Architectural Duties

Architects, engineers, and other design professionals who render professional services on construction projects are frequently forced to defend the quality of designs and professional services in litigation. A recurring issue in litigation involving design professionals, and an issue that deserves early attention by defense counsel, is defining the appropriate standard of care against which the design professional's services must ultimately be judged.

Determining the standard of care applicable to a particular claim requires consideration of the contracts by which the professional provided services, the nature of the alleged defect performance, and the nature of the claim involved. A variety of claims that may arise from a design defect—delay claims, cost overruns, property damage, and personal injuries all may arise from design professionals' negligence. However, the standard of care is not the same in every action, for the design professional does not answer to all persons for all claims equally. This article explores the variation in a professional's standard of care depending on the nature of the claim against the design professional.

I. Nature of Claim.

The nature of the claim asserted against the professional and the identity of the party asserting the claim largely dictate the requisite standard of care to be applied in a given case. The variety of claims that may be brought, whether in tort or contract, require different standards for determining a design professional's liability.

A. Claim based on contract.

A typical claim against a design professional involves a suit by an owner who has a contract with the designer alleging inadequate services or improper design.[1] Of course, an owner may sue a designer for breach of contract for any number of reasons. If an owner requests plans for a ten-story high-rise building and the designer prepares plans for a three-story building, the contract has been breached with no consideration of the professional standard of care. Similarly, where an owner requests plans for a building with an agreed maximum cost of construction and the designer creates plans with a cost of construction far exceeding the owner's pre-set maximum, the designer has breached the contract.[2]

However, where an owner claims breach of contract due to a design defect or a building code violation in the design, proving the designer breached the contract requires consideration of the professional standard of care and measuring the designer's performance against the standard of care. It is a well-understood premise that design professionals are not required, by law or contract, to create perfect designs. Rather, they are required to exercise a certain standard of care in the performance of their contracted for duties. "[A]lthough an architect does not owe a duty to provide perfect plans he is bound to exercise the degree of professional care and skill customarily employed by other architects in the same general area."[3]

Breach of contract claims against design professionals involving design defects are not simply a matter of proving a design defect exists, like in a products liability action against a manufacturer

of a good. Rather, because the nature of professional services requires using professional judgment, science, and art, a designer may be found not liable for a breach of contract even where a design ultimately proves defective. This principle has long been established in American jurisprudence, as explained by the Massachusetts Supreme Court:

> Architects…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. 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. Moreover, unlike a mass producer of consumer goods, an architect has but a single chance to create a design for a client which will produce a defect-free structure. Accordingly, we do not think it just that architects should be forced to bear the same burden of liability . . . as that which has been imposed on manufacturers generally. We believe that unlike a manufacturer, an architect does not impliedly guarantee that his work is fit for its intended purpose. Rather he impliedly promises to exercise that standard of reasonable care required of members of his profession.[4]

To this rationale, the Minnesota Supreme Court added:

> Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces as anticipated. 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.[5]

This standard for holding design professionals accountable—not demanding perfect results, but requiring exercise of that skill and judgment which can be reasonably expected from similarly situated professionals has been firmly ensconced in American jurisprudence for over a hundred years.

> The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.[6]

The law is clear that designers are not bound by law to create defect-free designs. The law requires a professional designer to do no more than exercise reasonable care, that is, to prepare

plans and specifications with the degree of competence ordinarily exercised in like circumstances by reputable members of the profession.[7]

In fact, designers are not necessarily required by contract even to produce designs that are free from building code violations, at least where building codes are susceptible to multiple reasonable interpretations. Consideration of building codes is usually a necessary element of the designer's design services. However, courts recognize that building code violations sometimes occur in spite of the best efforts of designers to conform to the building code, often a result of differing interpretations of a building code. Thus, a design professional is not necessarily required to create designs that necessarily comply with the building code as Courts recognize that building codes are often difficult to interpret, even if established, proof of a building code violation in a designer's plans, specifications or designs, is not sufficient to establish negligence on the part of the designer because it does not address the standard of care issue.

