

ARCHITECTS' AND ENGINEERS' LIABILITY UNDER IOWA CONSTRUCTION LAW

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I. INTRODUCTION

This Article discusses principles and cases applicable to architects' and engineers' professional responsibility to their clients and other persons. Recent decisions by the Iowa Supreme Court have generally measured architects' and engineers' responsibility by the terms of their contracts; those developments encourage more careful drafting of professional service contracts, make the outcome of disputed issues more predictable, and lessen the litigation expenses and involvement for architects and engineers.¹ This Article will discuss those developments and the current principles of architects' and engineers' liability under Iowa law.

II. LIABILITY TO CONTRACTORS AND THIRD PARTIES

An architect or engineer can be liable for failure to exercise their duty of care to all persons lawfully on the premises they have designed or constructed.² An architect or engineer may be liable to persons with whom they have no contract.³ Generally, if the architect's or engineer's contract creates a duty, the breach of that duty may result in liability to any injured person.⁴ An architect's or engineer's potential for liability extends beyond privity of contract.⁵

The important question is whether the architect's or engineer's contract imposes a duty upon the professional to the injured person. When a contract imposes

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1. See, e.g., *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 615 (Iowa 1991) (determining duty by analyzing the contract terms).

2. *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 913 (Iowa 1975).

3. *Id.*

4. See *id.* ("The liability of the architect, moreover, is not limited to the owner who employed him; the modern view is that privity of contract is not a prerequisite.")

5. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d at 615.

a duty upon a party, neglect of that duty is a tort.⁶ Whether a contract that employs a professional creates a duty owed to a noncontractual party is a matter of law to be decided by the court.⁷ An architect or engineer cannot, by contract, determine to whom it may be liable for breach of a duty created by that contract.⁸ However, architects or engineers can define and shape their duty with contractual language describing the duty.⁹ The holding that an engineer cannot by contract determine to whom it may be liable¹⁰ in *Evans v. Howard R. Green Co.*¹¹ is difficult to reconcile with the language and result in *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*¹² The engineer's contract in *Shepherd Components* clearly expressed the scope of the work to be performed by the engineer and that the engineer owed no duty to an adjacent landowner for the contractor's activities.¹³ The two cases may be reconciled by stating that both stand for the proposition that the engineer's contract defines and limits the scope of duty to do certain work or actions, but the duty, once created, is owed to all persons lawfully on the premises. A more accurate statement, however, is that *Shepherd Components* permits engineers to limit the scope of duty by contract; by defining contractual work, engineers may limit the persons to whom they owe a duty.¹⁴

Shepherd Components discussed an engineer's responsibility for safety and site inspection.¹⁵ The "original plans and specifications did not detail any protective methods for [the contractor] to use in excavating the adjoining property."¹⁶ The contractor engaged its own engineer, not a party to the lawsuit, to prepare shop drawings of a system to retain the earth along the excavation route adjacent to the neighbor's building.¹⁷ The owner's engineer approved the shop drawings prepared by the contractor's engineer.¹⁸ The drawings required that sheet piling "be driven along the excavation route" and back filling be done as the sewer pipe was laid.¹⁹ The shop "drawings did not provide for excavation of the earth between the

6. *Chrischilles v. Griswold*, 150 N.W.2d 94, 98 (Iowa 1967).

7. *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 228 (Iowa 1974).

8. *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 912-13 (Iowa 1975).

9. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d at 616-17.

10. *Id.* at 91.

11. *Evans v. Howard R. Green Co.*, 231 N.W.2d 907 (Iowa 1975).

12. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612 (Iowa 1991).

13. *Id.* at 615-16.

14. *Id.* at 617.

15. *Id.* at 615-17.

16. *Id.* at 614.

17. *Id.*

18. *Id.* at 614.

19. *Id.*

neighbor's building and the sheeting."²⁰ During the excavation, the contractor "departed from the drawings by removing earth immediately adjacent to [the neighbor's] building and below its footings."²¹ The contractor stated that the additional earth "was removed to lessen the vibration caused by the hammer used to drive the sheeting."²² When an employee noticed the neighbor's building was cracked, work was halted.²³ "When the sheeting was removed three months later, the entire damaged wall collapsed."²⁴ The neighbor and the contractor sued the project engineer, alleging negligence.²⁵

The contract between the city and the engineer defendant contained standard construction observation language.²⁶ The contract specifically provided:

The ENGINEER shall: . . . Make periodic visits to the site of the construction to observe the progress and quality of the construction work and to determine, in general, if the results of the construction work are in accordance with the Drawings and the Specifications. On the basis of his on-site observation as an ENGINEER, he shall endeavor to guard the OWNER against apparent defects and deficiencies in the permanent work constructed by the Contractor but does not guarantee the performance of the Contractor. . . . The ENGINEER is not responsible for construction means, methods, techniques, sequences or procedures, time of performance, programs, or for any safety precautions in connection with the construction work. The ENGINEER is not responsible for the Contractor's failure to execute the work in accordance with the Construction Contract.²⁷

The contract also limited the engineer's responsibility for construction review services as follows:

The ENGINEER has not been retained or compensated to provide design and construction review services relating to the Contractor's safety precautions or to means, methods, techniques, sequences, or procedures required for the

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 615; see AIA DOCUMENT A201 (1987), GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, reprinted in, JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS APP C at C-2, C-11 (West, 5th ed. 1994) [hereinafter GENERAL CONDITIONS]; AIA DOCUMENT B141 (1987), STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, reprinted in, JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS APP A at A-2, A-4 (West, 5th ed. 1994) [hereinafter STANDARD FORM].

27. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d at 615.

Contractor to perform his work but not relating to the final or completed structure; omitted services include but are not limited to shoring, scaffolding, underpinning, temporary retainment of excavations and any erection methods and temporary bracing.²⁸

The contract also provided a disclaimer of the on-site review services as follows:

By means of the more extensive on-site observations of the work in progress, the ENGINEER will endeavor to provide further protection for the OWNER against defects and deficiencies in the Contractor's work, but the furnishing of such services shall not include construction review of the Contractor's construction means, methods, techniques, sequences or procedures, or of any safety precautions or programs in connection with the work, and the ENGINEER shall not be responsible for the Contractor's failure to carry out the work in accordance with the Construction Contract.²⁹

Both the engineer's and contractor's contracts placed the entire responsibility for avoiding damage to neighbor's property on the contractor.³⁰ Because the contractor had control of the work at the site and the engineer had no control of the work, the engineer did not owe a duty of care to others and could not be responsible for the contractor's negligence.³¹

Shepherd Components stated that "[a] general rule applicable to the case was that an engineer does not, by reason of its duty to inspect the construction site, assume responsibility for the day to day construction methods utilized the contractor or the contractor's negligence."³² The contractor, not the engineer, was contractually required to supervise the construction activities and take appropriate precautions.³³

The engineer's ability to stop the work did not trigger responsibility for the contractor's negligence.³⁴ The engineer had no legal duty to interfere with the contractor's judgment on which construction procedures to use; the requirement of visiting the site did not change this responsibility.³⁵ The court held the engineer did not have contractual authority to stop unsafe construction methods which were under the sole control of the contractor, even though the engineer had authority to stop work that did not conform with the contract.³⁶ The court concluded that the engineer

28. *Id.* at 615-16.

29. *Id.* at 616.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 617.

owed the neighboring property owner no duty of care because the engineer had neither responsibility for, nor control over, the construction procedures that were employed adjacent to the neighbor's building.³⁷

The more difficult case for the court would be a personal injury or death case against an architect or engineer whose contract had the *Shepherd Components* disclaimers but the architect's or engineer's conduct involved a failure to act upon observing known safety or Occupational Safety and Health Act (OSHA) violations. The court would have to address the issue whether exculpatory contract language permits an experienced professional, with an opportunity to avoid an injury or death, to ignore a safety violation and escape liability.

III. ARCHITECTS' AND ENGINEERS' STANDARDS OF CARE

The standard of care by which architects' and engineers' conduct is measured is that "degree of skill, care and learning ordinarily possessed and exercised by members of the profession in good standing in similar circumstances" at the time of the alleged negligence.³⁸ An architect or engineer is "bound to exercise reasonable care to see that the work is done in a proper manner with proper materials."³⁹ An architect or engineer is required to exercise reasonable care in certifying completion of defective or incomplete work.⁴⁰ The architect or engineer is required to "exercise reasonable care in the supervision and inspection of the work to protect the owner against payment of money to the contractor for work not performed or materials not delivered."⁴¹ This duty of care arises before the completion of the work and applies to the engineer's work during construction.⁴² Architects or engineers may be held liable for negligence in failing to exercise the ordinary skill of their profession, resulting in the erection of an unsafe structure.⁴³ Architects or engineers may be held liable for negligence if they prepare plans and specifications and if carrying out the work under these plans and specifications causes damage.⁴⁴

Generally, a jury determines whether the professional has met the standard of care.⁴⁵ Expert testimony may be needed to generate a jury question that the standard

37. *Id.*

38. *See* Schiltz v. Cullen-Schiltz & Assoc., Inc., 228 N.W.2d 10, 17 (Iowa 1975); *see also* *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d at 615; *Fisher v. Dallas County*, 369 N.W.2d 426, 430 (Iowa 1985) (citing *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d at 17); *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 913 (Iowa 1975).

39. *State v. Fisher*, 246 N.W.2d 922, 925 (Iowa 1976).

40. *Id.*

41. *Id.*

42. *Evans v. Howard R. Green Co.*, 231 N.W.2d at 912.

43. *Id.* at 913.

44. *Id.*; *McCarthy v. J. P. Cullen & Son Corp.*, 199 N.W.2d 362, 370 (Iowa 1972).

