as the result of the engineer's failure to inspect the roof installation for defects and to verify that the work was properly performed. The owner argued that because the contractor's installation was improperly performed, it followed that the engineer had negligently supervised the construction of the roof. The court held that expert testimony was required. The supervisory duties of the engineer, the extent of those duties and the expertise to determine whether there was compliance with the specifications and plans were outside of the common knowledge and experience of laymen.[83]

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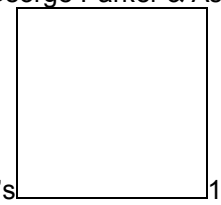
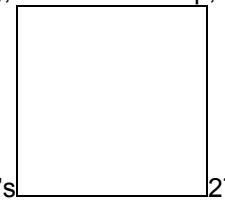
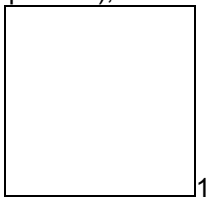
testimony); South Union, Ltd. v. George Parker & Assocs., AIA, 504 N.E.2d 1131 (Ohio Ct. App. 1985); *see also* authorities cited at West's  115 DAMAGES, k111, k120(2)(3), k123.

[81] Watson, Watson, Rutland/Architects, Inc. v. Montgomery County Bd. of Educ., 559 So.2d 168 (Ala. 1990); Annen v. Trump, 913 S.W.2d 16 (Mo. Ct. App. 1995); *see also* authorities cited at West's  272 NEGLIGENCE, k1672;  157 EVIDENCE, k571(3).

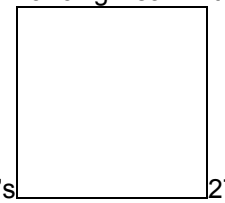
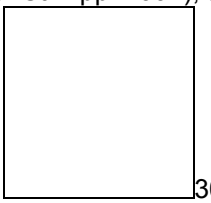
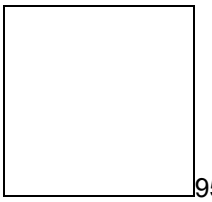
[82] 913 S.W.2d 16 (Mo. Ct. App. 1995).

[83] *Id*; *see also* discussion at notes 4, 5 and 6, *supra*.

A second basis for design professional liability to the owner during project administration is for acts taken by the design professional to resolve claims by and between the owner and the contractor. Contracts often contain detailed procedures for the design professional to rule upon claims between the owner and contractors.[84] The design professional may be liable to the owner for breach of contract for failing to follow the claim resolution procedures set forth in the parties' contract or for failing to act impartially in performing his duties.[85]

A third basis for the design professional's liability during contract administration is approval of progress payments and final payment to contractors. If the design professional's contract with the owner requires the design professional to issue a statement certifying the progress or completion of the work, the general rule is that the designer must exercise this duty in reasonable accordance with the standards of his design profession. The design professional is charged with the duty of using the

[84] *See, e.g.,* AIA Document A201, General Conditions of the Contract for Construction, Articles 4.3 and 4.4 (1997 edition).

[85] *See* Meco Sys., Inc. v. Dancing Bear Entm't, Inc., 948 S.W.2d 185 (Mo. Ct. App. 1997); *see also* authorities cited at West's  272 NEGLIGENCE, k1205(4);  308 PRINCIPAL AND AGENT, k61(1);  95 CONTRACTS, k196.

reasonable care of one skilled in his profession when issuing payment certificates and can be held liable for damages resulting from his failure to act accordingly.[86]

Contracts commonly include limitations on exactly what the design professional is certifying in issuing certificates for payment. For example AIA Document A201, General Conditions of the Contract for Construction ¶9.4.2 (1997 edition) provides that:

> [T]he issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

[86] *See, e.g.,* Roland A. Wilson & Assocs. v. Forty-O-Four Grand Corp., 246 N.W.2d 922 (Iowa 1976); Newton Inv. Co. v. Barnard & Burk, Inc., 220 So.2d 822 (Miss. 1969); *see also* authorities cited at

A breach of the design professional's duty to reasonably inspect the work and to issue a certificate representing the accuracy of the contractor's request may result in liability to the owner.[87] If the design professional fails to recognize defects that would have been detected through the exercise of ordinary care and certifies to the owner that the work is in conformance with the contract documents, he may be held liable for damages. Liability arises from the improper issuance of certificates for progress payments and final payment.