Consider, for example, *Center Court* which involved a lawsuit by an owner against an architect where the architect's design contained a number of building code violations.[8] The Owner presented undisputed evidence that the architect's design violated the applicable building codes. The architect argued that he had considered the applicable code and, in his judgment, created a design that complied with the code. Nonetheless, the court granted judgment to the architect with respect to certain claimed building code violations because the owner failed to establish that the architect violated his standard of care with respect to the building code issues. The owner's evidence of the code violation did not, in and of itself, establish a breach of the architect's standard of care. The court relied upon evidence produced by the owner's own expert as well as other experts that differences of opinion as to interpretation and application of building codes "quite often" arise on construction jobs.[9] The court agreed, finding no evidence that the architect violated his standard of care with respect to interpreting the building code and creating the design.[10]

Likewise, in *Garaman*, an owner sued an architect for malpractice but failed to produce evidence on the architect's standard of care.[11] The architect had testified that he had a duty to know the building code and that, although he believed his design complied with the codes, in certain instances his design failed to comply with the applicable building codes as subsequently interpreted by the code official. The architect also testified that building codes may be difficult to interpret, that he had gotten the town's approval for certain aspects of the design, but, upon completion, the town recanted and concluded that certain code violations existed. The owner argued, when an architect fails to comply with applicable building codes, he is negligent. The court disagreed, declaring an architect does not warrant perfect results, but is only required to exercise the appropriate degree of care.[12]

Thus, whether a design professional breached a contract with respect to the rendering of design services depends on the nature of the alleged breach and may depend on whether the designer violated the standard or care applicable to the circumstances.

B. Tort Claims

Design professionals are occasionally targeted by claimants with whom they have no contract. Typically, these suits would involve tort claims grounded in negligence and may involve personal injury claims by workers injured on a project, property damage, or cost overruns

incurred by a contractor on a project. Negligence actions against design professionals implicate two different standards of care depending on whether the claim is for ordinary negligence or professional negligence.

1. Ordinary negligence.

Design professionals sometimes are sued for negligence arising outside the provision of their professional services. Courts in other jurisdictions have ruled that failure to warn claims against a professional, for example, are not dependent on the rendering of professional services and may give rise to a negligence claim founded on a general duty of care.[13] Other types of claims against design professionals that may fall outside the rendering of professional services could be negligent hiring of consultants or employees, or negligent supervision of their employees.[14] Claims against professionals arising outside the rendering of professional services are typically subject to the standard of care applicable to ordinary negligence claims, that is, the "reasonably prudent person" standard of care.[15]

Where a lawsuit against a design professional is based on ordinary negligence, the suit raises the issue of what standard of care to apply to the professional's conduct and may create substantial controversy on whether a particular claim is one for ordinary or professional negligence. Moreover, such claims raise controversial issues of insurance coverage as to whether the design professional's errors and omissions carrier, its commercial general liability carrier, or both, must defend. Whereas pure professional negligence claims are typically excluded by CGL policies, such policies may be implicated where an ordinary negligence claim is brought against the designer.[16]

2. Professional negligence.

Claims against architects, engineers, surveyors, and other professionals for negligence in the performance of their professional services are considered professional negligence claims, analogous to negligence claims against doctors, lawyers, and other professionals.[17] Some courts use the term "malpractice" instead of "professional negligence" to describe a negligence claim against a professional.[18] To split linguistic hairs, professional negligence is a *form* of malpractice.[19]

No matter how a plaintiff labels a negligence claim against an design professional, the professional's conduct is to be judged by the appropriate standard of care relative to the professional community at issue, not merely the "ordinary prudent person" standard of an ordinary negligence claim.[20] Thus, a plaintiff's professional negligence claim against an architect, for example, must be considered vis-à-vis the appropriate standard of care for an architect. The general rule is that the standard of care regarding the rendering of professional services requires an architect, "to exercise a degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent [architects] in the same class to which they belong, acting under the same or similar circumstances."[21]

The professional negligence claim against a designer on a construction project applies to all services that may be considered professional in nature. Where a contract requires the designer to observe construction at appropriate intervals, or perform other services that call upon the professional's judgment, whether the designer has been negligent in the provision of such services necessarily implicates the professional's standard of care.

State statutes generally define the practice of architecture to encompass not only design aspects of a project, but also coordination, planning and oversight that are part of a construction project. All of these architectural services fall within the scope of an architect's professional services, by definition, and therefore are to be provided in accordance with an architect's standard of care. The same rationale applies to the provision of professional services by other design professionals as well.