45. *Evans v. Howard R. Green Co.*, 231 N.W.2d at 913.

of care has not been met.⁴⁶ However, the lack of care may be so obvious as to be within the comprehension of a lay person so that an expert is not needed.⁴⁷ The existence of substantial defects may be sufficient to generate a jury question on whether a well-designed structure would have problems.⁴⁸ A jury does not have to accept expert testimony.⁴⁹ An "expert's testimony provides no aid" to the court in its interpretation of an engineer's duty under an unambiguous contract.⁵⁰ Where the contract is unambiguous about the scope of the duty, expert testimony should not be used to deviate or change the scope of that duty.⁵¹ During a trial, an important issue is often the specific conduct of an architect or engineer that may have violated the general duty to use the average skill, care, and learning of similarly situated professionals.⁵² The trial judge hears the arguments of counsel about whether specific acts of an architect or engineer, if found to have occurred, may be deemed to be a violation of the architect's or engineer's duty to use reasonable care.⁵³ The court determines the specific conduct of the professional that may have breached the general standard of conduct, and then the jury determines whether the conduct occurred.⁵⁴ Often, the architect or engineer does not dispute that a certain act was performed, but there is a significant dispute whether that conduct may be identified in the jury instructions as negligent. If the jury finds that conduct to have occurred, then the architect or engineer will have violated the duty to use reasonable care.⁵⁵ As a practical matter, certainty as to whether particular conduct will be included as a specification of negligence in a jury instruction is difficult to achieve until the judge actually makes that determination. For that reason, advising architects and engineers

46. *City of Urbandale v. Frevert-Ramsey-Kobes, Architects-Eng'rs, Inc.*, 435 N.W.2d 400, 402 (Iowa Ct. App. 1988).

47. *Id.*

48. *Id.*

49. *See Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Co.*, 445 N.W.2d 789, 791 (Iowa 1989) ("[I]t does not follow that the trier of fact was compelled to accept that testimony.").

50. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.*, 473 N.W.2d 612, 617 (Iowa 1991).

51. *Id.*

52. *See id.* at 615 (defining the rule to be applied for negligence against a design engineer); *Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Co.*, 445 N.W.2d at 791 (requiring proof of specific negligence on the part of a professional).

53. *See Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Co.*, 445 N.W.2d at 792 (affirming the trial court's finding of specific acts of an engineer that constituted a breach of professional duty).

54. *Id.* at 791.

55. *See, e.g., Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 267 (Iowa 2000) (holding it is improper for a court to instruct the jury as to what conduct constitutes negligence in a negligence action brought by the parent of a child injured while sledding on school grounds against the public school district (citing 88 C.J.S. *Trials* § 284).

as to their risk and potential for liability in malpractice cases is, regrettably, an inexact estimate of what a judge is likely to do when drafting jury instructions.

IV. SOURCE OF STANDARDS

The contract between the architect or engineer and the client not only defines the duties to be performed, but also may be the source of an elevated standard of conduct. For example, the use of the phrase "highest standards in the engineering profession" created a jury question as to the scope of those standards.⁵⁶ Additionally, ethical standards and practices may be admitted to establish the standard or benchmark of a professional's conduct.⁵⁷ Generally recognized design parameters may define the scope of the duty as well.⁵⁸ For example, in *Evans*, the "Ten States Standards"⁵⁹ of wastewater treatment design governed the scope of the engineer's conduct.⁶⁰

V. CONTRACT VERSUS TORT CLAIMS

A claim that a professional has failed to meet the required standard of care is essentially a negligence cause of action.⁶¹ In *Kemin Industries v. KPMG Peat Marwick, L.L.P.*,⁶² a plaintiff brought both contract and negligence claims against its accountants.⁶³ In determining the claim asserted against the provider of information was a negligence claim, the court stated:

Almost all relationships involving professional services arise from an offer and acceptance that would constitute a simple contract. Nevertheless, a claim that a provider of professional services has failed to meet the standard of care that the law has placed on that party is essentially a negligence cause of action.⁶⁴

Accordingly, a claim alleging plans and specifications prepared by an architect or engineer were defective and did not meet the appropriate standard of care is a negligence claim.⁶⁵

56. *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993).

57. *Menzel v. Morse*, 362 N.W.2d 465, 473 (Iowa 1985).

58. *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 913 (Iowa 1975).

59. *Id.* "[The Ten State Standards] were promulgated by Great Lakes-Upper Mississippi River Board of State Sanitary Engineers to provide guidelines for the design and specifications of sewage plants." *Id.*

60. *Id.*

61. *Kemin Indus. v. KPMG Peat Marwick, L.L.P.*, 578 N.W.2d 212, 221 (Iowa 1998).

62. *Kemin Indus. v. KPMG Peat Marwick, L.L.P.*, 578 N.W.2d 212, 221 (Iowa 1998).

63. *Id.* at 215.

64. *Id.*

65. *Id.*

Because a claim for breach of professional services is a negligence claim, instead of a contract claim, the principles of comparative fault apply.⁶⁶ In a contract claim, the principles of comparative fault do not apply, and the alleged breaching party attempts to defend the damages claim by showing that its conduct did not cause the damage, and that the damage was caused by other conduct.⁶⁷ Iowa courts have yet to address other consequences that flow from the fact those claims sound in tort. For example, a claim that "sound[s] in tort whether or not involving a breach of contract" is not arbitrable under the Iowa Arbitration Act.⁶⁸ Negligence claims for damaged property are subject to a five-year statute of limitations.⁶⁹ Claims founded upon breach of a written contract are subject to a ten-year statute of limitations.⁷⁰ Generally, economic losses are not recoverable in tort, while they may be in a breach of contract claim.⁷¹ Damages recoverable on tort claims may differ from damages recoverable for breach of contract.⁷²

The primary distinguishing characteristic between tort and contract claims is the type of injury. Tort claims seek recovery for personal injuries and property damage.⁷³ In *Kemin Industries*, the court decided that an account receivable was property and described the account receivable as a "chose in action."⁷⁴ Because the claim in that case involved injury to the claimant's chose in action, property damage was involved and principles of comparative fault applied.⁷⁵ *Kemin* stated that "a specifically identified account receivable, which can be established in a specific amount under the evidence in the case, is a chose in action. We are satisfied that a chose in action is sufficiently recognized in our law as property . . ."⁷⁶ In contrast, where a party is "suing solely because he did not recover what he contracted to receive," the claim is a contract claim, rather than a tort claim.⁷⁷

66. *Id.* Comparative fault is the allocation of responsibility for an injury or damage among the parties who caused it. BLACK'S LAW DICTIONARY 1056 (7th ed. 1999).

67. *Kemin Indus. v. KPMG Peat Marwick, L.L.P.*, 578 N.W.2d at 220.

68. IOWA CODE § 679A.1(2)(c) (2001).

69. *Id.* § 614.1(4).

70. *Id.* § 614.1(5).

71. *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 650-51 (Iowa Ct. App. 1996).

72. *See R.E.T. Corp. v. Frank Paxton Co.*, 329 N.W.2d 416, 420 (Iowa 1983) (explaining the different types of damages available in tort and breach of contract claims).

73. *Kemin Indus. v. KPMG Peat Marwick, L.L.P.*, 578 N.W.2d, 212, 221 (Iowa 1998).

74. *Id.* "Chose in action" is property that may be owned and transferred. *See Gartin v. Taylor*, 577 N.W.2d 410, 413 (Iowa 1998).

75. *See id.* at 213, 221 (clarifying the claim in the case and defining chose in action).

76. *Id.* at 221.

77. *Flom v. Stahly*, 569 N.W.2d 135, 141 (Iowa 1997) (quoting UNIF. COMPARATIVE FAULT ACT § 1(b) cmt., 12 U.L.A. 128 (1996)).

Although warranty claims are common in the construction industry, it is not always clear whether they are tort or contract claims.⁷⁸ For instance, the Iowa Supreme Court has stated:

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the [Comparative Fault] Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.⁷⁹

*Flom v. Stahly*⁸⁰ held comparative fault principles are not available to reduce a claimant's recovery for breach of express warranty involving contract damages only.⁸¹

Breach of warranty claims are expressly included within the definition of "fault" under the Iowa Comparative Fault Act,⁸² and a claim for breach of warranty may sound in tort or in contract.⁸³ Whether principles of comparative fault will govern a breach of warranty claim depends on the type of damages sought by the claimant and whether there is property damage or only loss of expectancy.⁸⁴ Under Iowa law, an express or implied contract term requiring repair of real property may merely establish the duty element of a tort claim and comparative fault principles may be considered for purposes of reducing a claimant's recovery.⁸⁵ Because the express or implied contract term was breached and the resulting injury was a personal injury, the claim sounded in tort and comparative fault principles applied.⁸⁶ The Iowa Supreme Court has held that negligence is not submissible where there was no personal injury or property damage, other than to the work itself, resulting from the tortious event.⁸⁷ The distinguishing factor for determining whether principles of

78. *Id.*

79. *Id.* (quoting UNIF. COMPARITIVE FAULT ACT § 1(b) cmt., 12 U.L.A. 128 (1996)).

80. *Flom v. Stahly*, 569 N.W.2d 135 (Iowa 1997).

81. *Id.* at 140-141.

82. IOWA CODE § 668.1 (2001).

83. *Id.*

84. See *Flom v. Stahly*, 569 N.W.2d at 141 ("[T]he Iowa act applies only when the breach leads to personal injury or property damage apart from the original damage claimed.").

85. *Long v. Jensen*, 522 N.W.2d 621, 624 (Iowa 1994).

