# Annual Review of Significant Cases Affecting Design Professionals

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**This annual update is to provide a review of the most significant decisions impacting design professionals. The cases will consider the following important issues: the effect contractual language has on a professional designer's liability, duty of care owed to third parties and its scope, the completed and accepted doctrine, privity of contract issues, coverage issues, the economic loss rule, spoilage, *nullum tempus*, certificates of merit, and arbitration agreements.**

**As will be discussed, courts have reached various conclusions regarding duty to third persons, the accepted and completed doctrine, and whether privity will prevent actions between parties who are not in contract with each other. Further, these cases consider the extent to which contracting will limit a professional designer's liability for defective designs and how courts enforce such limitations. This update also provides case law suggesting that courts look to clear, unambiguous language in policies to decide coverage issues. Lastly, the cases included illustrate the complexity in applying the economic loss rule.**

## Contract

***LeBlanc v. Logan Hilton Joint Venture,* 463 Mass. 316, 974 N.E.2d 34 (2012)**

*The Supreme Judicial Court of Massachusetts held that an architect can be held liable for contribution for a breach of its contractual duties. However, a party has no right to contractual indemnification where the architect failed to report a subcontractor's negligence and the contract provided that the architect would not be responsible for the acts or omissions of the subcontractor.*

An electrician was killed by electrocution when he was repairing an electrical transformer at the Logan Airport Hilton Hotel in Boston. The plaintiff and administratrix of the hotel brought suit against numerous parties alleging negligence, gross negligence, and breach of warranty. These parties included the owner of the hotel, Logan Hilton Joint Venture (Hilton); the architect that designed the hotel, Cambridge Seven Associates, Inc. (Cambridge); the consultant that Cambridge retained to provide electrical services, Cosentini Associates-MA, LLP (Cosentini); and the construction subcontractor for electrical services, Broadway Electrical Co., Inc. (Broadway). Cross-

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claims were filed by Hilton and Broadway against Cambridge and Cosentini for indemnification and contribution. The trial court granted summary judgment in favor of Cambridge and Cosentini as to the complaint and the cross-claims.

Hilton and Broadway appealed from the grant of summary judgment as to their cross-claims. On appeal, the appeals court affirmed summary judgment as to Broadway's cross claim for indemnification, but reversed as to the other cross-claims. The supreme judicial court then affirmed the trial court's grant of summary judgment in favor of Cambridge and Cosentini as it related to the indemnification cross-claims, but reversed as to the contribution cross-claims.

Hilton and Cambridge entered a contract in which Cambridge was going to provide architectural services to Hilton for a hotel construction project. Under the contract, Cambridge "was to provide various professional services, including architecture, technical specification writing, coordination of consultants' services, and electrical engineering."[1] The contract also stated that Cambridge "was to prepare 'Design Development Documents' for the hotel consisting of 'drawings, specifications and other documents which fix and describe the expected final size and character of the Project,' including electrical systems materials."[2] Cambridge was to develop a "preliminary layout of switchgear, transformer and generator placement"[3] and was to use such specifications to prepare the final construction documents, which would include "final electrical specifications."

Once the construction phase started, Cambridge had to visit the site regularly to make sure the work was being performed in accordance with the construction documents. Cambridge, however, "was not required to make exhaustive or continuous on-site inspections."[5] Cambridge was required to submit written reports to Hilton every two weeks detailing Cambridge's observations and progress on the work. Cambridge also, according to the contract, had to notify Hilton of any deficiencies or deviations from the requirements of the construction contract which came to Cambridge's attention.

The contract specified that Cambridge "shall not have control over or charge of acts or omissions of the contractor or its subcontractors, and 'shall not be responsible' for the contractor's 'failure to carry out Work in accordance with the Construction Contract.'"[6] The indemnity provision of the contract stated that Cambridge would indemnify Hilton against all claims "'arising out of and to the extent caused by the negligent acts, errors or omissions during the performance of professional services'[7] by its consultants provided that the claims did not 'result from the negligent acts or omissions of the Indemnitees or other parties for whom Cambridge is not responsible.'"[8]

The court then described the electrical switchgear and how LeBlanc was electrocuted. When LeBlanc arrived at the switchgear, it had no warning signs or other text on the face of the switchgear cabinets. The doors of the switchgear were also opened. LeBlanc was electrocuted when he attempted to open cabinet 1 and touched the gear.

The specifications of the switchgear were as follows: The switchgear was to have a stenciled "mimic bus" diagram, which would show the configuration of the equipment. It was also supposed to have a warning sign on or adjacent to the switching equipment stating: "WARNING—LOAD SIDE OF SWITCH MAY BE ENERGIZED BY BACKFEED."[9] The manufacturer of the switch gear noted that he never received the specifications and therefore did not install the diagram or warning signs on the switchgear. A subcontractor hired by Broadway also tested the switchgear and recommended placing warning signs on it. Cosentini reviewed the report and also wrote a letter to Broadway agreeing with the subcontractor that warning signs needed to be installed on the switchgear. Nevertheless, this recommendation failed to lead to warning signs and the diagram being placed on the switchgear.

While the trial court concluded that some party was negligent for failure to install warning signs where the decedent was killed, the court ultimately ruled that it could not be Cambridge or Cosentini (the design team) because Cambridge "'shall not have control over or charge of acts or omissions' of the contractor or its subcontractors, and 'shall not be responsible' for the contractor's 'failure to carry out Work in accordance with the Construction Contract.'"[10] As a result, the court entered summary judgment concluding that the design team could not be held liable for contribution or indemnification. Thereafter, Hilton and Broadway settled with the plaintiff for $3 million. Hilton and Broadway were the only parties to appeal the court's grant of summary judgment.