Claims against design professionals may invoke the professional standard of care under the circumstances of the case. Further, determining the appropriate standard of care against which to judge a professional's services may prove highly controversial in any given case, whether based on contract or tort theories. The controversy may not stop at the underlying liability action but may spill into the realm of an insurance coverage dispute.

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[11] *Strauss Veal Feeds, Inc. v. Mead & Hunt, Inc.*, 538 N.E.2d 299, 302 (Ind. Ct. App. 1989).
[2] *See Malo v. Gilman*, 379 N.E.2d 554 (Ind. Ct. App. 1978).
[3] *Merchants Nat'l Bank & Trust Co. v. Smith, Hinchman & Grylls Assoc., Inc*., 876 F.2d 1202, 1205 (5th Cir. La. 1989).
[4] *Klein v. Catalano*, 386 Mass. 701, 718-19 (Mass. 1982).
[5] *Mounds View v. Walijarvi*, 263 N.W.2d 420, 424 (Minn. 1978).
[6] *Coombs v. Beede*, 89 Me. 187, 188-189 (Me. 1896).
[7] *Lukowski v. Vecta Educational Corp*., 401 N.E.2d 781, 785 (Ind. Ct. App. 1980), citing *Walters v. Kellam & Foley, Mussett, Nicholas & Stevenson, Inc*., 360 N.E.2d 199 (Ind. Ct. App. 1977).
[8] *Center Court Assocs. Ltd. Ptn. v. Mainland/Strauss & Behr*, 1994 Conn. Super. LEXIS 1149, 95 (Super. Ct. Conn. 1994).
[9] *Id*. at 193.
[10] *Id*. at 193-96.
[11] *Garaman, Inc. v. Williams*, 912 P.2d 1121, 1124 (Wyo. 1996).
[12] *Id.*
[13] *See S.T. Hudson Engineers, Inc. v. Pennsylvania National Mutual Cas. Co*., 909 A.2d 1156 (N.J. App. 2006); *See Camp Dresser & McKee, Inc. v. The Home Ins. Co.*, 568 N.E.2d 631, 633-34 (Mass. Ct. App. 1991).
[14] *See, e.g. Fairbanks Hosp. v. Harrold*, 895 N.E.2d 732 (Ind. Ct. App. 2008) (hospital's failure to supervise its employee who sexually assaulted a patient was not within the scope of professional services provided by hospital).
[15] *Id*. at 894.
[16] *See Gregoire v. AFB Construction, Inc*., 478 So.2d 538, 541 (La. Ct. App. 1985) (CGL insurer must defend engineer against duty to warn claims; professional services exclusion inapplicable); *CBM Engineers, Inc. v. Transcontinental Ins. Co*., 460 So.2d 745 (La. Ct. App. 1984) (CGL insurer required to defend engineering consultant against failure to warn claims by workers injured on construction project)
[17] *Garaman, Inc. v. Williams*, 912 P.2d 1121, 1124 (Wyo. 1996) (claim against architect for negligent provision of architectural services construed as a claim for "professional negligence); *Karnes v. Keffer-Overton Assocs*., 2001 Iowa App. LEXIS 692 (Iowa Ct. App. 2001) (claim against architect for negligent design in case involving collapsed staircase one of "professional negligence").

[18] *See Kishwaukee Community Health Services Center v. Hospital Bldg. & Equipment Co., Div. of HBE Corp*., 1988 U.S. Dist. LEXIS 2671, 22-23 (N.D. Ill. Mar. 22, 1988); *D&D Assocs. v. Bd. of Educ*., 2007 U.S. Dist. LEXIS 93867, 63-66 (D.N.J. 2007) (claim against architect for negligent design, supervision, and related architectural services consider malpractice); *Mounds View v. Walijarvi*, 263 N.W.2d 420, 425 (Minn. 1978).
[19] *Corcoran v. Sanner*, 854 P.2d 1376, 1379 (Colo. Ct. App. 1993).
[20] *Lukowski v. Vecta Educational Corp*., 401 N.E.2d 781, 785-86 (Ind. Ct. App. 1980).
[21] *Troutwine Estates Dev. Co., LLC v. Comsub Design & Eng'g, Inc.*, 854 N.E.2d 890, 902 (Ind. Ct. App. 2006).