86. *Id.*

87. *Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000). The Iowa Supreme Court has frequently considered the compensability of economic loss in tort:

[T]he line between tort and contract must be drawn by analyzing the interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a

comparative fault are available is the type of injury or damage suffered by the claimant.⁸⁸ Where the claimant sues merely for recovery of the benefit of its bargain or loss of expectancy, the claim is for breach of contract.⁸⁹ Where the claimant sues for personal injury or property damage, other than to the work itself, the claim is in tort and principles of comparative fault apply.⁹⁰

VI. THE ECONOMIC LOSS DOCTRINE

Iowa state courts have not addressed the question of whether a negligence claim may be maintained for purely economic damages against an architect or engineer.⁹¹ Other states appear to be split on the issue of whether a party can recover economic damage against design professionals involved in plans and specifications or contract administration in the absence of a contract.⁹²

particular claim. We agree that the line to be drawn is one between tort and contract rather than between physical harm and economic loss. . . . When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract.

Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect.

Nelson v. Todd's Ltd., 426 N.W.2d 120, 124-25 (Iowa 1988) (citations omitted); Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 128 (Iowa 1984) (adopting the general rule that a plaintiff "cannot maintain a claim for purely economic damages arising out of [a] defendant's alleged negligence").

88. Determan v. Johnson, 613 N.W.2d at 264 (holding by seeking damages for a roof that was in danger of collapsing but had not yet done so, the plaintiff's remedy was for unfulfilled expectations and thus her remedy was in contract, not tort law); Tomka v. Hoecht Celanese Corp., 528 N.W.2d 103, 105 (Iowa 1995) (holding the buyer's remedy of cattle feed was in contract law where the product failed to perform as expected because "contract law protects a purchaser's expectation interest").

89. *Id.*

90. See Flom v. Stahly, 569 N.W.2d 135, 141 (Iowa 1997); see also *supra* text accompanying note 44.

91. See Am. Fire & Cas. Co. v. Ford Motor Co., 588 N.W.2d 437, 439 (Iowa 1999) (discussing Iowa cases on economic loss doctrine in product liability cases). But see Burns Philp, Inc. v. Cox, Kiewit & Co., No. 4-99-CV-90033, 2000 WL 33361992, at *8-*10 (S.D. Iowa Nov. 2, 2000) (clarifying the Iowa Supreme Court's *Kemin* holding in federal district court).

92. See Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 475 (8th Cir. 1968) (stating Missouri law allows recovery to a surety for economic loss occasioned by architect's negligence in failing to properly supervise construction project despite lack of privity between surety and architect); Bus. Men's Assurance Co. of Am. v. Graham, 891 S.W.2d 438, 454 (Mo. Ct. App. 1995) (noting Missouri law allows economic claims against architects and engineers); Cooper v. Jevne, 128 Cal. Rptr. 724, 728 (1976) (distinguishing between liability of an architect for negligence in rendition of services and liability of a manufacturer for a defective product); see also Mid-Western Elec. v. DeWild Grant Reckert & Assocs., 500 N.W.2d 250, 253 (S.D. 1993) (holding with a majority

The Iowa Court of Appeals denied a homeowner's claim against a brick sales company for negligence, breach of implied warranty, and strict liability after the bricks a contractor used to construct the house began to chip and crack.⁹³ The court of appeals held the remedy was limited to contract for the expectancy loss and dismissed the homeowner's claims.⁹⁴ The homeowner did not argue the economic loss doctrine did not apply to consumer transactions.⁹⁵

A potentially complicating factor in Iowa is the distinction between property damage and expectancy loss. *Kemin* held claims of professional negligence based on property damage would lie in tort but not in contract; principles of comparative fault should apply.⁹⁶ The property at issue in *Kemin* was an account receivable.⁹⁷ Based on the *Kemin* holding, a contractor could arguably sue the architect or engineer for negligence or interference with a contract to recover the outstanding account an owner owes the contractor.⁹⁸ Such a claim would lie in tort for damage to the contractor's property—the account receivable.⁹⁹

The future of the economic loss doctrine in claims against architects and engineers will be determined by the Iowa Supreme Court. Design professionals who seek to avoid contractors' claims for economic damages will argue the allocation of liabilities among those who contract with an owner should be purely a matter of contract. Contractors will answer by arguing the privity of contract defense has been eliminated in personal injury and property damage cases, and it should not bar recovery when there are actual economic losses. Contractors will further argue that they assume and rely on design professionals to perform duties with the average skill,

of jurisdictions that design professionals are liable to third party contractors); *Peter Kiewit Sons' Co. v. Iowa S. Utils. Co.*, 355 F. Supp. 376, 392 (S.D. Iowa 1973) (recognizing Iowa law acknowledges the existence of a duty to a third party contractor who is a direct beneficiary of the contract); *Bacco Constr. Co. v. Arn. Colloid Co.*, 384 N.W.2d 427, 433 (Mich. Ct. App. 1986) (noting "the clear trend in other jurisdictions is to allow a negligence action" of a contractor against a project engineer or architect "without direct privity of contract"). *But see Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.*, 881 P.2d 986, 992 (Wash. 1994) (limiting recovery of economic loss to the remedy provided by contract); *Tomb & Assoc., Inc. v. Wagner*, 612 N.E.2d 468, 471 (Ohio Ct. App. 1992) (awarding a design professional attorney's fees against a contractor for bringing an economic damages claim while lacking privity); *Floor Craft Floor Covering, Inc. v. Parma Cmty. Hosp. Ass'n*, 560 N.E.2d 206, 212 (Ohio 1990) (holding design professionals are not liable in tort for economic damages in the absence of privity of contract).

93. *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 650 (Iowa Ct. App. 1996).

94. *Id.* at 651-52.

95. *Id.* at 652 n.2.

96. *Kemin Indus. v. KPMG Peat-Marwick L.L.P.*, 578 N.W.2d 212, 221 (Iowa 1998).

97. *Id.* at 213.

98. *Id.*

99. *See id.* *But see Determan v. Johnson*, 613 N.W.2d 259, 263 (Iowa 2000) (noting a home buyer was not allowed to sue the seller for negligence when the loss was for unfulfilled expectations with respect to the quality of the home she purchased).

care, and learning of other similarly situated professionals. If these standards are not met or actual economic loss occurs, the contractor will suffer real consequences. On the other hand, the design professionals will argue their primary duty is to guard the owner against defective or nonconforming construction, and they should not be placed in a conflict of interest position with the owner when exercising their duties.

Design professionals may also argue that they should not be subject to disproportionate damages. For example, consequential damages a contractor suffers as a result of a delay may be far greater than contemplated by the architect or engineer when fees were initially set. The 1997 version AIA Document A201 contains a mutual waiver of consequential damages arising out of or relating to the contract.¹⁰⁰

The architect's or engineer's liability in tort for economic damages to a contractor may often involve intentional conduct.¹⁰¹ When contractors establish the elements of a claim of interference with a contract or other intentional tort, it would seem that their damages should not be limited to only personal injury or property damage, but should also include the recovery of economic loss. Similarly, when informational torts are involved, such as negligent misrepresentation or fraudulent misrepresentation, there would seem to be insufficient reasons for limiting the contractor's recovery to personal injury or property damage. With respect to informational torts, often the only type of damage suffered is economic loss and the court may decide that it is appropriate to allow this recovery.¹⁰² The common law and jury trials are time tested methods of placing the economic loss where it seems most appropriate. On the other hand, the economic loss doctrine is an arbitrary rule that may prohibit recovery for actual consequences caused by a design professional's negligence in those circumstances where it would be appropriate to require the professional to exercise reasonable care.

100. AIA DOCUMENT A201 (1997), GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, reprinted in JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS APP. C, at C-26 (Brooks/Cole Pub. Co., 6th ed. 2000).

101. See, e.g., *Am. Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439-40 (Iowa 1999) (allowing a tort remedy for economic losses resulting from product defects that could foreseeably result in hazard or danger).

102. See *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 123 (Iowa 2001) (allowing recovery for a school counselor's negligent misrepresentation that resulted in the interference with an athlete's intangible economic interest of playing NCAA basketball under scholarship).

VII. BREACH OF A DUTY VOLUNTARILY ASSUMED

Iowa recognizes the breach of a duty voluntarily assumed as a tort.¹⁰³ Claimants may allege that design professionals voluntarily assumed a duty either by undertaking responsibilities that were not included in a contract or by promising to do certain work on a project site.¹⁰⁴ In *Shepherd Components*, the neighbor alleged that the city's engineer "assumed a duty by instructing [the contractor's] employees on how to perform the job," but the "case was not presented to the jury on [that] theory," therefore, the issue was not considered on appeal.¹⁰⁵ *Fisher v. Dallas County* held a county engineer who voluntarily undertook to advise persons may subject himself to the standard "of skill, care, and learning ordinarily possessed by other members of the engineering profession."¹⁰⁶ Because *Shepherd Components* makes clear that the scope of the engineer's duty to other persons may be carefully defined by contractual language, the tort of breach of a duty voluntarily assumed is likely to be used increasingly by claimants in cases of architects' and engineers' liability. Claimants will try to evade the exculpatory language of architects' and engineers' contracts by alleging that the architects or engineers voluntarily undertook duties that were not required by their contract and that they are liable for breach of the duties in tort.

VIII. INTERFERENCE WITH CONTRACT

Iowa courts have not yet had occasion to determine the scope of a contractor's claim against an architect or engineer for interference with a construction contract. This issue may arise when an architect or engineer provides advice to the owner concerning: (1) the qualifications and performance of a contractor; (2) termination of a contractor; (3) whether work is within the scope of a construction contract; (4) conformance with the work to drawings and specifications; (5) whether progress

103. See *Thompson v. Bohlken*, 312 N.W.2d 501, 507 (Iowa 1981) (stating liability of insurance company to third parties for its inspections of property does not arise from contract for insurance but from its undertaking the responsibility for making inspections in such a manner as to increase the risk of harm or create reliance to another's detriment); *Fabricius v. Montgomery Elevator Co.*, 121 N.W.2d 361, 363-64 (Iowa 1963) (recognizing the common law right to sue an insurer for breach of a duty gratuitously undertaken); RESTATEMENT (SECOND) OF TORTS § 324A (1965) ("One who being under no duty to do so takes charge of another . . . is subject to liability to the other for any bodily harm caused to him by (a) the failure to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.").

