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Economic Loss in the Construction Context: Should Architects Be Liable for the Commercial Expectations of Contractors?

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ECONOMIC LOSS IN THE CONSTRUCTION CONTEXT: SHOULD ARCHITECTS BE LIABLE FOR THE COMMERCIAL EXPECTATIONS OF CONTRACTORS?

TABLE OF CONTENTS

- I. INTRODUCTION 258
- II. HISTORICAL PERSPECTIVE 262
 - A. *Survey of the Means of Construction* 262
 - B. *Historical Development of Legal Theory Regarding Economic Loss* 265
 - C. *Application of Legal Theory to the Construction Industry* 267
- III. ECONOMIC LOSS DOCTRINE 269
 - A. *Various Conceptions of the Economic Loss Doctrine* 269
 - 1. Privity Necessary to Sustain a Cause of Action in Tort . . . 270
 - 2. All Recoverable Damages Defined by Contract 271
 - 3. All Recoverable Damages Defined by a Duty in Tort 275
 - B. *Instances in Which the Economic Loss Doctrine Does Not Apply* 277
 - 1. "Physical Harm" 278
 - 2. "Property Damage" 280
- IV. THIRD PARTY ACTIONS FOR RECOVERY OF ECONOMIC LOSS 282
 - A. *Contract: Third Party Beneficiary Theory* 284
 - B. *Tort* 286
 - 1. Negligence Theory 287
 - 2. Negligent Misrepresentation Theory 293
 - C. *Rationale Behind the Rejection of the Economic Loss Doctrine* . 298
- V. PROPOSED TREATMENT OF ECONOMIC LOSS IN THE CONSTRUCTION CONTEXT 299
- VI. CONCLUSION 305
- VII. APPENDIX 306
 - A. *Diagram of the Traditional Delivery System of Construction Contracts* 306
 - B. *Diagram of the Design/Build System of Construction Contracts—A Modern Variation of the Traditional Delivery System* 307

I. INTRODUCTION

Pharmatech, a pharmaceutical corporation, needed a larger building to house its growing office staff.¹ After discussing among its board members the options of how to construct such a structure, Pharmatech decided to engage Archiwerks to act as its project architect for its new headquarters.² The two parties used a standard form contract. After Archiwerks had completed the construction documents, Pharmatech solicited bids from general contractors in the area. After reviewing the completed bids, Pharmatech selected the low bidder, Capital Construction, to perform construction services as its general contractor on the project. Pharmatech and Capital also engaged in a standard form contract.

The plans for the headquarters depicted a structure enclosed with a glass wall system. The specifications for the frames of the wall system called for stainless steel "or approved equal."³ Pursuant to its contract with Pharmatech, Archiwerks observed the construction process once the project had been awarded to Capital. This observatory role included approving shop drawings which Capital submitted.⁴ On the shop drawings which Capital submitted to Archiwerks for the frames of the glass wall system, "painless" steel was depicted. "Painless" was a trade name for a new material which had only recently been marketed in the construction industry. The manufacturers of "painless" claimed that its product had all the characteristics of stainless steel. The most important of these characteristics was its resistance to corrosion. Because "painless" had such qualities and could be manufactured at roughly half the cost of stainless steel, Capital had recently used "painless" on another project in the same geographic area as Pharmatech's new headquarters with favorable results.

1. This fact pattern is a hypothetical scenario based upon theories developed in previous cases in the construction context. *See infra* note 6.

2. Archiwerks, as project architect, would develop a design for the building with detailed drawings called construction documents, from which the building would actually be built. These construction documents, or plans, along with specifications, contracts and other addenda together form contract documents. *See infra* note 30 and accompanying text.

3. "Equals" are allowances made by the architect for the contractor to provide alternatives to a brand specified in the plans and specifications. Normally, if an architect specifies a brand name of a product, such an allowance would be made as long as the performance of that allowance, or "equal," met the performance criteria set forth in the specifications. This type of specification is commonly known in the industry as a "performance specification." For a discussion of performance specifications, consult RICHARD PATRICK MAHER, INTRODUCTION TO CONSTRUCTION OPERATIONS 221-41 (1982).

4. These are detailed drawings which depict how Capital planned to fabricate the various components of the building. They are prepared by the contractor or the manufacturer. *See infra* note 32 and accompanying text (discussing shop drawings and submittals).

Archiwerks was unfamiliar with “painless.” Although the manufacturers claimed that it was noncorrosive, little testing had been conducted to determine whether the product could withstand the Midwestern climate which the headquarters would have to endure.⁵ Since Archiwerks felt that data in this regard was not sufficiently extensive, it decided to delay approving the shop drawings until further testing could be conducted. The delay was effectuated by Archiwerks notwithstanding assurances from the manufacturer and protests from Capital. The testing took several months to complete. The results of the tests proved Capital’s thesis—“painless” was as good as stainless steel.

As a result of the delay, Capital incurred considerable costs in testing as well as lost profits. The specifications, requiring approval of “equals,” did not specify any tests that would have to be performed. In this regard, the specifications may have been ambiguous. Capital decided to sue Archiwerks for damages that Capital incurred as a result of the delay. The theory was that the specifications, because ambiguous, were negligently drafted. As a result of this negligence, Capital was harmed by having to pay for additional testing procedures it did not anticipate performing when it submitted its bid to Pharmatech for the project.⁶

The damages suffered by Capital in this hypothetical scenario can be described as pure economic loss.⁷ These losses are contract-type losses

5. Examples of such tests are found in the ANNUAL BOOK OF ASTM STANDARDS, Vol. 01.01 (1986). ASTM A789 and A632 deal with chemical composition and testing procedures for stainless steel tubing.

6. If specifications are ambiguous, the act or omission of the architect giving rise to the ambiguity constitutes a breach of the professional standard of care. G. William Quatman, *Liability of Architects and Engineers to Third Parties*, in DESIGN PROFESSIONAL’S HANDBOOK OF BUSINESS AND LAW 561, 567 (Robert F. Cushman & James C. Dobbs eds., 1991). Cases dealing specifically with the problem of negligently drafted specifications are legion. See, e.g., *Associated Architects & Eng’rs v. Lubbock Glass & Mirror Co.*, 422 S.W.2d 942 (Tex. App. 1967); *R.H. Macy & Co. v. Williams Tile & Terrazzo Co.*, 585 F. Supp. 175 (N.D. Ga. 1984); *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass’n*, 560 N.E.2d 206 (Ohio 1990); *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs.*, 386 N.W.2d 375 (Minn. Ct. App. 1986); *Lutz Eng’g Co. v. Industrial Louvers, Inc.*, 585 A.2d 631 (R.I. 1991). See also *infra* note 187 and accompanying text.

7. *Casa Clara Condominium Ass’n v. Charley Toppino & Sons*, 620 So. 2d 1244, 1246 (Fla. 1993). The types of economic losses include: (1) inadequate value; (2) costs of repair and replacement of the defective product; (3) consequent loss of profits. Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966). Economic losses in the hypothetical scenario described in the Introduction are the commercial expectations of the contractor. *Id.* The first type of economic loss, inadequate value, includes diminution in value based on defectiveness. Comment, *Manufacturers’ Liability to Remote Purchasers for “Economic Loss” Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966); See generally Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075 (1979) [hereinafter *Architectural Malpractice*]; ROBERT F. CUSHMAN & G. CHRISTIAN HEDEMANN, ARCHITECT AND

amounting to disappointed commercial expectations and are distinct from personal injury or property damage.⁸ In a majority of jurisdictions, the economic losses described in this hypothetical scenario have been allowed in actions by contractors against architects if negligence can be proved.⁹ Recovery is allowed despite the lack of privity¹⁰ between the contractor and the architect.¹¹

This Note argues that recovery of economic loss by contractors from architects, even when architects are negligent, creates a problem for the entire construction industry and should be avoided. The problem is that the adversarial relationship designed by the owner between architect and contractor is compromised when the architect is forced to consider the commercial expectations of the contractor. Therefore, the architect should have no duty in tort to protect against the economic loss of the contractor in this adversarial system and a *per se* rule should be adopted barring recovery. This notion squares with other professions such as accounting and law. Professionals in those areas, if meant by their clients to have an adversarial relationship with third parties, are not forced to consider the commercial expectations of those third parties.

This Note analyzes the hypothetical scenario described above in light of

ENGINEER LIABILITY: CLAIMS AGAINST DESIGN PROFESSIONALS 122-25 (2d ed. 1995) (discussing the problems surrounding liability for economic loss in the construction context).

"[E]conomic loss describes those damages falling on the contract side of 'the line between tort and contract . . .'" *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 990 (Wash. 1994) (internal citations omitted). Consequential loss is usually based on the theory that an act or omission of the architect caused delay. For a discussion of the difficulties in determining causation in construction delay, see THEODORE J. TRAUNER, JR., *CONSTRUCTION DELAYS* (1990); RICHARD H. CLOUGH, *CONSTRUCTION CONTRACTING* 103-04 (2d ed. 1969) (discussing cases in which delay allows a contractor more time as well as consequential damages in cases where the contract provides for it).

8. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 450 (Ill. 1982).

9. *Quatman*, *supra* note 6, at 572.

10. Privity (of contract):

That connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and defendant in respect of the matter sued on. However, the absence of privity as a defense in actions for damages in contract and tort actions is generally no longer viable with the enactment of warranty statutes (see *e.g.* U.C.C. § 2-318 . . .), acceptance by states of doctrine of strict liability . . . and court decisions (*e.g.* *MacPherson v. Buick Motor Co.*, . . . 111 N.E. 1050 [N.Y. 1916]) which have extended the right to sue for injuries or damages to third party beneficiaries, and even innocent bystanders . . .

BLACK'S LAW DICTIONARY 1199 (6th ed. 1990).

11. *Quatman*, *supra* note 6, at 561, 572. See generally Frank D. Wagner, Annotation, *Tort Liability of Project Architect for Economic Damages Suffered by Contractor*, 65 A.L.R. 3D. 249 (1975).

developments in the law disfavoring as well as favoring liability and concludes that architects should not be held liable for pure economic loss of contractors. In Part II.A, this Note traces the historical development of the relationships among those in the construction industry.¹² Then Part II.B surveys how courts have viewed economic loss in products liability cases.¹³ Part II.C demonstrates how this rationale regarding economic loss has been applied in the construction industry.¹⁴ Part III analyzes the economic loss doctrine, the minority position in the construction context.¹⁵ In Part III.A, this Note discusses various conceptions of the doctrine.¹⁶ In Part III.B, this Note presents ways in which plaintiffs in jurisdictions that employ the economic loss doctrine contend that the doctrine does not reach their loss.¹⁷ In Part IV, this Note analyzes various theories which, collectively, allow a cause of action by contractors against architects for economic loss.¹⁸ These theories include the contract theory of third party beneficiary, discussed in Part IV.A,¹⁹ and the tort theories of negligence and negligent misrepresentation, discussed in Part IV.B.²⁰ One or more of these theories are in force in a majority of jurisdictions. In Part IV.C this Note discusses the rationale for rejecting the economic loss doctrine in the construction context.²¹

Finally, Part V introduces a way to view economic losses in light of the relationships among those in the construction industry.²² This Note proposes a test to determine whether to impute a duty on the part of architects to protect against third party economic loss. The reasoning behind this test, which will be proved as viable based on its application to relationships in other professions, will aid courts in concluding that a duty in tort should not lie with an architect to protect the commercial expectations of contractors. Thus, whether a contract analysis or tort analysis is engaged, economic loss by contractors should not be recoverable from architects when contractors and architects are meant by owners to be adversaries.

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12. See *infra* notes 23-51 and accompanying text.
 13. See *infra* notes 52-73 and accompanying text.
 14. See *infra* notes 74-81 and accompanying text.
 15. See *infra* notes 82-176 and accompanying text.
 16. See *infra* notes 82-134 and accompanying text.
 17. See *infra* notes 135-76 and accompanying text.
 18. See *infra* notes 177-267 and accompanying text.
 19. See *infra* notes 188-209 and accompanying text.
 20. See *infra* notes 210-60 and accompanying text.
 21. See *infra* notes 261-67 and accompanying text.
 22. See *infra* notes 268-93 and accompanying text.

II. HISTORICAL PERSPECTIVE

A. Survey of the Means of Construction

The traditional delivery system of construction contracts,²³ described in the introductory hypothetical scenario, involves relationships²⁴ among owner, design professional,²⁵ and contractor, and is the most common means by which buildings are built.²⁶ Standard form contracts, including the B141²⁷ and the A201,²⁸ both published by the American Institute of Architects (AIA),²⁹ usually define the relationships among these parties. Under this system, an owner retains an architect for preparation of plans and specifications,³⁰ and then procures a contractor through a process of competitive bidding to construct the building according to the contract documents.³¹ Once construction has commenced, the architect typically acts as the owner's agent to observe the progress of the construction, approve shop drawings and submittals,³² and to

23. JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 104-11, 354-55 (5th ed. 1994). The traditional delivery system also includes other parties such as consultants, subcontractors, lenders, insurers and sureties, but those groups are not analyzed with any detail in this note.

24. See *infra* APPENDIX A.

25. The term "design professional" includes architects as well as engineers. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 990 (Wash. 1994). Thus, although "architect" is used more often throughout this note, "engineer" could be used interchangeably.

26. See SWEET, *supra* note 23, at 108.

27. B141 Standard Form of Agreement Between Owner and Architect (14th ed. 1987) [hereinafter B141].

28. A201 General Conditions of the Contract for Construction (14th ed. 1987) [hereinafter A201].

29. See generally AMERICAN INSTITUTE OF ARCHITECTS, THE HANDBOOK OF ARCHITECTURAL PRACTICE (6th ed. 1951) [hereinafter AIA HANDBOOK].

30. B141, *supra* note 27, ¶¶ 2.2, 2.3, 2.4. Plans and specifications are part of what are collectively referred to as contract documents. A201, *supra* note 28, ¶ 1.1.1. For a discussion of contract documents, see CLOUGH, *supra* note 7, at 88.

31. B141, *supra* note 27, ¶ 2.5.1. See also CLOUGH, *supra* note 7, at 87; AIA HANDBOOK, *supra* note 29, at 48.

32. Shop drawings are the most common form of submittals. SWEET, *supra* note 23, at 220. Submittals include product data such as "illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information" which illustrate the equipment or materials that the contractor proposes to employ to actually build the structure. A210, *supra* note 28, ¶ 3.12.2. Shop drawings "instruct the fabrication 'shop' how to fabricate component parts." SWEET, *supra* note 23, at 220. These drawings are defined as data prepared especially for the project at hand "to illustrate some portion of the [w]ork." A201, *supra* note 28, ¶ 3.12.1. Another type of submittal is samples, which are physical examples of "materials, equipment or workmanship [which] establish standards by which the [w]ork will be judged." *Id.* ¶ 3.12.3. See also AIA HANDBOOK, *supra* note 29, at 35-37.

certify payment from the owner to the contractor.³³ One aspect of the traditional delivery system which is immediately apparent is the lack of contractual privity between an architect and a contractor.³⁴ An owner selects a system with a lack of such privity mainly for economic reasons.³⁵ First, competitive bidding among prospective contractors helps to ensure the lowest possible price for the project.³⁶ Second, because the contractor has a profit motive,³⁷ the architect, as the owner's agent, acts as a check on the contractor to insure that the contractor does not overcharge the owner in building the project or deviate from the contract documents in constructing the building.³⁸ Disadvantages of the traditional delivery system include the fact that the project takes longer to build, and complaints which often arise between the architect and the contractor about alleged improper performance of each other's duties.³⁹

Variations on the traditional delivery system include construction management,⁴⁰ turnkey,⁴¹ and design/build.⁴² The main difference between these modern variations and the traditional system is the contractual relationship between the owner and the others involved in the process.⁴³ For example, in the design/build variation, the owner is no longer in privity with an architect or

33. B141, *supra* note 27, ¶ 2.6. See also AIA HANDBOOK, *supra* note 29, at 20-21; CLOUGH, *supra* note 7, at 106-07. For a discussion of the payment certification process see MAHER, *supra* note 3, at 259-74; CLOUGH, *supra* note 7, at 97-98.

34. SWEET, *supra* note 23, at 285.

35. *Id.* at 354.

36. *Id.* at 381.

37. *Id.* at 448-58. The contract price can be amended through a device known as a change order. B141, *supra* note 27, ¶ 2.6.13; A201, *supra* note 28, ¶¶ 7.3.1, 7.2.1, 7.4.1.

38. MAHER, *supra* note 3, at 299-300. See also SWEET, *supra* note 23, at 354. The architect acts as the "eyes and ears" of the owner on the jobsite. *Id.*

39. SWEET, *supra* note 23, at 355.

40. Construction management is similar to the traditional delivery system in that an architect is retained for the preparation of plans and specifications and a contractor is chosen for construction of the project. However, the owner also enters into a third contract with a construction manager who basically takes over the architect's site supervision duties once construction has commenced. SWEET, *supra* note 23, at 363-64; SOL A. WARD & THORNDIKE LITCHFIELD, COST CONTROL IN DESIGN AND CONSTRUCTION 119-32 (1980).