In addition to certifying that the progress of the work matches the contractor's claims in the pay applications, the design professional may be contractually required to

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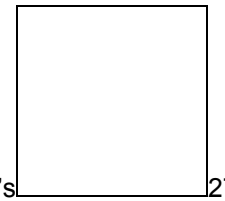
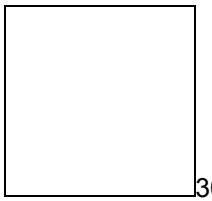
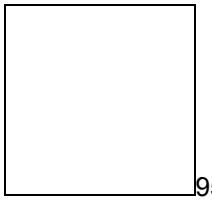
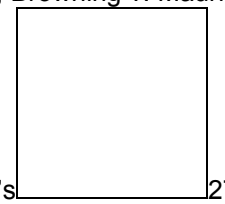
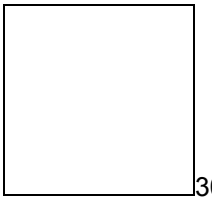
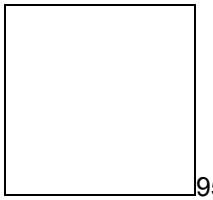
West's  272 NEGLIGENCE, k1205(4);  308 PRINCIPAL AND AGENT, k61(1);  95 CONTRACTS, k196.

[87] *See generally* Annotation, *Liability of Architect or Engineer for Improper Issuance of Certificate*, 43 A.L.R.2D 1227 (1955); *see also* Palmer v. Brown, 273 P.2d 306 (Cal. Ct. App. 1954); Browning v. Maurice B. Levien & Co., 262 S.E.2d 355 (N.C. Ct. App. 1980); authorities cited at West's  272

determine that the contractor has paid all of his subcontractors and suppliers and any other person with inchoate lien rights. The design professional who undertakes this duty to the owner may be liable to the owner for negligence in authorizing final payment to the contractor before all potential lien claimants have been properly paid by the contractor. In *Palmer v. Brown*,[88] the owner sued the project architect asserting that the architect breached its contract by issuing certificates of payment without first determining whether the contractor had paid its subcontractors or suppliers. At the time the architect issued the certificate for payment, the contractor had outstanding debts to subcontractors and suppliers. Following payment to the contractor pursuant to the architect's certificate of payment, the contractor still failed to pay its subcontractors, resulting in liability of the owner to these creditors. The court held that the owner's complaint stated a cause of action against the architect based on the architect's duty to protect the owner by verifying that the contractor had paid all outstanding debts on the project or by obtaining partial or final lien waivers from the contractor's subcontractors and suppliers.[89]

In a more recent case, an architect was found not to have owed or breached a duty to the owner to assure that the contractor paid its subcontractors. In *Fabe v. WVP*

NEGLIGENCE, k1205(4);  308 PRINCIPAL AND AGENT, k61(1);  95 CONTRACTS, k196.

[88] 273 P.2d 306 (Cal. Ct. App. 1954).

[89] *Id.*

Corp.,[90] the court found for the architect, based on a provision in the owner-architect contract similar to that of AIA A201 stated above. In *Fabe*, the architect reviewed the contractor's payment applications and the work performed, and certified payment to the contractor. It was later discovered that the contractor had not paid its subcontractors, laborers or materialmen. The owner sought damages alleging the architect negligently failed to discover that the contractor had submitted fraudulent lien waivers and certificates for payment. The court rejected the owner's argument that the architect's act of examining the lien waivers gave rise to the concomitant duty to determine the authenticity of those documents.[91]

[90] 760 S.W.2d 490 (Mo. App 1988).
[91] *Id.*