104. See *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 617 (Iowa 1981) (alleging that defendant assumed a duty by instructing employees on how to perform their job although under no contractual obligation to do so).

105. *Id.*

106. *Fisher v. Dallas County*, 369 N.W.2d 426, 430-31 (Iowa 1985).

payments should be made; (6) the date of substantial completion; (7) assessment of liquidated damages; or (8) calculation of working days. Generally, the architect or engineer has partial immunity, which allows for candid and accurate advice.¹⁰⁷ This protection is often set forth in contracts.¹⁰⁸ A contractor's claim of interference with a construction contract against the architect or engineer may require proof that the "defendant was acting other than in accord with his contractual obligations to his principal."¹⁰⁹ When a design professional enforces literal compliance with contract specifications to further personal goals or to injure the other party, the design professional is liable for tortious interference.¹¹⁰

IX. ARCHITECTS' AND ENGINEERS' FAILURE TO TEST

In *Roland A. Wilson & Associates v. Forty-O-Four Grand Corp.*¹¹¹ an architect's failure to test windows and subsequent approval of payments to the contractors made the architect liable to the owner for negligence.¹¹² The contract required the architect to "see that the plans were carried out by the contractor."¹¹³ The court specifically held the architect was required to exercise reasonable care to determine whether the contractor had done its work before approving the certificates for payment.¹¹⁴

X. LIABILITY FOR CHANGE OF DESIGN BY OTHERS

When one engineering firm begins work on the project and is replaced by another engineering firm, significant issues of liability and causation are raised when a party is injured. This situation may arise when an engineer is terminated and

107. See RESTATEMENT (SECOND) OF TORTS §§ 596, 772 (1965).

108. See GENERAL CONDITIONS, *supra* note 26, at C-11 to C-12 (defining the architect's role in the administration of the contract); STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT (1996), ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE, *reprinted in* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS App I, at I-30 to I-32 (Brooks/Cole Pub. Co., 6th ed. 2000) (defining the engineer's status during construction).

109. *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781, 790-91 (7th Cir. 1985).

110. *Id.* at 791. See *Bib Constr. Co. v. City of Poughkeepsie*, 204 A.2d 947, 948 (N.Y. App. Div. 1994) (holding a general contractor's claim against an architectural and engineering firm for tortious interference with a contract on a municipal project could lie where the architect or engineer did "not act in good faith and commit[ed] independent torts or predatory acts directed at [the contractor] for personal pecuniary gain"); *J.J. Craviolini v. Scholer & Fuller Associated Architects*, 357 P.2d 611, 613 (Ariz. 1961) (holding no dispute existed between the owner and the contractor, so the architect could not invoke the doctrine of quasi-judicial immunity).

111. *Roland A. Wilson & Assocs. v. Forty-O-Four Grand Corp.*, 246 N.W.2d 922 (Iowa 1976).

112. *Id.* at 925.

113. *Id.* at 924.

114. *Id.* at 925.

replaced by another or a project has been abandoned for a period of time and a new engineer assumes responsibility for the project. In these situations, the issue arises whether the first engineer may be held liable for injuries or damages that result during or because of the continuation of the work by another firm. The acts of the second or substitute engineering firm are often an intervening cause, preventing any negligence of the first engineering firm from being the proximate cause of the plaintiff's injuries.¹¹⁵

*Rieger v. Jacque*¹¹⁶ held that a defendant's allegedly negligent conduct is not a proximate cause of the plaintiff's injuries because the second professional's acts were an intervening cause.¹¹⁷ After receiving tax planning recommendations from an insurance agent, Rieger hired a lawyer to draft a trust.¹¹⁸ The resulting trust proved disastrous and Rieger sued the attorney as well as the insurance agent and his company.¹¹⁹ The Iowa Supreme Court ruled that, as a matter of law, the insurance agent's tax advice was not a proximate cause of plaintiff's damages because a lawyer was subsequently hired to act on the advice and draft the trust for the plaintiff.¹²⁰ The court held the lawyer's acts were unquestionably an intervening cause that excused the defendant insurance agent from liability when the lawyer did not rely on the material supplied by the insurance agent but instead relied on his own discussions with the plaintiff.¹²¹ Following the reasoning in *Rieger*, an engineer who is replaced by a subsequent engineer should not be liable if the second engineer does not use or rely on the first engineer's work.

The court recently summarized the requirements for causation as follows:

[U]nder any definition of causation, this element has two components: (1) the defendant's conduct must have *in fact caused* the plaintiff's damages (generally a factual inquiry) and (2) the policy of the law must require the defendant to be *legally responsible* for the injury (generally a legal question).¹²²

In Iowa, satisfaction of the elements of proximate cause require a showing that the conduct of a party is a substantial factor in producing damage and no other rule of law relieves the defendant of liability.¹²³ Regarding proximate cause, the court in

115. *Rieger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1998).

116. *Rieger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1998).

117. *Id.* at 252.

118. *Id.* at 249.

119. *Id.*

120. *Id.* at 252.

121. *Id.*

122. *Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996).

123. *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 567 (Iowa 1997); *see Gerst v. Marshall*, 549 N.W.2d at 817 (defining the causation requirement solely as conduct which is a

*Kelly v. Sinclair Oil Corp.*¹²⁴ stated: "Proximate causation presents the question of whether the policy of the law will extend responsibility to those consequences which have in fact been produced by an actor's conduct."¹²⁵

Intervening or superseding causes may break the chain of causation between a defendant's conduct and a plaintiff's damages.¹²⁶ The Iowa Supreme Court has stated:

We have held that a defendant's conduct is not a legal cause of a plaintiff's harm if it is superseded by later independent forces or conduct. The court must find that "the later-occurring event is such as to break the chain of causal events between the actor's [conduct] and the plaintiff's injury."¹²⁷

Unless facts are undisputed, the jury determines whether conduct was an intervening or superseding cause.¹²⁸ Applying these causation principles, a second design professional's conduct would likely break the chain of causation between the first design professional's conduct and the plaintiff's damages.

XI. MISREPRESENTATION CLAIMS

Under Iowa law, the duty to use reasonable care in supplying information only applies to persons engaged in the business or profession of supplying information to others.¹²⁹ In many instances, architects and engineers are in the business or profession of supplying information to others, particularly when they are involved in gathering information for design parameters, applications for governmental approval of licenses, or furnishing information that is the basis for design choices. In such instances, the tort of negligent misrepresentation would still require the standard of

substantial factor without which the damage would not have occurred); *Hagen v. Texaco Ref. & Mktg., Inc.*, 526 N.W.2d 531, 537 (Iowa 1995) ("This requirement is met upon proof that a defendant's conduct was a substantial factor in producing the damages and the damages would not have occurred except for the defendant's conduct."); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994) (affirming that the lower court had correctly applied the substantial factor test to determine causation).

124. *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341 (Iowa 1991).

125. *Id.* at 349 (quoting *State v. Marti*, 290 N.W.2d 570, 585 (Iowa 1980)); see also *Gerst v. Marshall*, 549 N.W.2d at 817 (stating the policy determination of proximate cause is made only after cause in fact has been established).

126. *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 597 (Iowa 1996); *Hagen v. Texaco Ref. & Mktg., Inc.*, 526 N.W.2d at 537.

127. *Hagen v. Texaco Ref. & Mktg., Inc.*, 526 N.W.2d at 538 (citations omitted).

128. *Id.*; *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 15 (Iowa 1977); *Iowa Elec. Light & Power Co. v. Gen. Elec. Co.*, 352 N.W.2d 231, 235 (Iowa 1984).

129. *Fry v. Mount*, 554 N.W.2d 263, 266 (Iowa 1996).

the ordinary skill, care, and learning of members of the profession in similar circumstances.¹³⁰

Section 552 of the Restatement (Second) of Torts provides the analytical framework for the theory of negligent misrepresentation.¹³¹ The Restatement provides that negligently prepared plans or specifications give contractors a cause of action against architects or engineers for economic loss.¹³² "This tort [of negligent misrepresentation] does not depend on the existence of a contractual relationship."¹³³

A negligent misrepresentation theory may be based on either supplying false information on the plans or specifications or failing to exercise reasonable care in obtaining or communicating information.¹³⁴ Plans and specifications are to be utilized by a limited number of users, such as contractors, who are well-known to the architect. These contractors rely on the plans of subcontractors and specifications in carrying out their contract with the owner. Negligent misrepresentation is distinguishable from the theory of negligence because misrepresentation focuses on information provided by the maker, rather than solely on the duty of care owed by the maker.¹³⁵

In *Mercy Hospital v. Hansen, Lind & Meyer*,¹³⁶ a statement of representation by an architect that re-caulking would solve the repair problem at a building was found to be a fraudulent misrepresentation.¹³⁷ The tort of fraud applies in very limited circumstances because it requires proof by a preponderance of clear, satisfactory, and convincing evidence that a representation was: (1) false, (2) material, (3) and the defendant knew it was false, (4) the defendant intended to deceive, (5) the plaintiffs acted in reliance on the truth of the representation, and (6) the plaintiffs were justified in so acting.¹³⁸

XII. IMPLIED WARRANTIES

Although there are several implied warranties with respect to construction, Iowa courts have yet to embrace the idea that a design professional's services are subject to an implied warranty.¹³⁹ In a construction contract, it is implied that the

130. *Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975).

131. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

132. *Id.*

133. *Barske v. Rockwell Int'l. Corp.*, 514 N.W.2d 917, 924 (Iowa 1994).