41. Turnkey is a process whereby a client with a need for a building retains a design/build firm, and the design/build firm furnishes all services necessary to design and build the structure, such that when the project is returned to the client, the client has a completed building—all the client must do is "turn the key" to occupy the structure. WARD & LITCHFIELD, *supra* note 40, at 2.

42. Design/build is a project delivery method in which the design function and the construction function, normally held by an architect and contractor respectively, are merged into one firm which performs both functions or contracts with others to perform both functions. SWEET, *supra* note 23, at 356-71; WARD & LITCHFIELD, *supra* note 40, at 1-13. See also *infra* APPENDIX B. As a consequence, the process of competitive bidding among contractors goes away. WARD & LITCHFIELD, *supra* note 40, at 2.

43. SWEET, *supra* note 23, at 356.

contractor.⁴⁴ Privity is maintained solely with a design/build firm which either has design and construction services on staff or engages in its own contracts with an architect and contractor.⁴⁵ An advantage to the owner of this modern variation is that the project can be completed faster.⁴⁶ Because there is no competitive bidding process, the design/build firm can engage in fast-tracking, in which the project is begun even before the plans and specifications are completed.⁴⁷ The disadvantages to the owner of the modern variations include a higher project price,⁴⁸ as well as no ability on the part of the owner to sue the architect, in some jurisdictions, for economic loss because of the lack of privity.⁴⁹

Typically, an owner will consider the advantages and disadvantages of the different types of delivery systems before selecting the one which is best suited for its needs.⁵⁰ As a large corporation, Pharmatech, the owner in the introductory hypothetical scenario, would have considered its need to move quickly into new headquarters, in which case design/build would be the appropriate option, against the cost benefits of the traditional delivery system. The fact that Pharmatech chose to engage in the traditional delivery system after considering these advantages and disadvantages is significant with respect to how disputes should be handled among the parties in the future.⁵¹ Also significant in the resolution of such disputes is how courts have applied the law regarding economic loss in other commercial contexts.

44. WILLIAM D. BOOTH, *MARKETING STRATEGIES FOR DESIGN-BUILD CONTRACTING* 1-10 (1995). See also *infra* APPENDIX B.

45. SWEET, *supra* note 23, at 367.

46. *Id.* at 356-57; WARD & LITCHFIELD, *supra* note 40, at 1-13.

47. "Fast-tracking" is a method of design/build in which construction begins on each phase of the building as component architectural plans and specifications are completed and approved. *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 429 (Tenn. 1991). See also SWEET, *supra* note 23, at 356-57.

48. In construction management, this higher project price is mainly due to the additional contract the owner has with the construction manager who supervises the construction. In design/build, this higher project price is due to the lack of competitive bidding. See MAHER, *supra* note 3, at 302-04; CLOUGH, *supra* note 7, at 9.

49. SWEET, *supra* note 23, at 356-71. But see *Keel v. Titan Constr. Corp.*, 639 P.2d 1228 (Okla. 1981). In *Keel*, the owner in the design/build scenario was allowed to bring an action against the architect, both on a theory of third party beneficiary as well as a negligence action for economic losses sustained as a result of defective design. *Id.* at 1231, 1232.

50. An exception to this rule is in the case of a public owner, such as a governmental entity, which must follow statutory procedure, normally mandating the traditional delivery system. SWEET, *supra* note 23, at 363-71.

51. See *infra* part V.

B. Historical Development of Legal Theory Regarding Economic Loss

Courts have decided construction dispute cases such as the hypothetical scenario described in the Introduction by looking to the law of products liability.⁵² In the field of products liability at common law, privity was necessary in order to recover in tort.⁵³ Courts devised this concept because they thought that no duty to protect the purchaser existed unless the seller warranted the product purchased.⁵⁴ Courts later abandoned the requirement of privity⁵⁵ in cases of personal injury⁵⁶ and property damage.⁵⁷ Courts therefore drew a distinction between interests in tort⁵⁸ and those in contract.⁵⁹ In the former, the seller was held strictly liable.⁶⁰ In the latter, the seller could only be liable if in privity with the ultimate purchaser.⁶¹ From this development grew a defense to strict liability actions called the economic loss

52. "[T]here is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure" WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 85, at 517 (2d ed. 1955). See also note 179 and accompanying text.

53. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842). In *Winterbottom*, an injured coachman was denied recovery against the supplier of a defective wheel. *Id.* at 406. The case is commonly known as the genesis of the requirement of privity as the *sine qua non* of duty in negligence cases. See *Williams & Sons Erectors v. South Carolina Steel Corp.*, 983 F.2d 1176, 1181 (2d Cir. 1993).

54. *Winterbottom*, 152 Eng. Rep. at 405.

55. The swiftness with which the requirement of privity was abandoned in the early part of the twentieth century led Justice Cardozo to remark "[t]he assault upon the citadel of privity is proceeding in these days apace." *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).

56. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 793 (1966).

57. "There is no sensible reason for distinguishing between the two kinds of damage." William L. Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1143 (1960). The defense of "privity" is not permitted in suits for personal injury, whether founded upon a claim of negligence or upon a claim of strict liability. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

58. Tort:

A legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; or (3) the violation of some private obligation by which like damage accrues to the individual.

BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

59. Contract: "[A] promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation. *Lamoureux v. Burrillville Racing Ass'n*, 161 A.2d 213, 215 (R.I. 1960).

60. *MacPherson*, 111 N.E. at 1053; Quatman, *supra* note 6, at 565.

61. David Hilton Wise, *Economic Loss Rule*, CONSTRUCTION BRIEFINGS, June 1995, at 1, 3-4.

doctrine.⁶² If the losses suffered by the purchaser were solely economic in nature, as opposed to personal injury or property damage,⁶³ privity of contract needed to exist in order to recover.⁶⁴ No cause of action existed for pure economic losses in tort.⁶⁵ Today, some courts that have adopted the economic loss doctrine hold that privity of contract is necessary to maintain an action in tort.⁶⁶ Most jurisdictions, however, simply hold that, in cases of pure economic loss, the contract will define the remedy.⁶⁷ If no privity exists, no recovery for economic loss will lie.

Agreement that the economic loss doctrine should bar tort recovery in products liability cases is by no means universal, however. Two cases, decided in the same year by different state courts, reflect these opposing views. In *Santor v. A & M Karagheusian, Inc.*,⁶⁸ the New Jersey Supreme Court extended tort liability beyond personal injury and property damage to include economic losses.⁶⁹ This view was rejected by the California Supreme Court in *Seely v. White Motor Co.*,⁷⁰ which held that only where a contract or

62. Referred to as the *Moorman* rule in Illinois. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982); see generally Mark C. Friedlander, *The Impact of Moorman and its Progeny on Construction Litigation*, 77 ILL. B.J. 654 (1989). See also CUSHMAN & HEDEMANN, *supra* note 7, at 148-49.

63. *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1245 (Fla. 1993). The economic loss rule prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any other property other than itself. *Id.*

64. *Moorman*, 435 N.E.2d at 453.

65. *Id.*

66. *Ward v. Ernst & Young*, 435 S.E.2d 628, 634 (Va. 1993). See also *Gilliland v. Elmwood Properties*, 391 S.E.2d 577, 580 (S.C. 1990). For a synopsis of *Gilliland*, see *infra* note 82 and accompanying text.

67. *Moorman*, 435 N.E.2d at 453.

68. 207 A.2d 305 (N.J. 1965).

69. *Id.* at 312. In *Santor*, the plaintiff brought an action alleging breach of implied warranty of merchantability. *Id.* at 307. The carpeting which the plaintiff had ordered from the defendant's dealer began to unravel soon after being installed. *Id.* The carpeting was marketed as Grade #1 by the manufacturer. *Id.* The court allowed recovery by the plaintiff from the manufacturer, even though the plaintiff had no privity with that manufacturer, only the dealer. *Id.* at 314. See also *infra* note 211.

70. 403 P.2d 145, 151 (Cal. 1965). In *Seely*, a truck driver sued the truck manufacturer, with whom he had no privity, for economic losses resulting from an accident caused by the defective brakes of the truck. *Id.* at 147. The court allowed the suit because of an express warranty by the manufacturer to the plaintiff. *Id.* at 148. The express warranty to the plaintiff read: "The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof . . ." *Id.* Although a cause of action for breach of warranty was allowed in that case despite lack of privity, damages in tort were denied. *Id.* The court in *Seely* also attempted to distinguish the facts of its case from *Santor v. Karagheusian, Inc.* *Id.* at 151. Had the carpet in *Santor* been sold "as is" instead of "Grade #1,"

express warranty existed between the parties would economic losses be recoverable.⁷¹ The United States Supreme Court endorsed Judge Roger Traynor's opinion in *Seely* with regard to admiralty jurisdiction when it reasoned that if liability was opened to a potentially indeterminate class of third parties for diminished commercial expectations, "contract law would drown in a sea of tort."⁷² The Supreme Court's ruling notwithstanding, the economic loss doctrine is still the minority view. The cases where tort recovery is allowed in the majority of jurisdictions for pure economic loss include professional liability claims in the construction context.⁷³

C. Application of Legal Theory to the Construction Industry

Under its contract with an owner, an architect is held to a professional standard of care in completing the contract documents and observing the

the court in *Seely* posited that no basis of recovery would have existed. *Id.*

71. *Id.* at 148.

72. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (citation omitted). For examples of how courts have placed limits upon the number of potential third party claimants against design professionals, see *Local Joint Executive Bd. of Las Vegas v. Stern*, 651 P.2d 637 (Nev. 1982); *Craig v. Everett M. Brooks Co.*, 222 N.E.2d 752 (Mass. 1967). In *Las Vegas*, employees of a hotel that burned down sued the architects of the hotel to recover lost wages and benefits as a result of the fire. *Las Vegas*, 651 P.2d at 637-38. The court denied recovery against the architect on theories of negligence and strict liability because of the lack of privity. *Id.* at 638.

In *Craig*, a contractor was allowed to sue a consulting engineer with whom it had no privity for negligence. *Craig*, 222 N.E.2d at 755. The engineer, pursuant to its contract with the developer, staked out areas on the property so that the contractor would have guideposts in constructing a road on the property. *Id.* at 753. The stakes were placed in incorrect locations, necessitating the rebuilding of the road on another portion of the site. *Id.* The court stated that because the user of the information was known to the engineer at the time he supplied it, liability would not be unlimited. *Id.* at 754-55. See also William L. Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 248-50 (1966).

73. These include claims of malpractice against accountants, health care professionals, attorneys, and design professionals. In the absence of privity of contract between two disputing parties, the general rule is that "there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 92, at 657 (5th ed. 1984). See generally *Chemtrol Adhesives, Inc., v. American Mfrs. Mut. Ins. Co.*, 537 N.E.2d 624 (Ohio 1989); *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984); *Local Joint Executive Bd. of Las Vegas v. Stern*, 651 P.2d 637 (Nev. 1982). However, this view is not held by many courts when architects are involved. See, e.g., *Milton J. Womack, Inc. v. State House of Representatives*, 509 So. 2d 62 (La. Ct. App. 1987); *Owen v. Dodd*, 431 F. Supp. 1239 (N.D. Miss. 1977); *Mayer of Columbus v. Clark-Dietz & Assocs.-Eng'rs, Inc.*, 550 F. Supp. 610 (N.D. Miss. 1982); *Davidson & Jones, Inc. v. County of New Hanover*, 255 S.E.2d 580 (N.C. Ct. App. 1979); *Berkel & Co. Contractors v. Providence Hosp.*, 454 So. 2d 496 (Ala. 1984). Thus, allowing claims against architects by third parties for economic loss is an anomaly with respect to claims against other types of professionals. See *infra* Part V.

construction of the project.⁷⁴ This standard, made explicit in the owner-architect agreement,⁷⁵ is a tort standard.⁷⁶ The architect contracts to use that degree of skill and care that a reasonably prudent architect would use under the same or similar circumstances.⁷⁷ When an architect breaches this standard of care and personal injury or property damage results, courts readily find liability.⁷⁸ When plaintiffs suffer solely economic loss because of a breach of this standard, the owner usually sues the architect, whose remedy for such loss is provided for by the owner-architect agreement.⁷⁹ In some cases, though, a contractor suffers economic losses because of the architect's negligence.⁸⁰ How far courts should go in imposing liability on the architect for damages caused to a contractor is a matter of difficulty because the contractor and the architect are not in privity with one another in the traditional delivery system.⁸¹

In the introductory hypothetical scenario, assuming Archiwerks breached its standard of care in drafting the specifications for "approved equals" without specifying the tests which Capital would have to perform, most courts would hold Archiwerks liable for Capital's economic loss. But, because of the lack of privity between Archiwerks and Capital, a small number of states following the economic loss doctrine would bar recovery of Capital's loss, even if Archiwerks

74. Quatman, *supra* note 6, at 567.

75. B141, *supra* note 27, ¶ 1.1.2.

76. See *infra* notes 220-28 and accompanying text (discussing the scope of an architect's duty).

77. See *American Fidelity Fire Ins. Co. v. Pavia-Byrne Eng'g Corp.*, 393 So. 2d 830, 838 (La. Ct. App. 1981) (holding that "the duty owed by those practicing learned professions to their clients, patients or retainers, is that of exercising that degree of professional care and skill customarily employed by others in the same profession in the same general area.").

78. Quatman, *supra* note 6, at 567.

79. B141, *supra* note 27, at Art. 7.

80. Quatman, *supra* note 6, at 567. This note is concerned solely with negligence on the part of the architect, not with intentional torts.

81. Two commentators describe the contrast between ignoring the contract provisions altogether and giving them controlling effect. Compare Keith L. Davidson, *The Liability of Architects*, TRIAL, June 1977, at 20, 22-23 and Bibb Allen, *Liabilities of Architects and Engineers to Third Parties*, 22 ARK. L. REV. 454 (1968) (surveying personal injury and property damage liability for architects arising from the preparation of plans and specifications as well as from construction supervision). Some propose an application of various factors, including the applicable contract provisions. JAMES ACRET, ARCHITECTS AND ENGINEERS: THEIR PROFESSIONAL RESPONSIBILITIES §§ 10.2, 10.3 (1977); Anthony F. Earley, Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME L. REV. 306 (1977) (favoring a balancing approach of factors relating to the protection and expectations of parties involved to determine whether a duty in tort should exist). In *Architectural Malpractice*, *supra* note 7, at 1084-86, the cause of action for negligence is advocated in two situations: (1) where the architect breaches the duty of care imposed upon him in his performance of a provision contained in the architect's contract with the owner, when it is reasonably foreseeable that the contractor would rely upon that undertaking by the architect; and (2) where the architect, by its conduct, assumes a responsibility, wherein it is reasonably foreseeable that the contractor would rely upon the non-negligent performance of that undertaking by the architect. *Id.*

had breached its standard of care.

III. ECONOMIC LOSS DOCTRINE

A. Various Conceptions of the Economic Loss Doctrine

The jurisdictions which recognize the economic loss doctrine as a defense to third party actions can be divided into three groups. The first conception states that the only way to recover in tort for economic losses is if privity of contract is present.⁸² This formulation has been the most criticized in that it contradicts the very reason for contracting in the first place, which is to define the limits of liability upon breach.⁸³ If a party is able to recover in tort what that party was unable to negotiate at the bargaining table, the terms of the contract become meaningless.⁸⁴ The second, championed most notably by Illinois courts, states that all economic losses are to be defined by contract.⁸⁵ No cause of action, therefore, exists in tort for economic losses.

The third conception begins with the notion that privity is neither an element of the economic loss doctrine⁸⁶ nor an exception to its enforcement.⁸⁷

82. *Ward v. Ernst & Young*, 435 S.E.2d 628, 634 (Va. 1993). See also *Gilliland v. Elmwood Properties*, 391 S.E.2d 577 (S.C. 1990). In *Gilliland*, an owner was allowed to sue an architect both for breach of contract and tort for recovery of economic losses. *Id.* at 580. The architect had allegedly made representations about its ability to design a project that would fit within the client's budgetary constraints as well as qualify the project for certain governmental approval and tax exempt bond funding. *Id.* at 578-79. These representations induced the client to enter into a contract with the architect. *Id.* at 579. The project later failed. *Id.* The court held that the architect owed a duty in tort independent of that in contract. *Id.* at 580. The court reasoned that the common law requirements of a negligence action had been met where misrepresented facts induced the owner to enter a contract. *Id.*

83. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1200 (Del. 1992); *Miller v. United States Steel Corp.*, 902 F.2d 573, 574-75 (7th Cir. 1990).

84. *Wise*, *supra* note 61, at 3.

85. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 453 (Ill. 1982). See also Steven B. Lesser, *Economic Loss Doctrine and Its Impact upon Construction Claims*, CONSTRUCTION LAW., Aug. 1994, at 21; Timothy J. Muldowney, *Architects, Engineers and Construction Litigation*, 60 DEF. COUNS. J. 356 (1993); Mary Yuen, Note, *Absent Privity of Contract, Contractors May Not Recover Economic Damages Caused By an Architect's Negligence*, 60 U. CIN. L. REV. 565 (1991); Michael D. Tarullo, *The Good, the Bad, and Economic Loss Liability of a Design Professional*, CONSTRUCTION LAW., Apr. 1991, at 10.

86. *Miller*, 902 F.2d at 575. In *Miller*, the economic loss doctrine was applied to deny recovery of economic losses in tort. *Id.* The plaintiff had relied on oral representations of the defendant that Cor-Ten steel would be appropriate on his own building. *Id.* at 574. These representations proved incorrect and the plaintiff had to incur significant expense in rectifying the situation. *Id.* The court stated that tort law was a "superfluous and inapt tool for resolving purely commercial disputes." *Id.* This theory was not appropriate because the plaintiff could have asked the defendant for an express warranty, but did not. *Id.* at 575. He should therefore "not be permitted to opt out of commercial law by refusing to avail himself of the opportunities which that

Thus, instead of a contract analysis, courts should use a tort analysis in determining whether or not a duty exists to protect third parties from economic loss.⁸⁸ The nonexistence of a duty results in the application of the economic loss doctrine as a per se rule to bar recovery. The existence of a duty results in tort liability under negligence or negligent misrepresentation. The states employing this analysis have used different formulations to determine whether such harm to the contractor is foreseeable to the architect in order to impute a duty.⁸⁹ In Florida, the emphasis seems to be on the degree of control the negligent architect has over the work of the contractor.⁹⁰ In New York, the relationship between the negligent architect and the contractor must be one so close as to "approach" privity.⁹¹

1. Privity Necessary to Sustain a Cause of Action in Tort

Virginia and South Carolina courts have held that privity of contract is an essential element of a duty in tort.⁹² This requirement is necessary because the standard of quality to which the parties aspire must be defined by that which the parties have agreed upon.⁹³ On its face, this notion seems logical. If no privity exists, plaintiffs cannot recover economic loss damages. However, a closer examination reveals the weakness of this conception of the economic loss doctrine. Conceivably, courts would allow a party that suffers economic loss caused by another with whom that party is in privity to sue for the loss not only in contract, but also in tort.⁹⁴ This fact is significant because the measure of

law gives him." *Id.*

87. *Danforth*, 608 A.2d at 1200-01.

88. *Id.* at 1200.

89. See *infra* notes 220-28 and accompanying text (discussing the scope of an architect's duty). See also *Lutz Eng'g Co. v. Industrial Louvers, Inc.*, 585 A.2d 631 (R.I. 1991), in which a subcontractor was prevented from suing an architect for negligence in approving shop drawings for a number of louvered panels in an industrial building. *Id.* at 635. The original specifications did not mention air-leakage requirements for the louvers, merely that they be similar to a brand named in the specs or an "approved equal." *Id.* at 633-34. The shop drawings were rejected once for failure to conform to this condition, but were approved later without change. *Id.* at 634. The installed louvers began to leak when rain was pushed into the building by wind. *Id.* The contractor held the sub responsible for bringing the louvers into conformance with the air-leakage requirements, and the sub sued the architect to recoup its loss. *Id.* The court held that the architect owed no duty to the sub and was thus not liable to the sub for negligence. *Id.* at 635. See also *infra* note 233 and accompanying text.

90. *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 401 (Fla. 1973).

91. *Ultramares v. Touche*, 174 N.E. 441, 446 (N.Y. 1931).

92. See, e.g., *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1195 (4th Cir. 1985); *Ward v. Ernst & Young*, 435 S.E.2d 628, 634 (Va. 1993); *Gilliland v. Elmwood Properties*, 391 S.E.2d 577, 580 (S.C. 1990). See also *supra* note 82 and accompanying text.

93. *Ward*, 435 S.E.2d at 631; *Blake Constr. Co. v. Alley*, 353 S.E.2d 724, 726 (Va. 1987); *Crowder v. Vandendeale*, 564 S.W.2d 879, 882 (Mo. 1978).

94. *Wise*, *supra* note 61, at 3.

tort recovery is normally more liberal than that in contract.⁹⁵ Instead of confining recovery to those damages agreed upon under the contract, plaintiffs could ignore the contract, and the court would allow a tort suit.⁹⁶ This position is antithetical to the notion that a contract is a means by which a party can limit its liability to another in the event of a breach.⁹⁷ Because of its contradictory nature, this version of the economic loss doctrine is not widely accepted.⁹⁸

2. All Recoverable Damages Defined by Contract

In this conception, like the one espoused in Virginia and South Carolina, economic losses are thought of as mere deterioration or loss of the bargain.⁹⁹ The quality standards to which the building and contract documents are held by the parties must be in reference to what was agreed upon in contract.¹⁰⁰ Duty is therefore imputed solely by contract.¹⁰¹ But, under this conception, unlike Virginia and South Carolina, recovery of economic loss when privity is present is confined to that measure of damages defined in the contract.¹⁰² A cause of action in tort is thus disallowed for economic loss, privity or not.

Although its genesis lay in California,¹⁰³ this conception of the economic loss doctrine has developed most notably in Illinois to include the construction context. The first case to adopt the *Seely* rationale in Illinois was *Moorman Manufacturing Co. v. National Tank Co.*¹⁰⁴ This decision made clear the

95. This fact is especially true when one considers that in some owner-contractor agreements, a no-damage-for-delay clause is present. See *infra* notes 117, 123 and accompanying text.

96. It should be noted, however, that such recovery has been denied in the past in Virginia. See *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 58 (Va. 1988).

97. *Wise*, *supra* note 61, at 3.

98. Virginia and South Carolina were the only states that could be found with such a rule.

99. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 450 (Ill. 1982).

100. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 327 (Ill. 1982) (citation omitted).

101. *Id.* at 326.

102. See, e.g., Matthew S. Steffey, *Negligence, Contract, and Architects' Liability for Economic Loss*, 82 KY. L.J. 659 (1994) (positing that contractors should not be able to sue architects in tort because they have a contract remedy with the owner). Cf. Jeff Sobel, Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CAL. L. REV. 1361 (1967) (arguing that tort law should be extended in order to hold architects strictly liable for the economic losses of contractors).

103. See *supra* notes 70-71 and accompanying text (discussing *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965)).

104. 435 N.E.2d 443 (Ill. 1982). In *Moorman*, a plaintiff who suffered damages when a bolted steel grain storage tank he purchased from defendant developed a crack could not recover in tort. *Id.* at 453. The only damages recoverable were those in contract. *Id.* at 450. Allowing a cause of action in that case would have undermined state law:

[T]he law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. . . . These rules determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver.

fundamental difference between tort and contract, the latter being the only method by which to recover economic losses.¹⁰⁵ The *Moorman* rule, as it became known, was later applied to a subsequent purchaser of a home in *Redarowicz v. Ohlendorf*.¹⁰⁶ The court denied recovery of economic loss by the remote purchaser from the builder under a tort theory.¹⁰⁷ Other contractual remedies were available which would define the builder's liability.¹⁰⁸

After *Moorman* and *Redarowicz*, a dispute arose among Illinois circuits about how to apply the *Moorman* rule to architects,¹⁰⁹ because *Moorman* would have allowed recovery in product liability cases where negligent misrepresentation was proved.¹¹⁰ The Illinois Supreme Court put this issue to rest when it decided *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*¹¹¹ The court rejected the argument that liability should lie based on the fact that *Moorman* made an exception for negligent misrepresentation because the information provided in the contract documents was merely incidental.¹¹² The end and aim of the transaction was the physical building itself, and buildings are not information within the meaning of the Restatement.¹¹³ The court also rejected the argument that the application of *Moorman* to the professional context would upset established principles of

. . . Thus, adopting strict liability in tort for economic loss would effectively eviscerate section 2-316 of the UCC.

Id. at 447. The court also felt that allowing such recovery would have blurred the line between contract and tort law:

[Denying tort recovery for economic losses] comports with the notion that the essence of a product liability tort case is not that the plaintiff failed to receive the quality of the product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property. On the other hand, contract law, which protects expectation interests, provides the proper standard when a qualitative defect is involved, i.e., when a product is unfit for its intended use.

Id. at 448.

105. *Id.* at 453.

106. 441 N.E.2d 324 (Ill. 1982). In *Redarowicz*, the court extended the *Moorman* rule and denied recovery of economic losses of a subsequent purchaser against a builder. *Id.* at 331.

107. *Id.* at 327.

108. *Id.* at 331.

109. *Compare* *Rosos Litho Supply Corp. v. Hansen*, 462 N.E.2d 566 (Ill. App. Ct. 1984) (allowing recovery against architect), *with* *Fence Rail Dev. Corp. v. Nelson & Assocs.*, 528 N.E.2d 344 (Ill. App. Ct. 1984) (denying recovery).

110. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 452 (Ill. 1982).

111. 555 N.E.2d 346 (Ill. 1990). In *2314 Lincoln Park W.*, the court applied the *Moorman* rule to architects. *Id.* at 353. Condo owners (who had no privity with the architect) could not recover economic loss from an architect. *Id.* The court felt that the owners could have their commercial expectations met through their contract with the developer: "Contracting parties are free to bargain over the terms of their warranties." *Id.* at 348 (citing *Moorman*, 435 N.E.2d at 447-48).

112. *Id.* at 351 (citation omitted).

113. *Id.*

liability for malpractice in other professions,¹¹⁴ simply because no duty existed even under negligence theory to protect the commercial expectations of third parties.¹¹⁵ Thus, duty in negligence does not exist in this conception of the rule.

The rationale for the rule limiting economic loss to contract recovery is that the owner, who has a contract with the contractor, is better equipped to assess the risks of doing business together on a project than an architect who has no such contract with the contractor.¹¹⁶ The owner and contractor can decide on many different ways in which to handle claims for economic loss.¹¹⁷ The owner's insurer can, therefore, adequately gauge the risks involved by looking at the contract between the parties and affixing the owner's premiums accordingly.¹¹⁸ Conversely, insurers of architects have no such luxury.¹¹⁹

114. *Id.* at 353.

115. *Id.* at 351-53. See also *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n*, 560 N.E.2d 206 (Ohio 1990), in which the plaintiff, a flooring subcontractor, installed vinyl flooring for the owner, a hospital, in a manner prescribed by instructions in the plans and specifications prepared by the defendant architect. *Id.* at 206-07. After installation, bubbles began to appear and the plaintiff had to replace the flooring at a significant cost. *Id.* The allegation was that the architect negligently specified the flooring and sealant which caused the plaintiff's damages. *Id.* Recovery was denied on the theory that such recovery for economic losses is strictly a subject for contract negotiation and assignment. *Id.* at 212.

116. The economic loss rule was developed to prevent disproportionate liability and allow parties to allocate risk by contract. Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase*, 66 WASH. L. REV. 937, 940-41 (1991). See also *Floor Craft Floor Covering*, 560 N.E.2d at 211. The court stated, in relevant part:

The controlling policy consideration underlying tort law is the safety of persons and property—the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on the one hand and economic losses on the other.

Id. (internal citations omitted).

117. These methods include a "no-damage-for-delay" clause for breach. See *infra* note 123 and accompanying text.

118. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986 (Wash. 1994). In *Berschauer*, a contractor was denied recovery against an architect with whom it had no privity. *Id.* at 993. The court felt that it "must exercise caution . . . that [it does] not unduly upset the law upon which expectations are built and business is conducted." *Id.* at 991. The court also felt that:

If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

Id. at 992. In light of these concerns, the court held that contract principles should override tort principles and prevent third parties from suing in tort for economic losses. *Id.* at 993.

119. See Lieder, *supra* note 116, at 940.

Without a contract telling insurers the limit of the architect's liability, a considerable ambiguity exists.¹²⁰ In order to protect itself from the ill effects of such an ambiguity, insurers would have to charge architects exorbitant amounts in premiums.¹²¹ As a result, many architects would be forced out of business, or at least out of the traditional delivery system.¹²² Thus, the very system many owners would like to choose because of its unique advantages would no longer be a viable option to them.

Another rationale for restricting recovery of economic loss of contractors to those defined by their contracts with the owners focuses on the contractors' motivations for suing an architect for such losses in the first place. Many times the contract between the owner and architect contains a "no-damages-for-delay" clause.¹²³ Recovery for the contractor of economic loss under the contract would therefore be barred.¹²⁴ In order to avoid this result, the contractor would seek to sue the architect in tort.¹²⁵ The rationale behind many courts' rejection of the Virginia model is appropriate here because a contractor should not be able to recover in tort that which it failed to bargain for in contract.

120. *Id.* See also Wise, *supra* note 61, at 4; Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993).

121. *Casa Clara*, 620 So. 2d at 1247.

122. See also Wise, *supra* note 61, at 4.

123. Steffy, *supra* note 102, at 702. See also Williams & Sons Erectors, Inc. v. South Carolina Steel Corp., 983 F.2d 1176 (2d Cir. 1993). In *Williams*, the contractor sued the architect for negligent misrepresentation of plans and specifications which caused delay. *Id.* at 1179-80. The contractor, pursuant to its contract with the owner, had a "no-damages-for-delay" clause, providing:

No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner for any delays or hindrances from any cause whatsoever; provided that the Owner, in the Owner's discretion, may compensate the Contractor for any said delays by extending the time for completion of the work as specified in the Contract.

Id. Thus, the contractor was given additional time to complete the project such that the contractor would not be in breach by completing the project later than the date contracted for, but the contract would not compensate the contractor monetarily for the delay. The contractor thus sued the architect in tort to be compensated. The court denied recovery because the relationship between the architect and the contractor did not "approach privity." *Id.* at 1182. The pre-bid meeting, at which the architect answered questions from prospective bidders including the plaintiff, was not enough to establish the required relationship. *Id.* at 1183.

See also Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206, 212 (Ohio 1990). The contractor may try to avoid a "no-damages-for-delay" clause in its contract with the owner by suing the architect in tort, thereby avoiding the contract terms in order to recover economic losses. *Id.* See also A201, *supra* note 28, ¶¶ 2.3.5, 2.3.16.

124. *Floor Craft*, 560 N.E.2d at 212.

125. *Id.*

3. All Recoverable Damages Defined by a Duty in Tort

In this conception, the court engages in a preliminary analysis to determine on a case-by-case basis whether or not to impute a duty on the part of an architect to protect third parties from economic loss.¹²⁶ For instance, Florida has denied recovery even when foreseeability existed.¹²⁷ Whether a duty will be imputed in that state depends upon whether the court thinks that, as a matter of policy, the public as a whole should bear the brunt of the economic loss sustained by those who neglect to contract for such losses in the first place.¹²⁸ The economic loss doctrine has been enforced as a per se rule to deny recovery when other statutory and common law remedies are available to the plaintiff,¹²⁹ and when the supervising architect has no direct control over the

126. See, e.g., Wisconsin law, which adheres to the view that facts and circumstances will determine whether a duty will be imputed or not. Compare *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764 (Wis. 1974) (finding liability), with *Vonasek v. Hirsch & Stevens, Inc.*, 221 N.W.2d 815 (Wis. 1974) (denying liability).

127. *City of Tampa v. Thornton-Tomasetti*, 646 So. 2d 279, 282 (Fla. Dist. Ct. App. 1994).

128. *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1353 (Fla. Dist. Ct. App. 1992). In *Sandarac*, a condominium association could not recover from an architect economic losses sustained through allegedly negligent preparation of plans and specifications because no privity existed. *Id.* at 1352. "Historically, the judiciary has limited the protected interests in negligence to interests concerning the safety of one's person and property. . . . [T]hese interests are ones that people usually have no opportunity to protect in private contracts." *Id.* at 1352-53.

See also *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993). In *Casa Clara*, a homeowner could not recover from a concrete supplier with whom it had no privity for purely economic losses. *Id.* at 1246. "The basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault . . . or to one who is better able to bear the loss and prevent its occurrence." *Id.* (citation omitted). For a discussion of the impact of *Casa Clara* on Florida law, see Robert Alfert, Jr., *Architects' Relief Act of 1993: The Legacy of Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons*, 69 FLA. B.J. 36 (1995). For another argument of public policy favoring the application of the economic loss doctrine consult Sidney R. Barret, Jr., *A Critical Analysis*, 40 S.C. L. REV. 891, 933 (1989) (arguing that when only economic harm is involved, the question becomes "whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.").