134. *Id.*, 514 N.W.2d at 924; RESTATEMENT (SECOND) OF TORTS § 552.

135. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a.

136. *Mercy Hosp. v. Hansen, Lind & Meyer*, 456 N.W.2d 666 (Iowa 1990).

137. *Id.* at 672-73.

138. *Magnusson Agency v. Pub. Entity*, 560 N.W.2d 20, 28 (Iowa 1997); *Hylar v. Garner*, 548 N.W.2d 864, 871 (Iowa 1996).

139. A minority of state courts have addressed implied warranty claims against design professionals. For example, *Tamarac Dev. Co. v. Delamater, Freund & Assocs.*, 675 P.2d 361 (Kan.

building will be erected "in a reasonably good and workmanlike manner and that it will be reasonably fit for the intended purpose."¹⁴⁰ There is an implied obligation in a construction contract that builders will comply with local ordinances governing buildings.¹⁴¹ Also, the Iowa Supreme Court has recognized an implied warranty of the adequacy of plans and specifications as to whether a project can be constructed at all.¹⁴²

In *Midwest Dredging Co. v. McAninch Corp.*,¹⁴³ the Iowa Supreme Court recognized the claim for breach of an implied warranty in a claim brought by a contractor against a city.¹⁴⁴ The court expressly stated that the basis for a contractor's claim of breach of implied warranty against an owner is the misrepresentation of material facts through concealment or false statements.¹⁴⁵ It specifically stated:

The rule provides that the government is not liable to a contractor for breach of implied warranty unless it misrepresents material facts through concealment or false statement. In essence, this rule establishes that no implied warranty will arise when the government, in good faith, presents all of the information it has on subsurface conditions to the contractor.¹⁴⁶

This discussion clarifies that the basis for the claim of breach of implied warranty in Iowa is that the project plans and specifications are alleged to misrepresent material

1984), involved a claim by a developer against an engineering/architectural firm for improper grading which led to drainage problems. *Id.* at 362-63. The Kansas Supreme Court, discussing whether a contract carried with it an implied warranty of workmanlike performance, stated:

[I]t can be said certain professionals, such as doctors and lawyers, are not subject to an implied warranty. However, an architect and engineer stand in a much different posture as to ensuring a given result than does a doctor or lawyer. The work performed by architects and engineers is an exact science; that performed by doctors and lawyers is not. A person who contracts with an architect or engineer for a building of a certain size and elevation has a right to expect an exact result. The duty of the architect is so strong and inherent in the task, we hold it gives rise to an implied warranty of workmanlike performance.

Id. at 365 (citation omitted). In *Donnelly Constr. Co. v. Obert/Hunt/Gilleland*, 677 P.2d 1292, 1297 (Ariz. 1984), the court held it was error to dismiss the general contractor's implied breach of warranty claim against the architect. *Id.*

140. *Kirk v. Ridgway*, 373 N.W.2d 491, 493 (Iowa 1985) (citing *Busker v. Sokolowski*, 203 N.W.2d 301, 303 (Iowa 1972)).

141. *C & F Maint. & Prop. Mgmt., Inc. v. Eliason & Knuth Drywall Co.*, 418 N.W.2d 44, 45 (Iowa 1988).

142. *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 222 (Iowa 1988).

143. *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216 (Iowa 1988).

144. *Id.* at 221-22.

145. *Id.* at 221.

146. *Id.* at 221-22 (citations omitted).

facts.¹⁴⁷ However, a claim that requires the contractor to prove the city misrepresented a material fact would sound in tort rather than in breach of contract.¹⁴⁸

When a contractor's claim of breach of implied warranty against an owner or governmental entity involves the plans and specifications prepared by a professional, a claim for contribution or indemnity by the owner against the professional may also be involved. The liability of the architect or engineer would be based on the standard of whether the professional exercised the ordinary skill, care, and learning of similarly situated professionals.¹⁴⁹ Under Iowa law, the *Midwest Dredging* elements are not the same as claims of professional negligence by owners against their architects or engineers.¹⁵⁰ The contractor's claim against the city would require proof of misrepresentation as required by the court in *Midwest Dredging*.¹⁵¹

XIII. LIMITATION OF LIABILITY

The Iowa Supreme Court has not expressly addressed whether a limitation of liability in a design professional's contract is enforceable. The Iowa Supreme Court has limited the enforceability of such disclaimers in other circumstances and has identified the factors that the court should consider to determine the enforceability of a design professional's limitation of liability.¹⁵²

147. *Id.*

148. See RESTATEMENT (SECOND) OF CONTRACTS, ch. 7, topic 1, introductory note, at 424-25 (1981) (stating that while misrepresentation under contract law, may, prevent the formation of a contract, make the contract voidable, or provide grounds for reformation of the contract, misrepresentation under tort law provides the basis for an affirmative claim for liability).

149. See *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 913 (Iowa 1975) ("An architect may be held liable for negligence in failing to exercise the ordinary skill of his profession.") (quoting 5 AM. JUR. 2D *Architects* § 25 (1998)); *Chaney Bldg. Co. v. City of Tucson*, 716 P.2d 28, 31 (Ariz. 1986) ("[P]rofessionals, such as architects, have a duty to use ordinary skill, care and diligence in rendering their professional services.").

150. Compare *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 221 (Iowa 1988) ("[T]he government is not liable to a contractor for breach of implied warranty unless it misrepresents material facts through concealment or false statements."), with *Evans v. Howard R. Green Co.*, 231 N.W.2d at 913 ("An architect's liability for negligence resulting in personal injury or death may be based upon his supervisory activities or upon defects in the plans. The liability of the architect, moreover, is not limited to the owner who employed him; the modern view is that privity of contract is not a prerequisite to liability.").

151. *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d at 221-22; *Chaney Bldg. Co. v. City of Tucson*, 716 P.2d at 31 ("The owner may be found liable for breach of implied warranty even though the architect is free from fault (in terms of compliance with the standard of care applicable to architects). Thus, the owner's implied warranty liability is broader than the design professional's liability for professional negligence and the owner may still be liable even though the plans and specifications are found not to have been negligently prepared.").

152. See *Baker v. Stewarts', Inc.*, 433 N.W.2d 706, 708 (Iowa 1988).

The leading Iowa Supreme Court case on this subject, *Baker v. Stewarts', Inc.*¹⁵³ involves an attempt to enforce an exculpatory clause in a contract with a professional hairdresser.¹⁵⁴ The court refused to enforce an exculpatory clause holding it was against public policy for professional hairdressers to avoid liability for their own negligence.¹⁵⁵ The Iowa Supreme Court quoted a commentator who observed that "some relationships are such that once entered upon they involve a status requiring of one party greater responsibilities than that required of the ordinary person, and, therefore, a provision avoiding liability is peculiarly obnoxious."¹⁵⁶ Contracts that relieve people from liability for their own negligence are strictly construed against them and will not be held to excuse negligence unless clearly expressed.¹⁵⁷ Borrowing from the California case, *Tunkl v. Regents of University of California*,¹⁵⁸ the Iowa court considered the following factors in determining when a contract affects public interest:

- (1) [The service concerns a] business of a type subject to public regulation;
- (2) [T]he party seeking exculpation performs a service of great importance to the public which is of practical necessity for at least some members of the public;
- (3) [T]hat party holds itself out as willing to perform the service for any member of the public who seeks it;
- (4) [D]ue to the essential nature of the service the party possesses a decisive advantage in bargaining power;
- (5) [T]he exculpatory clause appears in a standardized adhesion contract; and
- (6) [T]he purchaser is placed under the control of the seller and is thus subject to the risk of carelessness by the seller or its employees.¹⁵⁹

While other states have actively litigated the issue of a design professional's limitation of liability, the Iowa Supreme Court has not addressed the issue outside of the context raised in *Baker*.¹⁶⁰

153. *Baker v. Stewarts', Inc.*, 433 N.W.2d 706 (Iowa 1988).

154. *Id.* at 708.

155. *Id.* at 708-09.

156. *Id.* at 708 (quoting S. WILLISTON, *CONTRACTS* § 1751, at 148 (3d ed. 1972)).

157. *Id.* at 709.

158. *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963).

159. *Baker v. Stewarts', Inc.*, 433 N.W.2d at 708 (quoting *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d at 444-46).

160. *See id.* (finding the exculpatory clause at issue did not absolve liability based on acts of the professional staff); *see also* *Pratt Cent. Park Ltd. P'ship v. Dames & Moore, Inc.*, 60 F.3d 350, 351 (7th Cir. 1995) (dismissing the case for lack of jurisdictional amount but finding a contract capping liability is binding in Illinois); *Gibbes, Inc., II v. Law Eng'g, Inc.*, No. 91-1048, 1992 U.S. App. LEXIS 7602, at *14-*15 (4th Cir. Apr. 20, 1992) (enforcing a contract provision limiting an

XIV. STATUTORY IMMUNITY ON CLAIMS OF DEFECTIVE SPECIFICATIONS

Architects and engineers may share the sovereign immunity of the governmental entities for which they work, provided they follow the government's requirements.¹⁶¹ A claim of negligence, breach of implied warranty, and defective specifications will not lie against a municipality in Iowa unless the claimant proves the specifications violated a generally accepted engineering standard.¹⁶² Iowa law provides statutory immunity that expressly prohibits the claims of negligent design or specification without proof that a generally recognized engineering standard has been violated:

Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification or negligent construction or reconstruction of a highway, secondary road, or street as defined in section 321.1, subsection 78 that was constructed or reconstructed in accordance with the generally recognized engineering or safety standard, criteria or design theory in existence at the time of the construction or reconstruction.¹⁶³

The Iowa Supreme Court specifically requires the claimant to prove that there has been a violation of a generally accepted engineering standard.¹⁶⁴

The immunity of the sovereign—the state government or a municipality—may extend to those who comply with the contract requirements established by the governmental entity.¹⁶⁵ In *McLain v. State*,¹⁶⁶ the claimant was injured in a construction zone accident when traffic ahead of him stopped abruptly and he rear-ended the vehicle in front of him.¹⁶⁷ The claimant sued the state, general contractors, and signage subcontractor for failure to place adequate warning signs alerting

engineering firm's liability under Georgia law); *Valhal Corp. v. Sullivan & Assocs., Inc.*, 44 F.3d 195, 202 (3d Cir. 1995) (stating that exculpatory clauses are disfavored under Pennsylvania law and must therefore meet certain conditions to be enforceable); *City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1278 (Ak. 1994) (finding a limitation of liability clause is void under Alaska law); *Viner v. Brockway*, 30 Cal. App. 4th 1307, 1318 (1994) (applying the *Tunkl* factors to find a liability limiting clause unenforceable); *Markborough California, Inc. v. Super. Ct.*, 227 Cal. App. 3d 705, 715 (1991) (holding limitation of liability clauses are not against public policy when negotiated by the parties).