See also *City of Tampa v. Thornton-Tomasetti, P.C.*, 646 So. 2d 279 (Fla. Dist. Ct. App. 1994). In *Tampa*, an owner could not sue an engineer who was a subcontractor of the architect. *Id.* at 283. The court reasoned: "To expose a consultant not in privity with the owner to the same liability as the professional in privity would diminish the willingness of persons or entities not a part of the central bargain to provide services at the risk of having vicariously to participate in unanticipated losses." *Id.*

129. *Sandarac*, 609 So. 2d at 1352. In *Sandarac*, several reasons were advanced for the endorsement of the economic loss doctrine: (1) it is largely a restatement of the traditional common law rule that negligence law is intended primarily to protect interests concerning the safety of one's person and property; (2) it is a limitation on recovery in negligence when the parties have elected to an alternative remedy under contract law; and (3) it bars an otherwise viable negligence cause of action because the damages are only economic. *Id.* The court stated that:

[Not following the economic loss doctrine] creates a new relationship of duty and a

work.¹³⁰ Mere foreseeability, then, will not always lead to the imputation of a duty on the part of the architect to protect the commercial expectations of contractors.¹³¹ Similarly, New York has denied recovery when the relationship between the parties has not "approached" privity.¹³² However, this factor is based on foreseeability and has sometimes been found in the construction context allowing a cause of action.¹³³

corresponding standard of care to protect a purely economic interest in the absence of bodily injury or property damage [The judiciary] should be aware that it is not merely creating an exception to an existing common law rule of damages. It should be convinced that the problem justifies a judicial allocation of the relevant risks among the members of society, and that an adequate remedy cannot realistically exist through private contracts and statutory remedies.

Id. at 1353. An earlier case, *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), was thus limited to situations in which an architect has direct supervision over the plaintiff so that the plaintiff is a known, intended beneficiary of the architect's contract at the time it is performed. *Id.* at 1354. Here, the condominium association could not base its theory of recovery on negligence because: (1) a common law implied warranty for homeowners was available; (2) statutory warranties were available; and (3) an express third party beneficiary in the contract was available. *Id.* at 1352.

Similarly, in *Casa Clara*, 620 So. 2d at 1247, homeowners were denied recovery in tort because they had protection other than a tort claim for economic loss, including: (1) statutory warranties; (2) a warranty of habitability (common law warranty); (3) the duty of sellers to disclose defects; and (4) the ability of purchasers to inspect houses for defects and bargain over price in light of those defects. *Id.*

130. *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 8 (Fla. Dist. Ct. App. 1994). *Cf. Spancrete, Inc. v. Ronald E. Frazier & Assocs., P.A.*, 630 So. 2d 1197 (Fla. Dist. Ct. App. 1994). In *Spancrete*, a subcontractor was prevented from suing the architect for economic losses. *Id.* at 1198. *Moyer* was limited to its facts, because the court in that case made much of the fact that the architect had the authority to stop the work. *Id.* Under the A201 that power is vested solely in the owner. *Id.* The power to supervise the contractor is expressly denied. *Id.* The architect merely retains administrative powers as the agent of the owner (i.e. the power to reject the work). *Id.* "Supervising architect" thus did not apply here. *Id.*

131. *Spancrete*, 630 So. 2d at 1198.

132. *Ultramares Corp. v. Touche*, 174 N.E. 441, 446 (N.Y. 1931). See also *R.H. Macy & Co. v. Williams Tile & Terrazzo Co.*, 585 F. Supp. 175 (N.D. Ga. 1984). In *R.H. Macy*, the architect specified ceramic tile, which, after installed, was discovered to be defective. *Id.* at 175-77. The supplier, after being sued by the owner (with whom the supplier had a contract), cross-claimed against the architect for negligence in failing to have the tile tested. *Id.* at 176. The court held that there existed no duty on the part of the architect because the relationship did not "approach privity." *Id.* at 180. The architect's determination of the suitability of the tile was based neither on a contract nor a commitment to the plaintiff, but merely on the plaintiff's assumptions regarding the architect's responsibilities. *Id.* at 179.

133. *Strategem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535 (S.D.N.Y. 1994). In *Strategem*, a construction manager, as a representative of the owner, was allowed to sue the architect for contribution/indemnity in its defense of a suit against it by the owner for economic losses because the relationship between them had approached privity. *Id.* at 548. An owner corporation had hired a developer to act as its representative in building two office buildings in Manhattan. *Id.* at 538. The owner then hired an architect for architectural services. *Id.* The agreement between the owner and the architect stated that, with respect to any negligence caused by it, the architect would indemnify the owner and the owner's representative. *Id.* The owner became dissatisfied with

The duty in the tort conception of the economic loss doctrine is consistent with this Note's proposal. If courts are unwilling to bar recovery based on the mere lack of privity, they can engage in a duty analysis with the same result. The contribution of this Note is that, rather than a public policy analysis or one which determines whether the architect and the third party "approached" privity, courts should first look to the relationship between architect and contractor as determined by the owner in deciding whether to adopt a per se rule against recovery. If this relationship is an adversarial one, recovery should be barred.¹³⁴

B. Instances in Which the Economic Loss Doctrine Does Not Apply

One conception of the economic loss doctrine states that, when damages other than property damage or personal injury are suffered, contract will define the remedy, if any.¹³⁵ Thus, only personal injury and property damage are compensable in tort.¹³⁶ Plaintiffs in jurisdictions that enforce the economic loss doctrine, rather than attacking the doctrine directly, often elect to argue that their losses fit into one or both of the categories of exceptions to the doctrine

its representative and terminated their joint venture, and the representative commenced an action to recoup funds owed it under the contract. *Id.* at 538-39. The owner counterclaimed against the representative, charging it with various tort and contract theories. *Id.* at 539. The representative then filed a third party action against the architect for indemnification. *Id.* at 539-40. The owner's contention was that the representative failed to adequately supervise the construction project in which not enough rentable square footage had been provided for in the plans. *Id.* The representative contended that the architect resisted its efforts to make necessary changes, and that the architect made the incorrect calculations. *Id.* at 540. The architect contended that it had no duty to the representative, so no recovery could be had in tort. *Id.* The court held that the architect owed a duty to the representative because their relationship approached privity. *Id.* at 548. The court based its conclusion on the specific facts of the case: (1) the architect and the representative ran weekly meetings and the architect knew that the representative relied on the architect's figures and used them in calculations presented to the owner; (2) the owner/architect agreement specified that the owner's representative was a third party beneficiary; and (3) the relationship approached privity. *Id.* For the factors which New York courts look to in order to determine whether a relationship approaches privity, see *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985). See also *infra* note 182 and accompanying text.

Stragem is important from the standpoint that it is consistent with this note's proposal. Even if third party beneficiary status had not been explicitly conferred upon the owner's representative, liability would have been found against the architect because the representative and the architect were meant by the owner to have an amiable relationship as opposed to an adversarial one. See *infra* part V.

134. See *infra* part V.

135. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 453 (Ill. 1982).

136. *Id.* at 450. See also SWEET, *supra* note 23, at 284-96.

which are compensable in tort.¹³⁷ Courts have developed limitations on what is compensable under these two exceptions. First, courts have been reluctant to extend liability to include negligence resulting in merely the *threat* to personal safety.¹³⁸ Second, as to property damage, the defective building must damage “other property” in order to be compensable.¹³⁹ When a building merely “injures . . . itself,” no recovery will lie.¹⁴⁰

1. “Physical Harm”

Justice Roger Traynor, writing for the California Supreme Court in *Seely v. White Motor Co.*,¹⁴¹ dealt with the issue of physical harm as being compensable, and concluded that the only actionable conduct is that which creates an unreasonable risk of harm.¹⁴² This language was repeated throughout the country as the rationale behind denying compensation for economic loss when “unreasonable risks of harm” did not occur.¹⁴³ Most courts began making a distinction between “sudden, calamitous” events which created an immediate threat to personal safety and those which occurred over time due to “deterioration, internal breakdown, or nonaccidental use.”¹⁴⁴ Those in the former category were thought to be compensable because of the

137. Cases in which plaintiffs alleged personal injury (i.e. the “threat” of personal injury) or property damage include *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993), and *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 57 (Va. 1988).

138. *Seely v. White Motor Co.*, 403 P.2d 145, 151-52 (Cal. 1965).

139. *Casa Clara*, 620 So. 2d at 1247.

140. *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871 (1986).

141. 403 P.2d 145, 151 (Cal. 1965).

142. *Id.* Justice Traynor stated, in relevant part:

The distinction . . . between tort recovery for physical injuries and warranty recovery for economic loss . . . rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create *unreasonable risks of harm*. He cannot be held for the level of performance of his products in the consumer’s business unless he agrees that the product was designed to meet the consumer’s demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Id. (emphasis supplied).

143. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 448-49 (Ill. 1982).

144. *Cloud v. Kit Mfg. Co.*, 563 P.2d 248, 251 (Alaska 1977); *Moorman*, 435 N.E.2d at 449; 2314 Lincoln Park W. Condominium Ass’n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 352-53 (Ill. 1990).

extreme threat to life and limb.¹⁴⁵ Those in the second category were not compensable in tort because such occurrences were properly covered by contract law in the form of warranties.¹⁴⁶

Compensating for such "sudden occurrences" which cause an immediate threat to personal injury seems logical in light of the concerns expressed by the Indiana Supreme Court in *Barnes v. MacBrown & Co.*:

If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?¹⁴⁷

But these concerns did not sway the United States Supreme Court in *East River S.S. Corp. v. Transamerica Delaval*.¹⁴⁸ The Court rejected recovery even when the defect occurred as a result of a sudden, calamitous event.¹⁴⁹ The court in *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*¹⁵⁰

145. See *Russell v. Ford Motor Co.*, 575 P.2d 1383, 1385-86 (Or. 1978). In *Russell*, the court felt that a distinction should be drawn between disappointed users and endangered users, with only the latter being able to recover in tort. *Id.*

See also *Moorman*, 435 N.E.2d at 448. In *Moorman*, the argument that economic losses should be compensable because it was only by happy accident that personal injury was prevented from occurring (i.e. catching the defective condition before causing personal injury) was rejected. *Id.* at 449-50. Putting persons at risk should be compensable only if an "extreme threat to life and limb" occurred. *Id.* at 449. Thus, to be compensable property damage there must be a "sudden . . . occurrence." *Id.* at 450. Economic losses are those which occur over time due to deterioration, internal breakdown, or nonaccidental cause. *Id.* These losses are what warranties were designed to cover. *Id.*

See also *2314 Lincoln Park W.*, 555 N.E.2d at 352. The existence of a duty is dependent upon the type of property damage suffered: (1) if it is damaged over time, then no liability attaches; (2) if it is sudden, then liability attaches. *Id.* at 352-53. Unlike injuries or property damage to others in which a duty arises independent of the contract (based on policy considerations, etc.), there is no duty under negligence or strict liability to prevent a product from injuring itself. *Id.* at 352. Such a concern relates to the quality, rather than to the safety of the structure and thus is a matter better resolved under contract law. *Id.* at 353. The unit owners received express warranties from the developer and so they had a potential source of recovery for their losses. *Id.* at 352.

146. *Moorman*, 435 N.E.2d at 453.

147. 342 N.E.2d 619, 621 (Ind. 1976).

148. 476 U.S. 858, 870 (1986).

149. *Id.*

150. 620 So. 2d 1244, 1248 (Fla. 1993). In *Casa Clara*, recovery of economic losses by a homeowner against a subcontractor was denied. *Id.* at 1248. The concrete supplied by the sub had a high salt content which caused the rebar to corrode in the building and forced the homeowners to replace it. *Id.* at 1245. Because no person was injured and no other property was damaged, the homeowners had no cause of action against the defendant in tort. *Id.* at 1248.

agreed. The possibility of injury was not enough to sustain a negligence action because not all four elements of the tort were present; damages was the missing element.¹⁵¹ Because no damages from personal injury had yet occurred, any compensation based on the threat of personal injury would be indeterminate and speculative.¹⁵²

The Indiana court's concern about the welfare of those threatened by the negligence of architects is well founded.¹⁵³ But, under modern tort principles, the only threats which are actionable are those constituting assault, the proof of which requires a showing of intent.¹⁵⁴ Thus far no cause of action exists for threats of physical harm produced by negligence without actual damages sustained.¹⁵⁵ Creating such an action would have grave consequences. Under such a cause of action, theoretically, every driver that passed another driver who was drunk would have a cause of action against that drunk driver because, through his negligence, the drunk driver had threatened the safety of the other drivers. The "drowning" metaphor alluded to by the United States Supreme Court in *East River*¹⁵⁶ is therefore worthy of consideration in this context. Thus, rather than claiming threat to personal safety, some plaintiffs elect to plead that their economic losses constitute property damage.¹⁵⁷

2. "Property Damage"

As previously stated, compensable property damage is that which, through negligent design, causes damage to other property besides the building itself.¹⁵⁸ Courts have struggled with the meaning behind phrases like "other property,"¹⁵⁹ and that property which does not "injure itself."¹⁶⁰ In *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*,¹⁶¹ the plaintiff argued that what it had actually purchased was not the building itself, but rather, the building materials with which to build the building.¹⁶² The building was

151. *Id.*

152. *Id.* at 1247; *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1198 (Del. 1992).

153. Other courts have expressed similar concern about the threat to personal safety. *See, e.g., supra* note 145 and accompanying text.

154. RESTATEMENT (SECOND) OF TORTS § 331 (1979).

155. *See, e.g., supra* notes 151-52 and accompanying text. *See also* *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (observing that "negligence in the air . . . will not do." (internal citations omitted)).

156. 476 U.S. 858, 866 (1986). *See supra* note 72 and accompanying text.

157. *See, e.g., Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993).

158. *See supra* notes 139-40 and accompanying text.

159. *Casa Clara*, 620 So. 2d at 1247.

160. *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 867, 871 (1986).

161. 620 So. 2d 1244, 1247 (Fla. 1993).

162. *Id.*

thus "other" property, compensable in tort.¹⁶³ The court rejected this argument.¹⁶⁴ The product purchased by the homeowners was not the materials for the building, but the building itself.¹⁶⁵ A similar case in Virginia, *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*,¹⁶⁶ involved damage to a house caused by water leaking from an indoor pool.¹⁶⁷ The pool was in a structure that was separate from the rest of the house.¹⁶⁸ The plaintiff's theory was that because the pool structure was outside the home's foundation, injury to property could be claimed.¹⁶⁹ The plaintiff sought to recover the cost of repairing damage done to the home caused by the pool as well as the cost of repairing the pool so that it would cause no further damage to the home.¹⁷⁰ The court held that the plaintiff contracted for a package, including a pool, and the loss the plaintiff suffered was with part of that package.¹⁷¹ Thus, only economic losses were suffered and no recovery could be had.¹⁷² Even if the pool was unattached and located on some other spot on the property, the result would not change.¹⁷³

Another contractor-plaintiff attempted to rely on how the court in its jurisdiction had defined property interests in the past and argued that such a definition should apply in the economic loss context.¹⁷⁴ Virginia law had characterized lost profits or loss of value as injuries to property interests for purposes of determining the applicable statute of limitations.¹⁷⁵ This definition was rejected when it was used by the plaintiff to describe his losses.¹⁷⁶ A restrictive view was therefore taken as to actions involving mere threats to personal safety as well as property damage. Most plaintiffs who suffer economic loss in jurisdictions which enforce the economic loss doctrine will thus not be able to plead their cases within the narrow exceptions to the rule.

163. *Id.*

164. *Id.*

165. *Id.*

166. 374 S.E.2d 55 (Va. 1988).

167. *Id.* at 56.

168. *Id.*

169. *Id.*

170. *Id.* at 57.

171. *Id.* at 58.

172. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 58 (Va. 1988).

173. *Id.*

174. *Blake Constr. Co. v. Alley*, 353 S.E.2d 724, 725-26 (Va. 1987).

175. *Id.* at 726 n.3.

176. *Id.* "[The] cases [interpreting the statute] are not controlling, however, as the determinations of the nature of the injuries were made in an entirely different context; the cases did not purport to interpret [the] Code" *Id.*

IV. THIRD PARTY ACTIONS FOR RECOVERY OF ECONOMIC LOSS

Application of the economic loss doctrine is the minority view where the professional liability of architects to contractors is concerned.¹⁷⁷ The doctrine offers few advantages when applied to the hypothetical scenario described in the Introduction.¹⁷⁸ In the words of one state court, “[t]he economic loss rule is stated with ease but applied with great difficulty.”¹⁷⁹ The propensity to allow actions by contractors against architects arises from several factors. First, the plans and specifications are to be used by a limited number of users who are well known as such by the architect.¹⁸⁰ These users, namely contractors, rely solely on the plans and specifications in carrying out their contract with the owner.¹⁸¹ Thus, because the class who could recover in tort is determinate, concerns about contract “drowning in a sea of tort” seem unfounded. Second, because the potential users are foreseeable to the architect, the relationship between the architect and contractor may sometimes be said to “approach

177. Quatman, *supra* note 6, at 561. “At least five jurisdictions recognize the economic loss doctrine as a defense to third party claims against design professionals.” *Id.* at 568. These include: Georgia, Illinois, New York, Ohio, and Virginia. *Id.* Aside from these states, however, “most jurisdictions do not distinguish between personal injury or property damage and the risk of economic loss.” *Id.* at 572. “The majority . . . [of jurisdictions] hol[d] that when the traditional elements of a negligence or negligent misrepresentation action are satisfied, the design professional may be held liable for economic losses.” *Id.* See generally Wagner, *supra* note 11 (discussing the majority rule).