161. See IOWA CODE §§ 669.2, 670.2 (2001).

162. *Id.* § 670.4(8).

163. *Id.*

164. See *Connolly v. Dallas County*, 465 N.W.2d 875, 877 n.3 (Iowa 1991) (stating it is the party claiming the standard has not been met who has the burden of proof).

165. *McLain v. State*, 563 N.W.2d 600, 601 (Iowa 1997).

166. *McLain v. State*, 563 N.W.2d 600, (Iowa 1997).

167. *Id.* at 602.

motorists to traffic congestion.¹⁶⁸ The Iowa Department of Transportation (IDOT) developed the plans and specifications for the "type, number and location of traffic control devices."¹⁶⁹ The subcontractor placed signs warning of construction ahead in accordance with the IDOT's plans and specifications.¹⁷⁰ The district court granted summary judgment pursuant to section 668.10(1) of the Iowa Code which immunizes the state against claims of "failure to place, erect or install traffic control devices."¹⁷¹ The court held the state was immune because none of the immunity exceptions applied.¹⁷² The state could not be sued for failure to erect additional signs because the signs were in perfect working order and were not misleading and there were not exigent circumstances requiring additional signs.¹⁷³ Moreover, the general contractor and the signage subcontractor were also entitled to immunity because they "complied with all state plans and specifications and did not perform their work in a negligent manner."¹⁷⁴ The court further found that the contractor and subcontractor had no duty to monitor the effectiveness of the signs.¹⁷⁵

Architects and engineers working for municipalities may enjoy the same immunity from liability as the municipality. Iowa Code section 670.2 provides: "For the purposes of this chapter, employee includes a person who performs services for a municipality whether or not the person is compensated for the services, unless the services are performed only as an incident to the person's attendance at a municipality function."¹⁷⁶ This definition of "employee" is broad and should encompass independent contractors as well as common law employees.¹⁷⁷ The definition above should be contrasted with the definition of employee in Iowa's State Tort Claims Act.¹⁷⁸ With respect to tort claims against the state, the legislature expressly stated: "'Employee of the state' . . . does not include a contractor doing business with the state."¹⁷⁹ Additionally, while the Municipal Tort Claims Act¹⁸⁰ insulates agents, employees, or officers of the state from suits based on acts and

168. *Id.* at 601.

169. *Id.* at 602.

170. *Id.*

171. *Id.* at 603-04 (citing IOWA CODE § 668.10(1) (2001)).

172. *Id.* at 604.

173. *Id.*

174. *Id.*

175. *Id.*

176. IOWA CODE § 670.2.

177. *See id.*

178. *See id.* § 669.2(4) (defining employee). This Article references Chapter 669 of the Iowa Code, entitled *State Tort Claims Act*, by its title. *See id.* ch. 669.

179. *Id.* § 669.2(4).

180. *See id.* ch. 670. Chapter 670 of the Iowa Code, entitled *Tort Liability of Governmental Subdivisions*, is popularly referred to as the Municipal Tort Claims Act. *See id.* This Article references Chapter 670 as the Municipal Tort Claims Act.

omissions undertaken in the course of their duties, the State Tort Claims Act does not contain similar language.¹⁸¹ The legislature was careful in the State Tort Claims Act to narrowly define the term "employee" to exclude independent contractors and only indemnifying employees.¹⁸² In contrast, the Municipal Tort Claims Act defines the term "employee" broadly to include all persons who provide services to a municipality and grants immunity not only to employees, under the statutory definition, but also to all agents of a municipality.¹⁸³ Comparison of these two statutes strongly suggests that independent contractors of municipalities have immunity from suits based on acts and omissions undertaken in the course of fulfilling their duties to the municipality. While discussion of this issue has not been specifically reported by an Iowa court, it has been raised in Minnesota, for example.¹⁸⁴

XV. IOWA'S STATUTES OF LIMITATIONS

The amount of time a party has to commence an action is subject to applicable statutes of limitations.¹⁸⁵ Generally, the statute begins to run when the cause of action accrues as measured by the discovery rule.¹⁸⁶

A. The Discovery Rule Generally Provides that the Statute of Limitations Runs from the Date of Discovery of the Claim or Damage

Under the Iowa discovery rule, the statute of limitations begins to run when the injured person discovers, or in the exercise of reasonable care should have discovered, the alleged wrongful act.¹⁸⁷ The discovery rule delays the accrual of a cause of action until a plaintiff has discovered an injury or, by the exercise of reasonable diligence, should have discovered it.¹⁸⁸ The Iowa Supreme Court has

181. See *id.* §§ 669.4, .21, 670.4.

182. *Id.* §§ 669.4, .21.

183. See *id.* § 670.2 ("For purposes of this chapter, employee includes a person who performs services for a municipality . . .").

184. See, e.g., *Sota Foods, Inc. v. Larson-Peterson & Assocs., Inc.*, 497 N.W.2d 276, 282-83 (Minn. Ct. App. 1993) (finding engineers may be entitled to discretionary immunity when acting as "quasi-employees" of the city).

185. See generally IOWA CODE ch. 614 (discussing when a cause of action must be brought).

186. See *Langer v. Simpson*, 533 N.W.2d 511, 516-17 (Iowa 1995) (highlighting that the statute of limitations for tort cases began to run when the injury occurred before the adoption of IOWA CODE § 614.1(9)).

187. *Borchard v. Anderson*, 542 N.W.2d 247, 250 (Iowa 1996); *Woodroffe v. Hasenclever*, 540 N.W.2d 45, 48 (Iowa 1995); *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347, 351 (Iowa 1987).

188. *Sparks v. Metalcraft, Inc.*, 408 N.W.2d at 351; *Brown v. Ellison*, 304 N.W.2d 197, 201 (Iowa 1981); *Chrischilles v. Griswold*, 150 N.W.2d 94, 100 (Iowa 1967).

made it clear that a person is charged with the knowledge of what a reasonable investigation would have disclosed.¹⁸⁹ Specifically, the Iowa Supreme Court stated:

In addition, a person is charged on the date of the accident with knowledge of what a reasonable investigation would have disclosed The statute begins to run when the person gains knowledge sufficient to put him on inquiry. On that date, he is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Moreover, once a person is aware a problem exists, he has a duty to investigate even though he may not have exact knowledge of the nature of the problem that caused the injury.¹⁹⁰

Knowledge is imputed to claimants when they gain information sufficient to alert a reasonable person of the need to investigate.¹⁹¹ As to the date this knowledge is ascertained, the plaintiff is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation.¹⁹²

Clarifying the rule's purpose, the Iowa Supreme Court stated:

The underlying purpose of the discovery rule is that a statute of limitations should bar the remedies of claimants who have been excusably unaware of their rights to sue. Such purpose would be thwarted if we allowed claimants to ignore the statute of limitations when it becomes obvious they have an actionable claim based on one or more theories of action, and then later permit them to sue when additional facts are uncovered supporting additional theories. We therefore hold that once claimants have knowledge of facts supporting an actionable claim they have no more than the applicable period of limitations to discover all the theories of action they may wish to pursue in support of that claim.¹⁹³

The court has explained inquiry notice—the duty to investigate without knowledge of the exact nature of the problem that caused the injury—in several cases.¹⁹⁴ In *Estate of Montag v. T H Agriculture & Nutrition Co.*,¹⁹⁵ the Iowa Supreme Court approved of the doctrine stating: “Under our cases, the statute of limitations begins to run when a plaintiff first becomes aware of facts that would

189. *Vachon v. State*, 514 N.W.2d 442, 446 (Iowa 1994); *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985).

190. *Sparks v. Metalcraft, Inc.*, 408 N.W.2d at 351-52 (citations omitted).

191. *Ranney v. Parawax Co.*, 582 N.W.2d 152, 153 (Iowa 1998); *Estate of Montag v. T H Agric. & Nutrition Co.*, 509 N.W.2d 469, 470 (Iowa 1993).

192. *Estate of Montag v. T H Agric. & Nutrition Co.*, 509 N.W.2d at 470.

193. *Sparks v. Metalcraft, Inc.*, 408 N.W.2d at 352 (citation omitted).

194. *Estate of Montag v. T H Agric. & Nutrition Co.*, 509 N.W.2d at 469.

195. *Estate of Montag v. T H Agric. & Nutrition Co.*, 509 N.W.2d 469 (Iowa 1993).

prompt a reasonably prudent person to begin seeking information as to the problem and its cause."¹⁹⁶ In *Franzen v. Deere & Co.*,¹⁹⁷ the Iowa Supreme Court stated:

The period of limitations is the outer time limit for making the investigation and bringing the action. The period begins at the time the person is on inquiry notice Moreover, the duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury. It is sufficient that the person be aware that a problem existed. One purpose of inquiry is to ascertain its exact nature The information they possessed on the date of the accident was plainly sufficient to put them on inquiry notice concerning possible defects in the [product]. They did not investigate at that time. When they later investigated, they found the alleged defects they now rely on. They are not aided by the fact they postponed their investigation until their discussion with a lawyer in January 1981. The lawyer's suggestion that they might have an actionable claim did not diminish their prior duty to investigate the facts when they were on inquiry notice.¹⁹⁸

In *Chrischilles v. Griswold*,¹⁹⁹ the Iowa Supreme Court stated: "The question in any given case is not, What did plaintiff know of the injury done him?' but, 'What might he have known', by the use of the means of information within his reach, with the vigilance which the law requires of him?"²⁰⁰ In *Sparks v. Metalcraft, Inc.*,²⁰¹ the court explained the rule as follows:

The statute begins to run when the person gains knowledge sufficient to put him on inquiry. On that date, he is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Moreover, once a person is aware a problem exists, he has a duty to investigate even though he may not have exact knowledge of the nature of the problem that caused the injury.²⁰²

In *LeBeau v. Dimig*,²⁰³ the Iowa Supreme Court barred a plaintiff's claim that she discovered new injuries after the statute had run.²⁰⁴ The plaintiff suffered minor injuries and received less than \$200 in medical expenses but filed a claim more than two years after the accident when she developed epilepsy.²⁰⁵ The court held the

196. *Id.* at 470.

197. *Franzen v. Deere & Co.*, 377 N.W.2d 660 (Iowa 1985).

198. *Id.* at 662-63.

199. *Chrischilles v. Griswold*, 150 N.W.2d 94 (Iowa 1967).

200. *Id.* at 100.

201. *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347 (Iowa 1987).

202. *Id.* at 351-52.

203. *LeBeau v. Dimig*, 446 N.W.2d 800 (Iowa 1989).

204. *Id.* at 802-03.

205. *Id.* at 801.

minor injuries were such that they put the plaintiff on inquiry notice and the plaintiff could not split her claims between the injuries she discovered soon after her accident and those injuries which developed later.²⁰⁶ The statute of limitations begins to run when "a plaintiff first becomes aware of facts that would prompt a reasonably prudent person to begin seeking information as to the problem and its cause."²⁰⁷ There arises a duty of inquiry once a problem arises. The Iowa Supreme Court held, "once a person is aware a problem exists, he has a duty to investigate even though he may not have exact knowledge of the nature of the problem that caused the injury,"²⁰⁸ and "a person is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation."²⁰⁹ Moreover, plaintiffs may not postpone their lawsuits until such investigation is completed, but must file immediately and allow the discovery of additional facts to occur within the "procedural mechanisms" of the lawsuit.²¹⁰ In short, "the statute of limitations begins to run when the injured person discovers or in the exercise of reasonable care should have discovered the allegedly wrongful act."²¹¹

*B. Two-Year Statute of Limitations for Claims of Injury
to Person or Wrongful Death*

Iowa Code section 614.1(2) provides for a two-year statute of limitations for personal injury actions.²¹² As previously discussed, the two-year statute of limitations for personal injury actions is subject to the discovery rule.²¹³

*C. Five-Year Statute of Limitations for Claims for Injury to Property Including
Claims of Negligence, Breach of Implied Warranty, and Fraud*

Claims for breach of an implied warranty, fraud, and negligence are subject to a five-year statute of limitations under section 614.1(4) of the Iowa Code.²¹⁴ That section provides:

206. *Id.* at 802-03.

207. *Woodroffe v. Hasenclever*, 540 N.W.2d 45, 48 (Iowa 1995) (barring the claims alleging newly discovered sexual abuse because the plaintiff was on inquiry notice); see *Vachon v. State*, 514 N.W.2d 442, 448 (Iowa 1994) (holding the plaintiffs possessed the requisite knowledge of their potential cause of action when they retained the services of their attorneys).

208. *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347, 352 (Iowa 1987).

209. *Frideres v. Schiltz*, 113 F.3d 897, 899 (8th Cir. 1997) (applying Iowa law and citing *Sparks v. Metalcraft, Inc.*, 408 N.W.2d at 351).

210. *Woodroffe v. Hasenclever*, 540 N.W.2d at 48.

211. *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985) (citation omitted).

212. IOWA CODE § 614.1(2) (2001).

213. See discussion *supra* Part XV(A).

214. IOWA CODE § 614.1(4).

Those [injuries] founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.²¹⁵

This five-year statute of limitations will apply to most claims against design professionals for negligence because injury to property is the likely damage. The five-year statute covers actions for negligent damage to property,²¹⁶ breach of implied warranty,²¹⁷ and fraud.²¹⁸ Each of these claims is subject to the discovery rule.²¹⁹ For example, in *St. Andrew Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*,²²⁰ an owner sued an architect for breach of implied warranty, fraud, and negligence.²²¹ The court dismissed these claims because the owner failed to discover within the five-year statutory period that there existed sufficient facts to warrant an investigation.²²²

D. Ten-Year Statute of Limitations for Claims Founded on Breach of a Written Contract

The statute of limitations for breach of contract in Iowa requires that claims be brought within ten years.²²³ In *Brown v. Ellison*,²²⁴ the Iowa Supreme Court clarified that the statute of limitations for breach of an oral contract is five years and

215. *Id.*

216. *See* *Clark v. Figge*, 181 N.W.2d 211, 215-16 (Iowa 1970) (deciding that damage to property includes interference with business relationships and is therefore covered by § 614.1(4)); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 383 (Iowa Ct. App. 1989) (finding plaintiff's negligent misrepresentation claim properly falls within § 614.1(4)).

217. *See* *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990) ("A five-year statute of limitations governs actions for breach of implied warranty."); *City of Carlisle v. Fetzer*, 381 N.W.2d 627, 628-29 (Iowa 1986) (applying § 614.1(4) five-year statute of limitations to breach of implied warranty); *Kitzinger v. Wesley Lumber Co.*, 419 N.W.2d 739, 740 (Iowa Ct. App. 1987) (applying a five-year statute of limitations to a breach of warranty claim).

218. *See* *Bob McKiness Excavating & Grading, Inc. v. Morton Buildings, Inc.*, 507 N.W.2d 405, 408 (Iowa 1993) (stating that "actions for injuries to property and for relief on the ground of fraud must be brought within five years").

219. *Brown v. Ellison*, 304 N.W.2d 197, 201 (Iowa 1981); *Chrischilles v. Griswold*, 150 N.W.2d 94, 100 (Iowa 1967); *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347, 352 (Iowa 1987); *see* discussion *supra* Part XV(A).

220. *St. Andrew's Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*, Nos. 1999-443, 9-700, 98-1447, 2000 WL 18714, at *1 (Iowa Ct. App. Jan. 12, 2000).

221. *Id.* at *2.

222. *Id.* at *4.

223. IOWA CODE § 614.1(5) (2001).

224. *Brown v. Ellison*, 304 N.W.2d 197 (Iowa 1981).

commences to run from the date of the completion of the contract performance.²²⁵ The court stated:

In a contractual warranty action the statutory period of limitations normally commences when the contract is breached, unless the warranty relates to a future event, in which case the limitations period begins to run on the happening of the specified event. Similarly, a cause of action on a contract accrues and the limitations period begins to run when the contract is breached, not when the damage results or is ascertained.²²⁶

In *St. Andrew*, the court held the ten-year statute of limitations for written contracts applied, and (from the date identified in the contract the statute ran on the breach of contract and express warranty claims).²²⁷ The contract in *St. Andrew* used language similar to the AIA Document B141.²²⁸ The court found that the statute of limitations began to run no later than the date of substantial completion and the claims based on the written contract were barred as a result of the lapse of ten years before the lawsuit was filed against the architect.²²⁹

E. The Statute of Repose Terminates Claims Fifteen Years After Completion of the Project, Regardless of the Date of Discovery of the Claim

Iowa Code subsection 614.1(11) is Iowa's statute of repose.²³⁰ Statutes of repose are different from statutes of limitation.²³¹ Rather than *extend* the five-year statute of limitations of Iowa Code section 614.1(4) to bring claims of breach of implied warranty, negligence, or fraud for damage to property to a fifteen-year statute of limitations, Iowa's statute of repose simply *bars* claims for injury to property or person if those claims are not brought within fifteen years of the defendant's act or omission.²³²

225. *Id.* at 200 (citing IOWA CODE § 614.1(4)).

226. *Id.* (citations omitted).

227. *St. Andrew Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*, Nos. 1999-443, 9-700, 98-1447, 2000 WL 18714, at *2-*3 (Iowa Ct. App. Jan. 12, 2000) (citing IOWA CODE § 614.1(5)).

228. See STANDARD FORM *supra* note 26, at A-7 (providing that a demand for arbitration shall be made within a reasonable time and in no event after the applicable statute of limitations).

229. *St. Andrew Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*, Nos. 1999-443, 9-700, 98-1447, 2000 WL 18714, at *1-*3.

230. IOWA CODE § 614.1(11); see *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993) (discussing the statutes of limitations of IOWA CODE ch. 614 and distinguishing § 614.1(11) as a statute of repose).

231. Statutes of repose limit the time in which a cause of action may *arise*, whereas statutes of limitations limit the time in which a cause of action may be *brought*. BLACK'S LAW DICTIONARY 982 (6th ed. 1991).