178. Wise, *supra* note 61, at 4-5. Advantages of the doctrine include: (1) it offers a bright-line test to distinguish between the remedies available in contract and the remedies available in tort; (2) it respects the sanctity of contract to provide for such recovery; and (3) it maintains the adversarial relationship between architect and contractor. Steffey, *supra* note 102, at 695.

179. Sandarac Ass’n, Inc. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. Dist. Ct. App. 1992). The Illinois Supreme Court has denied recovery of economic losses in the construction industry by extending the economic loss doctrine of products liability cases. 2314 Lincoln Park W. Condominium Ass’n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990). However, even Illinois courts have struggled with this transition. See generally Friedlander, *supra* note 62; Steven G.M. Stein et al., *A Blueprint for the Duties and Liabilities of Design Professionals After Moorman*, 60 CHI.-KENT L. REV. 163 (1984) (discussing the conflict in lower Illinois courts after *Moorman*). Because this setting includes parties who are known by the architect at the time the architect begins work on the contract documents, courts have not applied the economic loss doctrine very readily as in other areas such as admiralty where the parties likely are not known to each other. Compare *Rosos Litho Supply Corp. v. Hansen*, 462 N.E.2d 566 (Ill. App. Ct. 1984) (allowing recovery in the construction context), with *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (denying recovery in the admiralty context), and *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (denying recovery in the admiralty context).

180. *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 400 (Fla. 1973).

181. *Id.* at 401-02.

privity."¹⁸² Third, modern authority is simply in favor of extending rather than restricting liability.¹⁸³

In the introductory hypothetical scenario, Archiwerks may, in fact, have been negligent in its preparation of plans and specifications relating to the stainless steel framing system it specified. For instance, if both the plans and specifications depicted "stainless steel or approved equal" without specifying the detailed tests or data that would be required of products falling into the "equal" category, Capital may not have known what information would be required of it if it specified "painless" on the shop drawings. Capital would have relied on the ambiguous specifications and suffered economic loss thereby. If the facts of the introductory hypothetical scenario were such, forcing Capital to sue Pharmatech for breach of contract, who in turn would join Archiwerks would be "an expensive, time consuming and wasteful process, and may be interrupted by insolvency, lack of jurisdiction, disclaimer, or the statute of limitations."¹⁸⁴ The economic loss doctrine in this context is therefore seen by most courts as inefficient and unnecessarily cumbersome, such that most would allow Capital to sue Archiwerks directly.

Liability, then, has been extended to architects to protect the commercial expectations of contractors. Theories based on contract as well as tort have been advanced in finding liability. Contract recovery is based on a third party beneficiary theory.¹⁸⁵ Theories of tort recovery are based on negligence or

182. *Ultramares Corp. v. Touche*, 174 N.E. 441, 446 (N.Y. 1931). This theory was further articulated by criteria set out in *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985): (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendant linking it to the party or parties and evincing the defendant's understanding of their reliance. *Id.* See also *supra* note 133 and accompanying text.

183. *A.R. Moyer*, 285 So. 2d at 399. "Privity is a theoretical device of the common law that recognizes limitations of liability commensurate with compensation for contractual acceptance of risk. The sharpness of its contours blurs when brought into contact with modern concepts of tort liability." *Id.* Modern authority is moving in the direction of measuring tort liability by the scope of the duty owed, rather than on artificial concepts of privity. 74 AM. JUR. 2D *Torts* § 52 (1974); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1385 (Del. Super. Ct. 1990).

184. Prosser, *supra* note 57, at 1124. *But see infra* notes 287-93 and accompanying text (discussing the value of this procedure on the entire construction industry even though somewhat cumbersome on individual plaintiffs).

185. *Guardian*, 583 A.2d at 1386. This theory allows a prime contractor to recover based on a claim that the contractor was the intended beneficiary of the contract between the architect and owner. *Id.* In *Guardian*, a third party beneficiary theory was held to be inapplicable. *Id.* at 1387. The court reiterated the majority rule that the only third parties who have legal rights under a third party beneficiary theory are donees and creditors of the promisee. *Id.* at 1386. As between architects and contractors, contractors are neither creditors nor are they the subject of an architect's generosity. *Id.* at 1387. "Using the plans during bid preparation is not tantamount to saying that the contract giving rise to those plans and specs was intended in any legal sense to benefit [the

negligent misrepresentation¹⁸⁶ and are due to negligent supervision, design errors or omissions, or negligent approval of shop drawings.¹⁸⁷

A. Contract: Third Party Beneficiary Theory

Contractors have often raised a theory of third party beneficiary upon which to recover economic losses from architects.¹⁸⁸ Under this theory, the party not in privity claims that it is the intended beneficiary of the contracting parties' contract.¹⁸⁹ Some courts have been receptive to this approach. For example, a New York court allowed an owner of a construction project, whose wholly-owned subsidiary entered into contracts with an architect and a contractor, to recover from them for economic loss despite the lack of privity.¹⁹⁰ The owner was able to show that it was merely the alter-ego of the subsidiary because the contract expressly stated that the contract was for its benefit.¹⁹¹ A federal court applying New York law also held that, where the contract expressly stated that the architect would indemnify the owner or the owner's representative with respect to any negligence caused by it, the owner's representative could recover in tort for economic losses.¹⁹² Liability is thus determined by the construction of the contract.¹⁹³

contractor].” *Id.*

186. *Id.* at 1381. These damages are prohibited under the economic loss doctrine. *Id.* at 1383. Again, this note is concerned with negligence actions only, not with intentional torts. For such an analysis, see Quatman, *supra* note 6, at 588-89.

187. Quatman, *supra* note 6, at 583-86. Negligence theory is based on: (1) defective design; (2) project delays; (3) negligent site selection; (4) negligent selection of materials; (5) ambiguous specifications; (6) failure to act. *Id.* Negligent misrepresentation theory is based on: (1) supplying false information on plans or specs; (2) failing to exercise reasonable care. *Id.*

188. *Id.* at 563-64. Under RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981), third party beneficiaries are allowed to sue in tort. See also *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. Ct. App. 1982). In *Johnson*, the plaintiff-contractor sued the architect for economic loss of delays and increased costs after allegedly failing to properly administer and process change orders for the construction project. *Id.* at 367. The contractor sued, inter alia, on a third party beneficiary theory. *Id.* at 368.

189. Quatman, *supra* note 6, at 561, 563.

190. *Key Int'l. Mfg. Inc. v. Morse/Diesel, Inc.*, 536 N.Y.S.2d 792, 795-96 (N.Y. App. Div. 1988).

191. *Id.*

192. *Strategem Dev. Corp. v. Heron Int'l. N.V.*, 153 F.R.D. 535, 548-49 (S.D.N.Y. 1994).

193. *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 402 (Fla. 1973). The court stated:

The question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.

Id. (following 17 AM. JUR. 2D *Contracts* § 304 (1964)).

However, where the contract is silent as to third party beneficiaries or expressly rejects such status, courts have almost universally denied recovery.¹⁹⁴ One court has expressed the opinion that an incidental benefit, conferred upon contractors by the existence of a contract between architect and owner, is not enough for third party beneficiary status to be conferred upon the contractor.¹⁹⁵ In order for such status to be conferred, the contract between architect and owner must have been made with the intent to confer an actual benefit on the contractor.¹⁹⁶ Therefore, where such intent is not expressly stated in the contract, most courts have not found third party beneficiary status.¹⁹⁷ Another court has limited those who could recover under a third party beneficiary theory without express language in the contract to situations involving creditors of a promisee or donees.¹⁹⁸ This same court, when applying this test to the traditional delivery system, held that contractors did not fit within either the creditor or donee exception.¹⁹⁹ Without express language in the contract between architect and owner, then, contractors could not recover on a theory of third party beneficiary. Although it is plainly foreseeable to an architect that a contractor will rely on the plans and specifications, the use by the contractor is not tantamount to saying that the contract giving rise to those documents was intended in any legal sense to benefit the contractor.²⁰⁰ The agency relationship between architect and owner is another factor disfavoring the theory that contractors are third party beneficiaries of the contract between architect and owner.²⁰¹ For all these reasons, contracts which do not expressly grant third party beneficiary status to the contractor are not likely to succeed.

In the hypothetical scenario described in the Introduction, the architect, Archiwerks, and owner, Pharmatech, entered into a standard form contract. As

194. *Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc.*, 521 N.Y.S.2d 165, 166 (N.Y. App. Div. 1987). In *Lake Placid Club*, condo owners could not sue the builder and architect for structural defects in units because no privity of contract existed. *Id.* Owners were not third party beneficiaries of the contract between the builder and architect and the developer because nothing in the contract suggested that the developer intended to give rights to the owners. *Id.* The developer's only motive was to obtain a sufficient construction product to sell to potential customers. *Id.* See also *Rieder Communities, Inc. v. Township of N. Brunswick*, 546 A.2d 563, 567 (N.J. Super. 1988); *Ward v. Ernst & Young*, 435 S.E.2d 628, 631 (Va. 1993); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1387 (Del. Super. Ct. 1990).

195. *Rieder Communities*, 546 A.2d at 567.

196. *Id.*

197. *Ward*, 435 S.E.2d at 630-36.

198. *Guardian*, 583 A.2d at 1387 (citing RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (1979)).

199. *Id.*

200. *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1387 (Del. Super. Ct. 1990).

201. *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 403 (Fla. 1973).

previously mentioned, this standard contract is the B141.²⁰² There is nothing in the B141 which would indicate that the contractor, in this case Capital Construction, was a third party beneficiary of the contract, such that a cause of action could be sustained.²⁰³ In fact, in the owner-contractor contract, this theory is specifically rejected.²⁰⁴ Regardless of which jurisdiction governs the introductory hypothetical scenario,²⁰⁵ Capital would most likely not be able to recover economic losses from Archiwerks under a third party beneficiary theory in the face of the B141 and the A201.²⁰⁶

Interestingly, there is nothing about the economic loss doctrine which would prohibit recovery of economic losses under a theory of third party beneficiary.²⁰⁷ Since such losses are contemplated by the contracting parties and the third party is the intended beneficiary of the contract, recovery could be had in the face of the doctrine.²⁰⁸ Thus, if a warranty is given to a third party, liability would attach for economic losses despite the lack of privity.²⁰⁹ In the absence of such express language, however, most contractors must rely on tort theory in order to recover economic losses from an architect.

B. Tort

Architects, like manufacturers of products, are strictly liable²¹⁰ for torts involving personal injury or property damage.²¹¹ However, they have not

202. See *supra* note 27 and accompanying text.

203. *Bib Constr. Co. v. City of Poughkeepsie*, 612 N.Y.S.2d 283, 284-85 (N.Y. App. Div. 1994).

204. A201, *supra* note 28, ¶ 1.1.2. The text of the contract reads: "The Contract Documents shall not be construed to create a contractual relationship of any kind . . . between the Architect and Contractor . . ." *Id.*

205. The situs of the construction project determines what law will apply in later disputes. *Id.* ¶ 13.1.1.

206. See *supra* notes 203-04 and accompanying text.

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

208. See *supra* notes 190-91 and accompanying text.

209. *Seely v. White Motor Co.*, 403 P.2d 145, 148 (Cal. 1965).

210. Strict liability is liability without intention or negligence on the part of the defendant. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 452 (Ill. 1982); *Seely*, 403 P.2d at 149-50. Strict liability in tort was designed to govern the distinct problem of physical injuries. *Id.* at 149. The "recognition that the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales caused this court to abandon the fiction of warranty in favor of strict liability . . ." *Id.* at 149-50 (citations omitted).

211. *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 313 (N.J. 1965). The "strict liability in tort formulation of the nature of the manufacturer's burden to expected consumers of his product represents a sound solution to an evergrowing problem . . ." *Id.* at 312. At the time *Santor* was decided, privity was not necessary to recover economic losses in the commercial context in other jurisdictions as well: *Randy Knitwear, Inc. v. American Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962); *Jarnot v. Ford Motor Co.*, 156 A.2d 568 (Pa. Super. Ct. 1959); *Continental Copper & Steel*

been held to strict liability where pure economic losses have been claimed.²¹² In these cases, courts have struggled with, and in most instances found,²¹³ a duty²¹⁴ on the part of the architect to protect the commercial expectations of third parties, such as contractors. The breach of this duty which causes harm to third parties has led to two theories of recovery—negligence and negligent misrepresentation.²¹⁵

1. Negligence Theory

The plaintiff suing a third party for recovery of economic losses has the burden of proof of establishing a duty which the third party breached and that

Indus., Inc. v. E.C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. Dist. Ct. App. 1958); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. 1962); *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. Ct. App. 1960). Increasingly, courts have found that architects under the traditional construction arrangement bear responsibility to act in situations where they are the only party in a position to prevent a loss. Justin Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?*, 28 EMORY L.J. 291 (1979) (discussing physical harm to construction workers caused by the negligence of architects).

212. *Seely*, 403 P.2d at 149. Torts involving personal injury are seen as products liability and are distinguishable from economic losses (strict liability versus negligence theory). A.R. Moyer, *Inc. v. Graham*, 285 So. 2d 397, 399 (Fla. 1973). Although most jurisdictions reject the economic loss doctrine for professionals, most also do not apply a strict liability approach with respect to economic losses. See, e.g., *Conforti & Eisele, Inc. v. John C. Morris Assocs.*, 418 A.2d 1290, 1292 (N.J. Super. Ct. Law Div. 1980).

Architectural services are not "products" under the UCC. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 990 (Wash. 1994). Therefore, the common law must be looked to in order to determine whether a contractor may recover economic loss in tort. *Id.* But see *Spivak v. Berks Ridge Corp.*, 586 A.2d 402, 405 (Pa. Super. Ct. 1990). In *Spivak*, homeowners sued the builder with whom the homeowner had no privity for the construction of a defective condominium. *Id.* at 404. The court found that the builder impliedly warranted that the house built by it was constructed in a reasonable workmanlike manner and was fit for habitation. *Id.* at 405. Such warranties arise by operation of law, independent of any contractual representations. *Id.* Similarly, third party plaintiffs have used the above rationale to justify tort action against an architect, in which an architect impliedly warrants that the plans and specifications are done in a non-negligent manner to all foreseeable users, including contractors. *Donelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1297 (Ariz. 1984).

213. *Bacco Constr. Co. v. American Colloid Co.*, 384 N.W.2d 427, 434 (Mich. Ct. App. 1986). In *Bacco*, a prime contractor was allowed to sue an engineer for economic loss when the engineer specified a sewer system which did not meet specifications represented in the contract documents after installed. *Id.* "[T]he clear trend . . . is to allow a negligence action without direct privity of contract." *Id.* at 433. See also *Wagner*, *supra* note 11, at 252.

214. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 326 (Ill. 1982). "The measure of liability in a tort action is based rather on the scope of duty owed to the plaintiff." *Id.* (internal citations omitted).

215. Intentional torts are not analyzed in this note. For such an analysis consult *Quatman*, *supra* note 6, at 588-89.

this breach proximately caused his or her damages.²¹⁶ Proximate cause helps stem unlimited liability for economic loss.²¹⁷ Although privity is not necessary to bring a tort action, some courts have held that proximate cause can only exist when the parties' relationship is so close as to "approach . . . privity."²¹⁸ Contributory or comparative negligence may also limit or bar recovery.²¹⁹

The imputation of duty, more than causation, is the facet of negligence with which courts have struggled.²²⁰ Those jurisdictions which do not require strict

216. See Wise, *supra* note 61, at 5.

217. *Id.*

218. *Ultramares Corp. v. Touche*, 174 N.E. 441, 446 (N.Y. 1931); *Ossining Union Free Sch. Dist. v. Anderson*, 539 N.E.2d 91, 95 (N.Y. 1989). In *Ossining*, the defendant-engineer had been retained by a school district's architect to evaluate the structural soundness of one of the school district's buildings. *Id.* at 92. The court found the "functional equivalent" of privity to exist where the engineers allegedly "undertook their work in the knowledge that it was for the school district alone . . . [and] rendered their reports with the objective of thereby shaping this plaintiff's conduct." *Id.* at 91, 95-96. The engineer had direct contact with the school district and sent a bill directly to the school district. *Id.* The concept of duty in tort has thus been construed narrowly by New York courts. See, e.g., *Security Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co.*, 597 N.E.2d 1080 (N.Y. App. Div. 1992); *Prudential-Bache Sec., Inc. v. Resnick Water St. Dev. Co.*, 555 N.Y.S.2d 367 (N.Y. App. Div. 1990); *Briar Contracting Corp. v. City of N.Y.*, 550 N.Y.S.2d 717 (N.Y. App. Div. 1989). The relationship between an architect and contractor may approach privity if there was direct communication, a client relationship, or other special circumstances linking them. *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 859 F.2d 242, 247 n.5 (2d Cir. 1988). Under certain circumstances, accountants may be held liable to third parties for economic loss. See *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985). See also *supra* note 182 and accompanying text.

219. Wise, *supra* note 61, at 5. See also *Lutz Eng'g Co. v. Industrial Louvers, Inc.*, 585 A.2d 631, 636-37 (R.I. 1991).

220. *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1352-53 (Fla. Dist. Ct. App. 1992). "Duty in negligence requires a relationship in which one person is determined to have a responsibility to protect some interest of another person." *Id.* at 1352. "The actor is liable for an invasion of an interest of another, if . . . the interest invaded is protected against unintentional invasion . . ." RESTATEMENT (SECOND) OF TORTS § 281 (1965). A defendant's duty may arise from a social relationship as well as from a contractual relationship. *Williams v. Jackson Co.*, 359 So. 2d 798, 801 (Ala. Civ. App. 1978). Although plaintiff may be barred from recovering from defendant as a third party beneficiary to defendant's contract with another, plaintiff may nevertheless recover in negligence for defendant's breach of duty where defendant negligently performs his contract with knowledge that others are relying on proper performance and the resulting harm is reasonably foreseeable. *Id.* See also *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026 (5th Cir. 1977) (holding that under Alabama law an electrical subcontractor on a construction project may proceed on a negligence theory in an action against an architect absent contractual privity between them); *Zeigler v. Blount Bros. Constr. Co.*, 364 So. 2d 1163 (Ala. 1978) (holding that recovery would be allowed absent privity if damages are foreseeable). The rationale behind the rejection of the privity requirement was stated by Prosser:

[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when

privity in order to recover losses have imputed a duty where the architect has actual knowledge that the third party will suffer economic losses if the architect is negligent.²²¹ The actual knowledge requirement, though, has since been abandoned.²²² Most courts now hold that if harm is reasonably foreseeable to a third party, a duty will be imputed to protect the commercial expectations of the third party as part of the architect's standard of care.²²³

he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 93 at 622 (4th ed. 1971). Applying this rationale to the construction context, some courts rely on the presence of six factors to determine whether or not to impose a duty:

(1) [t]he extent to which the transaction was intended to affect the plaintiff[;] (2) [t]he foreseeability of harm to him[;] (3) [t]he degree of certainty that the plaintiff suffered injury[;] (4) [t]he closeness of the connection between the defendant's conduct and the injury suffered[;] (5) [t]he moral blame attached to defendant's conduct[;] and (6) [t]he policy of preventing future harm.

Conforti & Eisele, Inc. v. John C. Morris Assocs., 418 A.2d 1290, 1292 (N.J. Super. Ct. Law Div. 1980) (internal citations omitted). See also generally *Howe v. Bishop*, 446 So. 2d 11 (Ala. 1984) (Torbert, C.J., concurring); *United Leasing Corp. v. Miller*, 263 S.E.2d 313 (N.C. Ct. App. 1980).

221. *Peyronnin Constr. Co. v. Weiss*, 208 N.E.2d 489, 494 (Ind. Ct. App. 1965).

222. *Wise*, *supra* note 61, at 5-6.

223. *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 400 (Fla. 1973) (holding that "the extent of [an architect's] duty may best be defined by reference to the foreseeability of injury consequent upon breach of that duty" (citing *Audlane Lbr. & Bldrs. Sup. v. D.E. Britt*, 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964))); *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1296 (Ariz. 1984) (holding that design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from negligent performance of their professional duties).

Another member of the design professional group, engineers, can be analyzed in a similar fashion. See *Aliberti, LaRochelle & Hodson Eng'g Corp. v. FDIC*, 844 F. Supp. 832 (D. Me. 1994). In *Aliberti*, a bank was allowed to sue a consulting engineer with whom it had no privity for negligence. *Id.* at 846. The engineer, who had a contract with a developer of a housing project, had made affirmative misrepresentations to the bank regarding the development's overall budget and feasibility. *Id.* at 845. The bank relied upon these misrepresentations in approving loans for the project. *Id.* at 846. The project was later abandoned by the developer and the bank suffered economic losses as a result. *Id.* at 838.

See also *Doran-Maine, Inc. v. American Eng'g & Testing, Inc.*, 608 F. Supp. 609 (D. Me. 1985). In *Doran-Maine*, a subcontractor was allowed to sue a supervising engineer, with whom it had no contract, for negligence. *Id.* at 615. Pursuant to its contract with the general contractor, the engineer negligently tested concrete pipe fabricated by the subcontractor and reported that the pipe did not meet the specifications, after which the contractor terminated its contract with the subcontractor. *Id.* The court agreed with the notion that, "[i]f an actor 'should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence.'" *Id.* at 615 (quoting RESTATEMENT (SECOND) OF TORTS § 435 cmt. b (1965)).

Foreseeability has been defined in several different ways by courts in deciding if a duty exists.²²⁴ Many courts have focused on the degree of control the architect has over the contractor's work.²²⁵ Other courts have

224. See *Donnelly*, 677 P.2d at 1295-96. In *Donnelly*, a contractor was allowed to recover economic losses from an architect with whom it had no privity on theories of negligence, negligent misrepresentation, and breach of implied warranty that the architect's plans and specifications were accurate. *Id.* at 1296-97. After being awarded the construction contract for a school renovation, the contractor noticed that the plans and specifications that the architect had prepared had substantial errors. *Id.* at 1293-94. These errors resulted in increased costs of construction to the contractor. *Id.* at 1294. The court reasoned that for duty in a negligence action to lie both the plaintiff and the risk must be foreseeable to a reasonable person, and that a broad view would be taken of the class of risks and victims that are foreseeable. *Id.* at 1295. See also generally *McFarlin v. Hall*, 619 P.2d 729 (Ariz. 1980). "Design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services," not only to those with whom the design professional is in privity, but also to those whom it is not. *Donnelly*, 677 P.2d at 1295. Also, with respect to the implied warranty claim, design professionals, in the absence of an express guarantee, do not warrant that their work is accurate, but they do warrant that they have exercised their skills with care and diligence and in a reasonable, non-negligent manner. *Id.* at 1297. Thus, a claim for breach of implied warranty does not, in this context, require privity. *Id.*

See also *Owen v. Dodd*, 431 F. Supp. 1239 (N.D. Miss. 1977). In *Owen*, a contractor was allowed to sue an architect with whom it had no privity for economic loss in the form of increased construction costs. *Id.* at 1242. The problems stemmed from an accumulation of water on the site which was alleged to have been caused by the architect's negligent preparation of a drainage plan for the construction site. *Id.* at 1240. The court held that an architect's duty to use reasonable care in the preparation of plans and specifications extended to the contractor who relied on those documents and as a proximate result was injured economically. *Id.* at 1242. See generally *Daniel Witherspoon, When is an Architect Liable?*, 32 MISS. L.J. 40 (1960).

See also *Mid-Western Elec., Inc. v. DeWild Grant Reckert & Assocs.*, 500 N.W.2d 250 (S.D. 1993). In *Mid-Western*, an electrical subcontractor was allowed to sue an engineer with whom it had no privity for recovery of economic losses allegedly sustained as a result of negligent approval of equipment. *Id.* at 254. A series of Ultraviolet light (UV) detectors were to be installed for a governmental entity. *Id.* at 252. The equipment was approved by the engineer and installed, but later rejected by the owner. *Id.* The subcontractor had to replace the equipment himself and later sued the engineer for its losses. *Id.* The court held that claims of professional negligence in which damages to a foreseeable third party are suffered will determine whether a duty in tort exists to protect that third party. *Id.* at 254. The court reasoned that to hold otherwise would be "condoning a professional's right to do his or her job negligently with impunity as far as innocent parties who suffer economic loss." *Id.*

225. *Moyer*, 285 So. 2d at 401. In *Moyer*, a prime contractor was allowed to recover from an architect for negligently stopping the work and preparing plans and specs. *Id.* The court made much of the fact that the architect had direct control over the contractor. *Id.* Other factors were also balanced: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; and (5) the policy of preventing future harm. *Id.* (quoting *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958)).

Similarly, in *United States ex rel. Los Angeles Testing Lab. v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958) (en banc), under the prime-owner agreement, the architect had the authority of general supervision as well as the authority to stop the work. *Id.* at 134-35. A claim based on negligent supervision/approval of defective work by the architect was allowed. *Id.* at 136. The

court held that the architect had altogether

too much control over the contractor . . . for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.

Id. But see B141, *supra* note 27, ¶ 2.6.6. Under the B141, the architect no longer has direct control over the work. *Id.* That power is reserved to the owner. The architect can, however, reject the work. *Id.* ¶ 2.6.11.

The extent of an architect's duty to a contractor on the jobsite has been a particularly fertile area for litigation. See, e.g., *Berkel & Co. Contractors v. Providence Hosp.*, 454 So. 2d 496 (Ala. 1984). In *Berkel*, a contractor was allowed to sue an architect for economic losses associated with the architect's allegedly negligent direction of the installation of concrete piles. *Id.* at 503.

See also *Magnolia Constr. Co. v. Mississippi Gulf South Eng'rs, Inc.*, 518 So. 2d 1194 (Miss. 1988). In *Magnolia*, a contractor was able to sue an engineer without privity for economic losses based on a theory of negligence. *Id.* at 1201, 1204. The contractor had been denied final payment by the engineer because it was determined that some sewer sections installed by the contractor were at the wrong depth. *Id.* at 1197. However true that may have been, the engineer had a representative present on the jobsite at all times that had certified payment to the contractor up to that point, giving the impression that the work was being done properly. *Id.* The court held that the contractor could reasonably rely on the representatives to provide any guidance with respect to the progress of the work. *Id.* at 1202.

See also *Shoffner Indus. v. W.B. Lloyd Constr. Co.*, 257 S.E.2d 50 (N.C. Ct. App. 1979). In *Shoffner*, a contractor was able to sue an architect in tort for recovery of economic losses allegedly caused by the architect's negligent approval of defective materials. *Id.* at 56. The architect approved trusses for a structure on which the contractor was working; the contractor installed them, and they were later discovered to be defective. *Id.* at 52. This discovery caused the contractor to incur additional labor cost and materials to rectify the situation. *Id.* The court reasoned that "the incidental fact of the existence of the contract between the architect and the property owner should not negative the responsibility of the architect when he enters upon a course of affirmative conduct which may be expected to affect the interest of third parties." *Id.* at 59.

See also *Forte Bros. v. National Amusements, Inc.*, 525 A.2d 1301 (R.I. 1987). In *Forte*, a third party contractor was allowed to sue for negligence against an architect/site engineer notwithstanding a lack of privity. *Id.* at 1303. The court held that the architect owed the contractor a duty to render his site inspection services professionally. *Id.*

See also *Detweiler Bros. v. John Graham & Co.*, 412 F. Supp. 416 (E.D. Wash. 1976). In *Detweiler*, a federal court applying Washington law allowed a subcontractor to sue an architectural firm in tort for economic losses the subcontractor suffered through alleged misrepresentations by the architect. *Id.* at 418. The architect had approved the subcontractor's submittal for a certain type of grooved piping and later ordered the subcontractor to stop the work and replace the grooved pipe with welded pipe. *Id.* The court held that privity of contract was not a condition precedent to the maintenance of a tort suit by a contractor against an architect. *Id.* at 420. The court found justification for its holding in the "emerging majority of jurisdictions [which] have taken the position that a contractor can maintain a negligence action against an architect without direct privity of contract between the parties." *Id.* at 419.

See generally, Jeffrey L. Nischwitz, Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 OHIO ST. L.J. 217 (1984) (concluding that architects should be liable for negligent preparation of plans and specs because the architect is in the best position to effectuate duties with respect to design, but not supervision of construction methods because an architect's emphasis is on design, not construction).

focused on what the “reasonable architect”²²⁶ would deem foreseeable.²²⁷ This focus includes what the architect knew or should have known. In the latter case, such a standard would allow a court to find a duty not only to contractors, but to other parties who have a specific pecuniary interest in the project as well.²²⁸

Capital, the contractor in the introductory hypothetical scenario, may be able to assert a claim for negligence against the architect, Archiwerks. Capital could argue that the assurances given by the manufacturers of “painless” as well as its own protests made the actions of Archiwerks unjustified. These unjustified actions were proved as such when further testing confirmed exactly

226. An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. 5 AM. JUR. 2D, *Architects* § 10, 632-33 (1995).

227. *Cooper v. Jevne*, 128 Cal. Rptr. 724 (Cal. Ct. App. 1976). In *Cooper*, a cause of action by purchasers of a house was allowed against an architect with whom no privity existed. *Id.* at 729. “[T]he architects were under a duty to exercise ordinary care as architects to avoid reasonably foreseeable injury to purchasers and that the architects knew or should have foreseen with reasonable certainty that [the] purchasers would suffer the specific monetary damages alleged if they failed to perform this professional duty.” *Id.* at 727-28. Thus, a cause of action for negligence was allowed. *Accord Mid-Western Elec.*, 500 N.W.2d at 253 (noting that “[t]oday the majority of jurisdictions that have examined this question allow a cause of action against an architect or engineer for economic damage if a party was foreseeably harmed by the professional’s negligence”).

See also *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs.*, 386 N.W.2d 375 (Minn. Ct. App. 1986). In *Waldor*, a subcontractor was allowed to sue an engineer with whom it had no privity for negligence in drafting and interpreting specifications. *Id.* at 377. The engineer, pursuant to a contract with the city for the updating of a wastewater treatment plant, prepared plans and specifications and supervised the construction of the project. *Id.* at 376. The engineer rejected a pump supplied by the subcontractor which conformed in all material aspects to the specifications. *Id.* The subcontractor was forced to provide a more expensive pump and suffered economic loss as a result. *Id.* The court reasoned:

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 indeterminate 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 has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Id. at 377 (citation omitted). The court concluded that it was foreseeable to the engineer that subcontractors were bound to follow the specifications and that the engineer’s negligence in drafting or interpreting them would cause harm to the subcontractor. *Id.* *Accord Associated Architects & Eng’rs v. Lubbock Glass & Mfg. Co.*, 422 S.W.2d 942, 944-45 (Tex. Civ. App. 1967) (allowing an action by a subcontractor against an architect for negligence in the preparation of plans and specifications and negligence in rejecting skylights furnished according to the architect’s defective plans and specifications).

228. *Cooper v. Jevne*, 128 Cal. Rptr. 724 (Cal. Ct. App. 1976); *National Sand, Inc. v. Nagel Constr., Inc.*, 451 N.W.2d 618, 620 (Mich. Ct. App. 1990) (allowing a subcontractor to maintain an action in tort against an engineer with whom the subcontractor had no privity).

what the manufacturer and Capital had maintained from the beginning, that "painless" had the same characteristics as stainless steel. Archiwerks had a duty to protect against Capital's economic losses which it breached when it negligently delayed accepting the shop drawings depicting "painless." As a proximate result of this negligent delay, Capital suffered damages in the form of lost profits. A negligence action, when viewed in light of the plans and specifications, may also give Capital a cause of action for negligent misrepresentation.

2. Negligent Misrepresentation Theory

A cause of action based on negligent misrepresentation is similar to one based on straight negligence, and they are often asserted together under the same facts.²²⁹ The former theory is distinguishable from the latter because it focuses on the information provided by the maker, rather than solely the duty of care owed by the maker.²³⁰ Although the same breach of the professional standard of care gives rise to both claims, the negligent misrepresentation is equivalent to a breach of warranty because of the special relationship between those who rely on the information negligently supplied and those who supplied the information to the recipient to conduct their business.²³¹ Thus, the

229. *Ossining Union Free Sch. Dist. v. Anderson*, 539 N.E.2d 91 (N.Y. 1989). In *Ossining*, a cause of action for negligent misrepresentation which produced only economic injury was allowed where the underlying relationship between the parties was so close as to be the functional equivalent of privity. *Id.* at 91. The relationship had approached privity because: (1) the defendant was aware that one of the purposes of its design plans was to assist the construction companies in their preparation of bids for the project; (2) the defendant knew that the subcontractor was part of a definable class which would rely on the plans; (3) there was conduct between the defendant and the subcontractor evincing and the defendant's understanding that the subcontractor had, in fact, relied on the plans in preparing the bid. *Id.* at 95.

Accord *Reliance Ins. Co. v. Morris Assocs., P.C.*, 607 N.Y.S.2d 106 (N.Y. App. Div. 1994). In *Reliance*, the subrogee of a subcontractor was allowed to sue an engineer, who negligently prepared sewer plans, for economic losses. *Id.* at 107. The subcontractor relied on these plans in preparing a bid, and as a result, the cost to complete the project was higher than what the subcontractor was paid (i.e. the bid price). *Id.*

230. *Glanzer v. Shepard*, 135 N.E. 275, 275-76 (N.Y. 1922). See also *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365, 370 (Tex. App. 1982). See *supra* notes 220-28 and accompanying text.