232. IOWA CODE § 614.1(11).

The Iowa Supreme Court distinguished statutes of limitations and statutes of repose as follows:

While Iowa Code chapter 614 is captioned "Limitations of Actions," subsection 614.1(11) is, in effect, a statute of repose. "Statutes of repose are different from statutes of limitation, although they have comparable effects." A statute of limitations bars, after a certain period of time, the right to prosecute an accrued cause of action. By contrast, a statute of repose "terminates any right of action after a specified time has elapsed, regardless of whether or not there has as yet been an injury." A statute of repose period begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs. Under a statute of repose, therefore, the mere passage of time can prevent a legal right from ever arising.²³³

F. *Agreements That Identify the Date from Which the Statute of Limitations Commences to Run Are Enforceable*

The Iowa Supreme Court allows some contractual restriction on the statute of limitations. In *Hamm v. Allied Mutual Insurance Co.*,²³⁴ the court held an "insurance company has the ability, if it so chooses, to clearly articulate the applicable limitations period for claims against the tortfeasor and the insurer, and the event upon which the limitations period begins to run."²³⁵ The court further stated that a policy that does not establish the applicable limitations period will be based on contract principles and the applicable statute of limitations will apply.²³⁶ The Standard AIA Owner/Architect Agreement states when the statute of limitations commences to run:

Article 9.3. Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date of issuance of the final certificate for payment for acts or failures to act occurring after Substantial Completion.²³⁷

233. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d at 408 (quoting *Hanson v. Williams County*, 389 N.W.2d 319, 321 (N.D. 1986) (citations omitted)).

234. *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775 (Iowa 2000).

235. *Id.* at 784.

236. *Id.*

237. STANDARD FORM, *supra* note 26, at A-8. For an example of language materially adopting the substance of AIA Document, see *St. Andrew Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*, Nos. 1999-443, 9-700, 98-1447, 2000 WL 18714, at *1 (Iowa Ct. App. Jan. 12, 2000).

Article 9.2 of the Owner/Architect Agreement defines the terms used in the contract as follows: "Terms in this Agreement shall have the same meaning as those in AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement."²³⁸

The Owner/Architect Agreement general condition 8.1.3 defines the Date of Substantial Completion as "the *date certified by the Architect* in accordance with Paragraph 9.8.1"²³⁹ which states: "Substantial Completion is the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the owner can occupy or utilize the work for its intended use."²⁴⁰

In *St. Andrew*, the court enforced contractual provisions that identified the start date for the running of the statute of limitations.²⁴¹ The language contained in AIA Document B141 was found to be enforceable and contractually bound the parties as to the start date for the running of the statute of limitations.²⁴²

G. Repair Estoppel May Toll the Statute of Limitations

The enforcement of a statute of limitations to bar a claim may be inequitable when defendants have made specific misrepresentations which delay the filing of the claim.²⁴³ Repair estoppel is derived from the doctrine of equitable estoppel.²⁴⁴ The Iowa Supreme Court stated:

We first turn to the issue of repair estoppel. This theory is an offshoot of the doctrine of equitable estoppel. Estoppel is triggered when false representations induce the plaintiff into action to his detriment under the statute of limitations. Whether repairs can serve as the equivalent of misrepresentations is an issue of first impression from our court. . . .

. . . In developing our own rule, we look to the purpose of the doctrine of equitable estoppel. To prevent fraudulent and stale actions our legislature has designated time periods in which a claim must be brought. Equitable

238. STANDARD FORM, *supra* note 26, at A-8.

239. GENERAL CONDITIONS, *supra* note 26, at C-17 (emphasis added).

240. *Id.* at C-18.

241. *St. Andrew Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*, 2000 WL 18714, at *1.

242. *Id.*

243. *See Meier v. Alfa Laval, Inc.*, 454 N.W.2d 576, 578-80 (Iowa 1990) (explaining that equitable principles may alleviate the harshness of the time bar when the party seeking the advantage of this rule cannot in good conscience cast aside his prior acts or assertion).

244. *Id.* at 579-80.

principles may alleviate the harshness of the time bar in cases when the party seeking the advantage of this rule cannot in good conscience cast aside his prior acts or assertions. Conduct amounting to false misrepresentation or concealment needs to be deceptive or fraudulent.

The repair of defective goods does not in itself rise to the level of deception. Neither do we believe that repairs accompanied by assertions that they will cure the defect generally amount to false misrepresentation. To be deceptive or fraudulent there must be some evidence that such repairs and assertions were not only made to conceal the true condition of the product, but also with the intent to mislead the injured party into the trap of the time bar. When such equitable grounds have not been established by clear and convincing evidence, it may not serve as a deterrent to the running of the statute of limitations.²⁴⁵

Therefore, the essential element of the Iowa doctrine of repair estoppel requires false representations or concealment.²⁴⁶ As with claims of fraud, the claim of false misrepresentation or concealment must be established by clear and convincing evidence to overcome the statute of limitations.²⁴⁷ In *St. Andrew*, the court determined that the doctrine of repair estoppel had not been established by clear and convincing evidence and the statute of limitations against the architect had run before the claims were filed by the owner.²⁴⁸ Iowa's requirement should be contrasted with Pennsylvania for example, that has a much broader version of the repair estoppel doctrine.²⁴⁹

XVI. INDEMNIFICATION

"Indemnity, a form of restitution, is founded on equitable principles; it is allowed where one person has discharged an obligation that another person should bear; it places the final responsibility where equity would lay the ultimate burden."²⁵⁰ The most common type of indemnity involving architects and engineers is express contractual indemnity.²⁵¹ An indemnity contract will not be construed to cover losses resulting from one's own negligence unless the right to contractual indemnity clearly

245. *Id.* (citations omitted).

246. *Id.*

247. *Meier v. Alfa Laval, Inc.*, 454 N.W.2d at 578.

248. *St. Andrew Evangelical Lutheran Church v. Larson & Unzeitig, Inc.*, Nos. 1999-443, 9-700, 98-1447, 2000 WL 18714, at *4-*5 (Iowa Ct. App. Jan. 12, 2000).

249. *See Amodeo v. Ryan Homes, Inc.*, 595 A.2d 1232, 1236-37 (Pa. Super. Ct. 1991) (finding Pennsylvania has not formally adopted the repair doctrine and the plaintiff would have to prove the defendant represented that repairs had cured the defect for equitable estoppel to apply).

250. *Hunt v. Emzen*, 252 N.W.2d 445, 447-48 (Iowa 1977).

251. *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 916-17 (Iowa 1975).

and unequivocally expresses that indemnitees will recover for their own negligence.²⁵² Where the indemnity contract is clear and unambiguous, it will be enforced and there is no need to resort to rules of construction.²⁵³ Accordingly, the rule of strictly construing the indemnity contract against relieving one of the consequences of one's own negligence would not undo an unambiguous contract.

The Iowa Supreme Court addressed indemnity contracts in favor of architects and engineers in the case of *Martin & Pitz Associates, Inc. v. Hudson Construction Services, Inc.*²⁵⁴ The court referred to the contractual indemnity requirement of AIA Document A201 which provides:

[T]he contractor shall indemnify and hold harmless the owner, architect, architect's consultants, and agents and employees . . . from and against claims, damages, losses and expenses . . . but only the extent caused in whole or in part by negligent acts or omissions of the contractor, a subcontractor; anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by the party indemnified hereunder.²⁵⁵

The court held the negligence of injured employees for causing their own injuries could not be imputed or held against general contractors for indemnification purposes.²⁵⁶ Where the only negligence of the contractor was the contributory negligence of the contractor's injured employee, the contract would not be construed to require the contractor to indemnify the architect for the defense of a lawsuit alleging negligence against the architect.²⁵⁷ Secondly, the Iowa Supreme Court held the indemnity obligation of the AIA General Conditions did not clearly and unequivocally require the contractor to indemnify the architect for the architect's own negligence.²⁵⁸ The contract did not provide indemnification for a claim against the architect alleging solely the negligence of the architect.²⁵⁹ Because architects were responsible for the design of the project, any claim of negligent design would necessarily be directed only at them, and the contract language with the contractor did not require indemnification for such an allegation.²⁶⁰

252. Herter v. Ringland-Johnson-Crowley Co., 492 N.W.2d 672, 674 (Iowa 1992).

253. Employers Mut. Cas. Co. v. Chi. & Northwestern Transp. Co., 521 N.W.2d 692, 693 (Iowa 1994); Thornton v. Guthrie County Rural Elec. Coop. Ass'n, 467 N.W.2d 574, 577 (Iowa 1991).

254. Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc., 602 N.W.2d 805 (Iowa 1999).

255. GENERAL CONDITIONS, *supra* note 26, at C-9; see Martin & Pitz, Assocs., Inc. v. Hudson Constr. Servs., Inc., 602 N.W.2d at 806.

256. Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc., 602 N.W.2d at 808.

257. *Id.*

258. *Id.* at 809.

259. *Id.*

260. *Id.*

XVII. CONCLUSION

Recent Iowa Supreme Court cases make architect's and engineer's contracts increasingly important. Design professionals can limit their risk on projects through careful drafting. The contracts can describe the scope of services, persons to whom duties run, excluded services, job site safety responsibilities, warranties, consequential damages, indemnities, limitations of liability, standard of care, code compliance, hazardous materials, statutes of limitation, document ownership, copyrights, dispute resolution, and other issues.

The standard American Institute of Architects (AIA) and Engineers Joint Contract Documents Committee (EJCDC) provide useful standard forms. Design professionals and their attorneys may include supplemental risk management provisions. Design professionals who use a simple purchase order form rather than these longer standard form contracts must pay attention to their drafting, also. Design professionals should take full and complete benefit of the recent case law developments from Iowa courts when drafting their contracts.

Design professionals have an opportunity to limit their exposure under common law tort claims through careful contract drafting. If contract language exonerates design professionals completely from the economic consequences of their mistakes, however, courts and juries will likely look to the common law to allocate those damages to the responsible persons. The recent court decisions invite architects and engineers to negotiate strong contractual defenses, but when the contract language shields the parties at fault from damages for their acts, the courts may reverse the trend.