231. *Ultramares Corp. v. Touche*, 174 N.E. 441, 446 (N.Y. 1931). See also *Spivak v. Berks Ridge Corp.*, 586 A.2d 402 (Pa. Super. Ct. 1990). In *Spivak*, homeowners sued the builder (with whom it had no privity) for the construction of a defective condominium. *Id.* at 404. The court found that the builder impliedly warranted that the house built by it was constructed in a reasonable workmanlike manner and was fit for habitation. *Id.* at 405. "Such warranties arise by operation of law, independent of any contractual representations." *Id.* Similarly, third party plaintiffs have used the above rationale to justify tort action against an architect, in which an architect impliedly warrants that the plans and specifications are done in a professional manner to all foreseeable users, including contractors. *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1297 (Ariz. 1984).

foreseeability requirement is taken a step further—the faulty information given on the plans and specifications must be intended by its negligent supplier to be specifically relied upon by a particular party or a settled class of parties before economic damages are recoverable, and this class must reasonably rely on the information negligently supplied.²³²

Like simple negligence, negligent misrepresentation has the requirement of foreseeability, but adds the additional requirement that the contractor reasonably rely on the information.²³³ The defenses of comparative and contributory negligence also still apply.²³⁴ The issues of foreseeability and reasonable reliance are demonstrated in two opinions from New York which were both written by Justice (then Judge) Benjamin Cardozo. In the first, *Ultramares Corp. v. Touche*,²³⁵ an accounting firm was sued for economic losses sustained by a creditor of one of the accounting firm's clients.²³⁶ This client, a business, had procured the services of the firm to prepare a financial statement of the business.²³⁷ After receiving the report, which had negligently overstated the business' financial situation, the business used the report to secure a loan from a lender.²³⁸ The lender relied on the information in the report in making the loan.²³⁹ After the business failed and the misstatement was revealed, the lender/creditor sought to recover its losses from the accounting firm.²⁴⁰ The court held that the creditor did not have a cause of action.²⁴¹ The court reasoned that it was foreseeable to the accounting firm that the information would be relied upon by the client, but not by third parties which had not been disclosed to the accounting firm at the time it made its report.²⁴² The report had been prepared specifically for the client.²⁴³ To expose accountants to liability to an indeterminate class of users who may happen to use the information was too remote to be actionable.²⁴⁴

232. *Glanzer v. Shepard*, 135 N.E. 275, 277 (N.Y. 1922).

233. *Wise*, *supra* note 61, at 5. A contractor's reliance on specifications must be reasonable. *APAC-Carolina, Inc. v. Greensboro-HighPoint Airport Auth.*, 431 S.E.2d 508, 517 (N.C. Ct. App. 1993). *Accord Lutz Eng'g v. Industrial Louvers, Inc.*, 585 A.2d 631, 636-37 (R.I. 1991). *See also supra* note 6 and accompanying text.

234. *Wise*, *supra* note 61, at 5.

235. 174 N.E. 441 (N.Y. 1931).

236. *Id.* at 442.

237. *Id.*

238. *Id.* at 443.

239. *Id.*

240. *Id.*

241. *Ultramares v. Touche*, 174 N.E. 441, 448 (N.Y. 1931).

242. *Id.*

243. *Id.*

244. *Id.*

The second case, *Glanzer v. Shepard*,²⁴⁵ was decided earlier than *Ultramares*. There, the court held that a weigher of beans, who had negligently misstated the weight of the beans to the buyer, was liable for economic losses to the buyer even without privity.²⁴⁶ Unlike in *Ultramares*, here the two requirements for negligent misrepresentation had been met.²⁴⁷ First, the weigher had intended the buyer to rely on the information given, and the information was reasonably relied upon by the buyer.²⁴⁸ Second, it was foreseeable that the buyer would suffer loss if the information was false.²⁴⁹ Judge Cardozo's opinion in *Glanzer* is echoed by Section 552 of the Restatement (Second) of Torts,²⁵⁰ which is in line with modern legal authority on the

245. 135 N.E. 275 (N.Y. 1922).

246. *Id.* at 277.

247. *Id.*

248. *Id.* at 275-76.

249. *Id.* at 277.

250. RESTATEMENT (SECOND) OF TORTS § 552 (1979): Information Negligently Supplied for the Guidance of Others.

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) [T]he liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Comment (a) to § 552 provides:

[I]t does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. A user of commercial information cannot reasonably expect its maker to have undertaken to satisfy this obligation unless the terms of the obligation were known to him. Rather, one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.

Id. This model has been widely endorsed by state courts. See *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1385-86 (Del. Super. Ct. 1990). Section 552 would abolish the privity requirement in certain cases of negligent misrepresentation. *Id.* In those cases where the privity requirement would be abolished, "the use of the information negligently supplied was not an indirect or collateral consequence [of the transaction] . . . it was the end and aim of the transaction." *Id.* at 1386.

As a countervailing view to Section 552, economic damages resulting from a party who negligently makes the performance of a contract more expensive to perform are not recoverable absent physical harm. RESTATEMENT (SECOND) OF TORTS § 766C (1979). *But see* comment e

subject of negligent misrepresentation.²⁵¹

Under the Restatement, negligently prepared plans or ambiguous specifications give contractors a cause of action against architects for economic loss.²⁵² First, the recipient of the information, although unknown to the

(stating that Section 766C may not apply if Section 552 applies).

251. *Guardian*, 583 A.2d at 1386.

252. For an example of a claim of defective specifications, see *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985). In *Bryant*, a general contractor sued the project architect (with whom it had no privity) for economic loss of delay and additional expense related to errors in the plans and specifications as well as the failure of the architect to detect the errors before the defective design was built. *Id.* at 1192-93. The court held that the lack of privity prevented the contractor from recovering. *Id.* at 1195.

Cf. *Carroll-Boone Water Dist. v. M. & P. Equip. Co.*, 661 S.W.2d 345 (Ark. 1983). In *Carroll-Boone*, a subcontractor was allowed to sue an engineer with whom it had no privity. *Id.* at 354. In order for a water intake structure designed by the engineer to become operational, a rock mass needed to be removed. *Id.* at 347-48. The specifications for the structure required blasting to remove the rock. *Id.* at 348. The intake structure had not been designed to withstand such blasts, and was damaged by the blasting. *Id.* As a result, the subcontractor incurred liability to the owner for repair and was thus able to sue the engineer for negligence. *Id.* at 354.

See also *Wolther v. Schaarschmidt*, 738 P.2d 25 (Colo. Ct. App. 1986). In *Wolther*, a homeowner was allowed to sue an engineer with whom it had no privity based upon a theory of negligent misrepresentation. *Id.* at 28. The homeowner's lender had entered into a contract with the engineer to prepare a report about the structural fitness of the house that the homeowner intended to purchase. *Id.* at 26-27. The engineer approved the structural fitness of the home and the homeowner was given a loan to purchase the home by the lender. *Id.* at 27. Later, it was discovered that some floor joists were termite-infested and had to be replaced. *Id.* The court held that it was foreseeable to the engineer that the homeowner would rely on the engineer's report to the lender as confirmation that the house was structurally sound. *Id.* at 28.

For a theory of liability based on defective plans, see *Gurtler, Hebert & Co. v. Weyland Mach. Shop*, 405 So. 2d 660 (La. Ct. App. 1981). In *Gurtler*, a subcontractor was allowed to recover from an architect in tort. *Id.* at 662. The subcontractor had alleged that plans and specifications supplied by the architect failed "to provide a satisfactory and complete set of . . . drawings from which shop drawings could be made resulting in multiple revisions, and eventually, the creation of a new set of shop drawings . . ." *Id.* at 661. The delay caused by the negligently prepared plans and specifications led to liability for damages on the part of the subcontractor to the general. *Id.* at 662.

See also *Milton J. Womack, Inc. v. House of Representatives*, 509 So. 2d 62 (La. Ct. App. 1987). In *Womack*, a contractor was allowed to recover economic loss damages from an architect with whom it had no privity based on a theory of negligence. *Id.* at 67. The plans and specifications prepared by the architect failed to depict wind-bracing within the existing State Capitol building, resulting in a delay while the architect prepared revised plans. *Id.* at 63-64. The delay resulted in the lost opportunity of the contractor to receive a bonus from the State for finishing the job early. *Id.* at 63. The court held that the architect had not exercised "the degree of skill ordinarily employed, under similar circumstances, by members of [its] profession . . . and to use reasonable care and diligence, along with [its] best judgment, in the application of [its] skill." *Id.* at 64. The court reasoned that a check of the drawings for the original building would have revealed the wind-bracing to the architect. *Id.*

Engineers have also been subject to liability under this cause of action based upon reports that they prepare. See *Davidson & Jones, Inc. v. County of New Hanover*, 255 S.E.2d 580 (N.C. Ct.

architect at the time the plans were prepared, is well known to the architect as a class of persons who will rely on the information provided.²⁵³ Second, in order for the building to be built, the plans must be followed. The architect knows or should know that reliance by the contractor on false information may result in losses to the contractor.²⁵⁴ But the defenses of comparative and contributory negligence still apply.²⁵⁵ On this point the issue of whether the contractor's reliance was reasonable becomes important.²⁵⁶ But reliance on the specifications is sometimes warranted if a discrepancy exists between information on the plans and information in the specifications.²⁵⁷

In the introductory hypothetical scenario, the contractor, Capital, may be able to assert a claim for negligent misrepresentation against the architect, Archiwerks, if the construction documents were ambiguous as to what tests or data would be required for "equals."²⁵⁸ An argument can be made that contractors in general, as well as Capital in particular, would need such information before they would decide to use an equal not specified explicitly by the architect.²⁵⁹ It was foreseeable to Archiwerks that ambiguous specifications might cause delays to Capital in this regard. This argument, even in jurisdictions which have adopted the economic loss doctrine, has been persuasive. However, even in those jurisdictions, courts have struggled over the

App. 1979). In *Davidson*, a general contractor who submitted bids and engaged in construction in reliance on a soil report was allowed to sue the engineers who prepared the report for damages caused by negligence in the report's preparation. *Id.* at 585-86.

See also *Stanford v. Owens*, 265 S.E.2d 617 (N.C. Ct. App. 1980). In *Stanford*, a buyer of property was allowed to sue an engineering firm who had prepared a report of the property for the seller. *Id.* at 624-25. The report detailed the subsurface condition of the property and concluded that the property could support the building that the buyer was proposing to build. *Id.* at 624. Soon after the purchase of the property and construction of the building, the buyer discovered cracks in the building which rendered it useless. *Id.* The court relied on *Davidson* to hold the engineer liable for the buyer's loss. *Id.* at 625.

253. *Ossining Union Free Sch. Dist. v. Anderson*, 539 N.E.2d 91, 95 (N.Y. 1989); U.S. *ex rel. Los Angeles Testing Lab. v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958). In *Rogers*, an architect negligently interpreted and construed reports, resulting in the prime contractor being able to assert a claim of negligent misrepresentation against the architect. *Id.* The court reasoned that it was reasonably foreseeable to the architect that reliance on the reports by the contractor would lead to economic losses if those reports were negligently prepared. *Id.* See also *Rieder Communities, Inc. v. Township of North Brunswick*, 546 A.2d 563 (N.J. Super. Ct. App. Div. 1988).

254. See *supra* notes 224-27 and accompanying text.

255. See *supra* note 219 and accompanying text.

256. See *supra* notes 232-33 and accompanying text.

257. *Unicon Management Corp. v. United States*, 375 F.2d 804 (Ct. Cl. 1967). *SWEET*, *supra* note 23, at 434.

258. See, e.g., *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs.*, 386 N.W.2d 375, 377 (Minn. Ct. App. 1986). Cf. *Lutz Eng'g v. Industrial Louvers, Inc.*, 585 A.2d 631, 635-36 (R.I. 1991) (denying recovery based on a theory of ambiguous specifications).

259. See *Waldor*, 386 N.W.2d at 377.

issue of whether negligent misrepresentation is actionable.²⁶⁰

C. Rationale Behind the Rejection of the Economic Loss Doctrine

Most jurisdictions recognize some form of the economic loss doctrine.²⁶¹ Most do not, however, extend the economic loss doctrine to the construction context.²⁶² A reason for this difference is that the duty analysis in the construction context, with respect to both tort and contract, is more focused than that in other commercial contexts.²⁶³ When professionals are rendering a service, the duty of care required is higher than that of manufacturers supplying a product.²⁶⁴ For example, Delaware and Indiana have recognized the economic loss doctrine in the context of commercial transactions, but say that the analysis is different when professionals, such as architects, are involved.²⁶⁵

260. See *supra* notes 109-15 and accompanying text. Illinois courts, though, have been uniform in disallowing claims for innocent misrepresentation. See *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982); RESTATEMENT (SECOND) OF TORTS § 552C cmts. b, f (1977) (relating to innocent misrepresentation: "Since the defendant's misrepresentation is an innocent one, he is not held liable for other damages; specifically, he is not held liable for benefit of the bargain or for consequential damages."). Negligent misrepresentation, however, was a specific exception to the *Moorman* rule. See *Moorman*, 435 N.E.2d at 452. See also 2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 351-53 (Ill. 1990); *Fence Rail Dev. Corp. v. Nelson & Assocs.*, 528 N.E.2d 344, 348 (Ill. App. Ct. 1988).

261. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1032 (5th Cir. 1985).

262. Quatman, *supra* note 6, at 561.

263. *Id.*

264. See *supra* notes 220-28 and accompanying text. See also SWEET, *supra* note 23, at 310-14.

265. See *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1201 n.5 (Del. 1992). In *Danforth*, the plaintiff, the owner of a house, had obtained plans for the house from the defendant. *Id.* at 1194-95. He then purchased from the defendant a "building package" for the home depicted in the plans and employed a local contractor to build the house for him. *Id.* at 1195. The kit had a two-year limited warranty. *Id.* Eight years later, the Plaintiff noticed rotting wood around the windows which was later determined to have been caused by condensation in the walls produced because of inadequate ventilation. *Id.* The plaintiff then sued the defendant for \$100,000 in corrective work, but was denied recovery despite privity. *Id.* at 1201. The court reasoned that the warranty had expired and that no recovery would lie in tort. *Id.* at 1200-01. This decision, though, was "not intended to address, and [did not] extend to, the question [of] whether the economic loss doctrine bars recovery of economic loss caused by professional malpractice in tort." *Id.* at 1201 n.5. The court felt that tort concepts should be applied in such a case to determine if an architect would be liable for the economic losses of the contractor: "[C]ontract notions of privity are irrelevant to the question whether a commercial seller owes a duty to foreseeable users of its products, under tort law, to protect against the risk that its product, if defective, might damage only itself." *Id.* at 1200. The court added: "Rather than obscure fundamental tort concepts with contract notions of privity, we believe that it is analytically more useful to focus on the precise duty of care that the law of negligence, not the law of contract or an agreement of the parties, has imposed on the defendant." *Id.* (quoting *Clark v. International Harvester Co.*, 581 P.2d 784, 794 (Idaho 1978)). See also *supra* note 183 and accompanying text.

These professionals, in their view, should be held to a higher standard.²⁶⁶

While professionals are held to a higher standard of care than others in the commercial context, professionals other than architects generally have no duty to protect the commercial expectations of third parties.²⁶⁷ This general rule controls when the professional and the third party are adversaries. However, this general rule has not been applied to the construction context even though architects and contractors are adversaries in the traditional delivery system. Rectifying this anomaly in the law of economic loss with respect to professionals is the motivation behind this Note's proposal.

V. PROPOSED TREATMENT OF ECONOMIC LOSS IN THE CONSTRUCTION CONTEXT

This Note advocates a per se rule against architect liability for the economic loss of the contractor in the traditional delivery system. Even if courts do not accept the view that contract law is better suited than tort law to deal with economic loss,²⁶⁸ those courts can engage in a tort analysis²⁶⁹ with the same result. This proposal concludes that a duty on the part of the architect to the contractor should not be found in the traditional delivery system. Courts that have engaged in tort analysis²⁷⁰ thus far have viewed the concept of duty in light of the particular facts and circumstances of each case, such as the amount

Cf. *Peyronnin Constr. Co. v. Weiss*, 208 N.E.2d 489, 495 (Ind. Ct. App. 1965) (holding that a prime contractor could not sue an engineer because there existed no privity of contract, no consideration, and no relationship existed to create a duty). *But cf. Essex v. Ryan*, 446 N.E.2d 368, 372 (Ind. Ct. App. 1983) (holding that actual knowledge of the contractor's reliance on the plans could result in a duty on the part of the engineer).

266. See *Cooper v. Jevne*, 128 Cal. Rptr. 724, 729 (Cal. Ct. App. 1976). In *Cooper*, the court extended liability for economic loss despite the lack of privity. *Id.* This case was unlike *Seely* because here the court was concerned with "the malpractice liability of a professional for negligence in the rendition of his services and not that of a manufacturer for defects in his product." *Id.* at 728. Thus an architect's duties to third parties is similar to that to beneficiaries of a will in the case of attorney malpractice. *Id.*

This position is directly opposed to *2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 353 (Ill. 1990). There, the plaintiff's argument that the application of the *Moorman* rule to its case would upset settled principles of malpractice liability in other professions was found to be untenable because the relationship between architects and other professionals was inapposite: (1) where health care professionals are concerned and personal injury is usually alleged, such that *Moorman* is inapplicable; and (2) where attorneys are concerned, an historical, noncontractual duty is imputed to the attorney to the client and the beneficiaries of the client (that which concerns the nature of the undertaking, e.g. a fiduciary relationship). *Id.*

267. See *infra* notes 281, 283 and accompanying text.

268. See *supra* notes 99-125 and accompanying text.

269. See *supra* notes 210-60 and accompanying text.

270. See *supra* notes 126-34 and accompanying text (discussing "duty in tort" as a means by which to determine whether or not to apply the economic loss doctrine).

of control the architect had over the contractor's work,²⁷¹ and whether the economic injury to the contractor was foreseeable to the architect.²⁷² This Note proposes a different analysis of the concept of duty—one which looks at the relationships among the parties and considers the ramifications of third party recovery on the entire construction industry. Courts have already engaged in a similar analysis with respect to other professions.²⁷³ Therefore, this Note simply urges courts to adopt similar judicial reasoning with respect to architects involved in the traditional delivery system.

As a test to determine whether to apply the economic loss doctrine in the construction context and thereby bar recovery of economic loss of third parties, courts should ask the following question:

Assuming there is no contractual privity between the design professional and the third party suffering harm, is the relationship between these two parties, as determined by the owner, an amiable one or an adversarial one?

If the answer to this question is "amiable," then the economic loss doctrine may *not* be applied as a per se rule to bar recovery and the court may proceed to engage in an established method²⁷⁴ of determining the presence or absence of a duty in tort. If the answer is "adversarial," the court should apply the economic loss doctrine as a per se rule to bar recovery. With respect to the traditional delivery system, the answer to this question will invariably be "adversarial," in which case duty in tort should not be found. However, the answer with respect to modern variations such as construction management²⁷⁵ or design/build²⁷⁶ may be "amiable," in which case the court may proceed to engage in a duty analysis.

271. See *supra* note 130 and accompanying text.

272. See *supra* note 133 and accompanying text.

273. See *infra* notes 278-82 and accompanying text.

274. This duty analysis may be performed by the court preliminarily, as on motion for summary judgment. See *supra* notes 126-34 and accompanying text. The court may also deny summary judgment and reserve the duty analysis for trial. See *supra* notes 177-266 and accompanying text (discussing generally third-party actions which have proceeded to trial). Both of these situations can be contrasted to the procedure when viewing a traditional delivery system. When this system is present, this note advocates a per se rule against duty in tort. Thus, adoption of this per se rule would allow architects to be relieved of liability on a motion to dismiss.

275. See *supra* note 133 and accompanying text (discussing recovery by a construction manager against an architect in *Strategem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535 (S.D.N.Y. 1994)). See also *supra* note 40 and accompanying text.

276. See *supra* notes 42-49 and accompanying text.

The test advocated by this Note is grounded in concerns expressed by courts faced with third party actions against other professionals such as accountants and attorneys.²⁷⁷ The reasoning for such a test is simple. A client who specifically designs relations between a professional and a third party to be adversarial has those relations frustrated when the professional is forced to consider the commercial expectations of the adversarial third party. First, an analysis of relations among parties in other professions such as accounting and law will illustrate the viability of this reasoning. Second, the application of this reasoning to the construction context will demonstrate the adverse ramifications of third party actions on the traditional delivery system.

Courts have generally held that, with respect to accountants, whether or not a duty to third parties will lie depends on the relationship of the parties as determined by the client.²⁷⁸ In *Ultramares Corp. v. Touche*, an accountant was not held liable to a third party because the service it performed was exclusively for the client.²⁷⁹ Conceivably, however, the court may have found a duty if the relationship between the third party and the accountant had been an amiable one. Whether a duty exists or not, then, depends upon the relationship of the parties as determined by the client. The reasoning behind this rule is that the adversarial relationship the client may wish to maintain between her accountant and the third party would be frustrated if the accountant is forced to consider the commercial expectations of that adversarial third party.²⁸⁰

The second group, attorneys, can be analyzed in a similar way to that of accountants. Courts have held that, where attorneys are concerned, a historical, non-contractual duty is imputed to the attorney to protect the client and the

277. These two professions are by no means exhaustive of the list of professions in which economic loss is typically suffered by third parties. For example, an analysis of how courts have viewed the duty of title abstractors to third parties can be found William B. Johnson, J.D., Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other than Person Ordering Abstract*, 50 A.L.R. 4TH 314 (1986 & Supp. 1996). Health care professionals are not analyzed in this note because they are not normally involved in disputes concerning economic loss. Usually, when they have breached a standard of care with respect to third parties, personal injury has been suffered and thus liability is more readily found. See, e.g., 2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 353 (Ill. 1990) (discussing the irrelevance of economic loss with respect to health care professionals).

278. See *Canaveral Capital Corp. v. Bruce*, 214 So. 2d 505 (Fla. Dist. Ct. App. 1968) (holding that third party liability would require gross negligence or intentional conduct to be actionable); *Landell v. Lybrand*, 107 A. 783 (Pa. 1919) (holding that no duty exists on the part of accountants to protect third parties from economic loss); Jack W. Shaw, Jr., Annotation, *Liability of Public Accountant to Third Parties*, 46 A.L.R. 3D 979 (1972 & Supp. 1996).

279. *Ultramares Corp. v. Touche*, 174 N.E. 441, 448 (N.Y. 1931).

280. See generally Shaw, *supra* note 278 (noting that a duty in tort depends on whether the accountant's report is prepared primarily for the benefit of the third party).

beneficiaries of the client.²⁸¹ An example of this historical duty is demonstrated by an attorney who prepares a will for a client.²⁸² The client wishes to provide for certain third parties as beneficiaries of the will. Clearly, the attorney has a duty to protect the economic expectations of those beneficiaries because the relationship between the attorney and the third parties, as determined by the owner, is an amiable one.

The commercial context can be contrasted to this situation.²⁸³ For example, an attorney who is retained by a seller of fungible goods to prepare a contract between the seller and a potential buyer of such goods has no tort liability to the buyer if the buyer suffers economic loss. If the attorney negligently prepares the instrument, resulting in economic loss to the buyer, the buyer does not have a cause of action against the attorney for negligence because the attorney owes no duty to the adversarial third party to protect that third party's expectations. The relationship between attorney and buyer, as dictated by the seller-client, is an adversarial one. The seller-client thus controls whether the attorney has a duty to protect the commercial expectations of the third party or not. The reason for such a rule, again, is that the adversarial relationship that a client may wish to maintain between his attorney and the third party is compromised if the attorney is forced to consider the commercial expectations of the third party.

281. 2314 *Lincoln Park W.*, 555 N.E.2d at 353; Joan Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4TH 615 (1988) (referring to third-party liability of attorneys).

282. 2314 *Lincoln Park W.*, 555 N.E.2d at 353.

283. See *Angel, Cohen & Rogovin v. Oberon Inv., N.V.*, 512 So. 2d 192 (Fla. 1987). In *Angel*, a corporation brought an action against a law firm for negligence in helping the firm's client prepare sale documents transferring the corporation's wholly owned subsidiary to the client while simultaneously arranging a second transaction reselling the same property to a third party at a profit and thus defrauding the corporation. *Id.* at 193. The court held that the law firm would not be liable to the corporation where the corporation was not the client of the law firm and thus lacked the requisite privity customarily required to maintain an action for negligence against the attorney. *Id.* at 194. Even if the law firm knew the client was a fiduciary of the corporation and knew of the potential conflict between the interests of its client and the corporation, tort liability would not lie. *Id.* Also, the corporation was not a third-party beneficiary since the corporation was incidental and not the intended beneficiary of the transaction. *Id.*

See also *Ayyildiz v. Kidd*, 266 S.E.2d 108 (Va. 1980). In *Ayyildiz*, a doctor sued an attorney who had represented the doctor's insurer under a theory that the attorney was negligent in failing to investigate the plaintiff's claim. *Id.* at 110. The court held that the attorney had no legal duty to the doctor and was not liable in negligence to him. *Id.* at 133. See generally *National Sav. Bank v. Ward*, 100 U.S. 195 (1879); *Firestone v. Galbreath*, 976 F.2d 279 (6th Cir. 1992); *Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627 (Cal. Ct. App. 1991); *Hopkins v. Akins*, 637 A.2d 424 (D.C. 1993); *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378 (Fla. 1993); *Weiss v. Manfredi*, 639 N.E.2d 1122 (N.Y. 1994); Teshima, *supra* note 281.

This position can be applied to the construction context. In the traditional delivery system of construction contracts,²⁸⁴ the owner specifically chooses to have an adversarial relationship between architect and contractor—a relationship lacking privity.²⁸⁵ Presumably, the owner could have chosen other means of project delivery which do not maintain an adversarial relationship between architect and contractor.²⁸⁶ Thus, only by the express choice of the owner does the relationship between architect and contractor become adversarial.

If courts do not apply the economic loss doctrine in the traditional delivery system, all architects, negligent and non-negligent, will be forced to consider the commercial expectations of contractors.²⁸⁷ The effect on non-negligent architects is that, even though the plans and specifications are prepared without breaching the professional standard of care,²⁸⁸ they might consider the commercial expectations of the contractor more important than those of the owner. In such a jurisdiction, the prudent architect would see potential future liability both from the owner, with whom it has privity, and the contractor, with whom it has no privity. The architect determines how to conform its conduct based on which of the two is more litigious, rather than solely on privity grounds.

In the introductory hypothetical scenario, Pharmatech had good reason to keep Archiwerks and Capital Construction adverse to one another—namely to protect the interests of Pharmatech. One of Archiwerks' duties under its contract with Pharmatech was to approve shop drawings.²⁸⁹ Archiwerks thus had a contractual duty, as Pharmatech's agent, to protect Pharmatech's interest in a building which would, among other things, withstand deterioration.²⁹⁰ Concomitant with this interest was a concern about how "painless" would withstand the effects of weather over time. Conversely, Capital was probably not interested in how "painless" would withstand the effects of weather. It had an interest in profiting from the construction, which would be enhanced through the use of the cheaper material. The interest of Pharmatech in quality is thus directly in conflict with Capital's interest in profit. Archiwerks is somewhere in the middle of this battle. Whether the economic loss doctrine is applied or not has a direct bearing on where Archiwerks "stands" with respect to the two

284. See *infra* APPENDIX A.

285. See *supra* note 34 and accompanying text.

286. See *supra* notes 40-42 and accompanying text.

287. See *supra* note 283 and accompanying text (discussing problems with third party liability of attorneys).

288. B141, *supra* note 27, ¶ 1.1.2. See also *supra* notes 74-78 and accompanying text (discussing an architect's professional standard of care).

289. B141, *supra* note 27, ¶ 2.6.12.

290. See *supra* notes 220-28 and accompanying text (discussing the scope of a design professional's duty).

opposing interests. If the economic loss doctrine is not applied as a per se rule to bar tort actions, Archiwerks will have to consider these opposing interests equally, even though its sole contract is with Pharmatech. This situation exists because not considering the commercial expectations of Capital will open Archiwerks up to possible tort liability from Capital in the future.

Suppose Archiwerks had reviewed the specifications prepared by its office after receiving Capital's submittal for "painless" and determined that the specifications were probably ambiguous as to what tests would be required of "equals" submitted by Capital before they would be approved. Based on this determination, Archiwerks may choose to approve the submittal rather than require the additional testing out of fear of tort liability from Capital. If such a fear was greater than its fear of possible contractual liability to Pharmatech, Archiwerks' contractual obligations would be subordinated to those in tort.

Adopting a per se rule against tort liability with respect to the traditional delivery system would not leave contractors who have been harmed by the negligence of architects without a remedy. Had Archiwerks breached its standard of care in its preparation of plans and specifications in a jurisdiction which followed the economic loss doctrine, Capital would not be able to sue Archiwerks directly in tort. But Capital would still have a cause of action against Pharmatech for breach of contract.²⁹¹ Pharmatech could, in turn, assign its right to sue Archiwerks in contract to Capital.²⁹² The party ultimately liable would thus be found even without the tort action.

However, allowing tort recovery in the traditional delivery system would have adverse consequences on the system as a whole. If Archiwerks had *not*, in fact, breached the standard of care, it would still be forced to consider the commercial expectations of Capital before approving or rejecting the shop drawings depicting "painless." Archiwerks would have to decide whether the threat of tort litigation in not approving the shop drawings was as great as approving them and opening itself up to possible contract liability to Pharmatech. Since Pharmatech chose the relationship between architect and contractor to be an adversarial one, Archiwerks' loyalty should be solely with Pharmatech. In this way, Archiwerks can perform its contract as the owner's agent without feeling threatened with potential tort liability by Capital.

Enforcing the economic loss doctrine in the traditional delivery system relieves the prudent architect from feeling compelled to compromise its contractual relationship with the owner in order to protect the commercial

291. Steffey, *supra* note 102, at 681-82.

292. *Id.* at 681.

expectations of the contractor.²⁹³ Allowing a cause of action in tort for economic loss in the traditional delivery system is simply too broad in its application in that it compromises even the prudent architect's contractual relationship with the owner. The duty to protect the commercial expectations of the contractor in the traditional delivery system should therefore not lie with the architect.

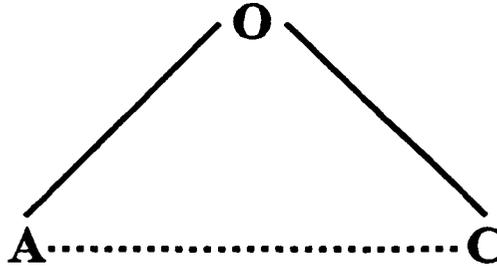
VI. CONCLUSION

The economic loss doctrine should be applied in the traditional delivery system as a *per se* rule to deny recovery of economic loss by a contractor against an architect. If courts reject the theory that contract law is better suited to deal with economic loss than tort law, a tort analysis can be engaged in with the same result. Although negligence and negligent misrepresentation are appealing in that the economic harm to users of information negligently supplied by the architect are foreseeable to that architect, the architect should owe no duty to protect such interests of such users because of the adversarial nature of the traditional delivery system. Refusing to apply the economic loss doctrine undermines this adversarial relationship and will result in removing the traditional delivery system as a viable option in the construction industry.

293. See *supra* notes 280, 283 and accompanying text (discussing problems with third party liability of other professionals).

VII. APPENDIX

A. Diagram of the Traditional Delivery System of Construction Contracts



O -Owner

A -Architect

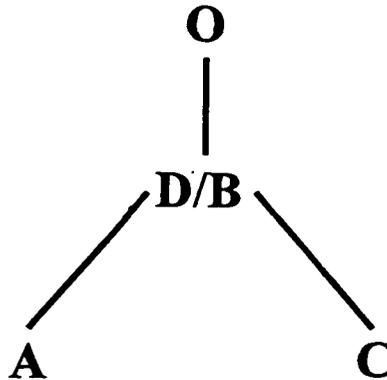
C -Contractor

—— -Contractual relations between parties. *See* B141, *supra* note 27 (contract between the architect and owner); A201, *supra* note 28 (contract between the contractor and owner).

----- -The cause of action prohibited by the economic loss doctrine (because no contractual privity exists).

The owner contracts with the architect for design and construction observation services via the B141. The owner then contracts with the contractor for construction services via the A201. The plans and specifications, as part of the contract documents which the architect prepares, are the documents the contractor follows to build the building. The owner chooses this method, in part, in order to keep the architect and contractor adverse to one another. The economic loss doctrine prevents a cause of action (represented by the dashed line) by the contractor against the architect for purely economic loss. *See supra* notes 23-39 and accompanying text for a discussion of the traditional delivery system.

B. Diagram of the Design/Build System of Construction Contracts—A Modern Variation of the Traditional Delivery System



O -Owner

D/B -Design/Build Firm

A -Architect

C -Contractor

— -Contractual relations between parties.

Here, in contrast to the traditional delivery system, the owner has no contract with either the architect or the contractor. The design/build firm is responsible to the owner for both design and construction services. Some design/build firms have both design and construction services on staff. Otherwise the firm contracts these services out to others. The point is that the design/build firm, the architect, and the contractor, rather than acting as adversaries as in the traditional delivery system, act as a “team” to provide a complete building to the owner. See *supra* notes 42-49 and accompanying text for a discussion of the design/build delivery system.

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