The appeals court concluded that while the design team had no control over the contractor and subcontractors, they did owe a duty to Hilton to send biweekly reports of "work progress and competence."[11] The court noted this duty extended to reporting deviations and deficiencies from the contract's requirements. As a result, the court concluded that the "Design Team's failure to notify Hilton of Broadway's failure to install the warning signage constituted a contractual breach that posed 'a field of risk for third parties likely to come into contact with the switchgear,' and thereby created an issue of fact of causal negligence for trial."[12] No expert testimony was needed, according to the court, because a layperson would be able to comprehend the issue of negligence as it related to the design team's contractual duties. The court then concluded that the trial court erred by granting summary judgment against Hilton for indemnification—both under contract and common law. As for Broadway, it found that summary judgment was appropriate for indemnification because "Broadway's claim essentially was that the Design Team should have protected it from 'its own oversight.'"[13] All other claims were also reversed, but it appears that this reversal came as a result of procedural issues relating to summary judgment.

The Supreme Court resolved the summary judgment procedural issue and proceeded to analyze the merits of the issue of contribution. First, the court concluded that privity of contract is not needed in order for a defendant to be held liable to third persons. "A defendant under a contractual obligation 'is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation.'"[14] Such duty is in tort, not contract, according to the court. The court then proceeded to analyze the design team's duties to Hilton. Such contractual duties, according to the court, included visiting the site at appropriate times, familiarizing themselves with the progress and quality of work, and determining whether such work was being conducted in conformity with the construction documents. Using such visits, they were to report biweekly to Hilton any deficiencies or deviations from the contract requirements. Therefore, the court stated that there was sufficient evidence to conclude that the design team had breached their "contractual obligations by failing to report to Hilton that Broadway had failed to comply with the specifications regarding the mimic bus and warning signage."[15]

Like the appeals court, the court noted that normally expert testimony is needed to establish the requisite standard of care in cases involving architects, but none was needed here because there was no issue as to whether the design team knew about the deficiencies. The court stated that "the Design Team actually knew of the deficiencies but failed to fulfill its contractual duty to report the deficiencies to Hilton."[16] Therefore, expert testimony was not needed to determine whether this was a breach of contractual obligation. As to the issue of causation, the court also disagreed with the trial court, concluding that "the Design Team had a contractual duty to report deficiencies to Hilton and to prepare a 'punch list' of all incomplete or unacceptable construction items that must be corrected before final completion of the project."[17] As a result, a genuine issue of material fact existed as to whether the design team's reporting the issues to

Hilton would have resulted in the proper warnings and a diagram being placed on the switchgear prior to the decedent's electrocution. The court, therefore, concluded that there was sufficient evidence on the record to conclude that the professional negligence of the design team based on their failure to report deficiencies to Hilton "posed a serious safety risk to anyone who operated the switchgear."[18] Summary judgment was therefore inappropriate on the claim of contribution against Hilton and Broadway.

As for the claims of contractual indemnification, the court concluded that even if Cambridge was negligent in failing to report Broadway's failure to install the proper signage on the switchgear, Hilton would still have no right of contractual indemnification because the contract stated "its right of indemnification 'shall not apply' where the losses 'result from the negligent acts or omissions of…other parties for which Cambridge is not responsible.'"[19] The court stated that Cambridge was not responsible for Broadway's failure to carry out its work in accordance with the construction contract and had no control over Broadway's acts or omissions. As a result, the court concluded that the trial court properly granted summary judgment in favor of Cambridge and Cosentini as it related to the claims for indemnification, but reversed as to the claims of contribution.

### *BPLW Architects & Engineers, Inc. v. U.S.*, 106 Fed. Cl. 521 (2012)

*The United States Court of Federal Claims concluded that although the architect failed to comply with contractual requirements when designing pipes, the resultant damages could not be attributable to the architect because the contractor committed installation errors.*

The government entered into a contract to provide architectural and engineering services for the construction of dormitories on an air force base. Several issues arose when the pipes were installed by the general contractor, which ultimately led to numerous dorm units flooding. The government sued the architect for negligently designing the pipes in such a way that the design failed to accommodate the "highly expansive" soils in the area. The government also stated that the architect negligently provided a civil site grading design. As a result, the government contended that it incurred substantial damages approximating $6.7 million.

The court found that the architect did provide negligent piping and civil site grading designs because the architect neither complied with the contract requirements nor the applicable standard of care. However, the court found that the government failed to establish causation, a necessary element for a breach of contract claim.

The court agreed that the architect had breached the applicable standard of care for designing the pipes at issue, as the pipes were not withstanding the maximum potential soil heave forecast by the soils report. The court, nevertheless, found that the pipes did not fail predominately because of the architect's failure to design appropriate pipes, but because the contractor committed errors during the installation process, using a broken and bent pipe. As a result, there was evidence establishing that moisture from the broken pipe entered the soil and caused the soil to heave in the short-term. Therefore, the court said that while it was certain that the pipes would have failed in the long-run, in the short-term, the broken pipe ensured that moisture would have entered the soil. The court then stated that the government could not carry its burden in showing that the architect's failure to design proper pipes caused the alleged damages since the pipes were certain to have failed in the short-term. Therefore, the government could not recover its repair costs.

***Sams Hotel Group v. Environs, Inc.,*** **No. 1:09-cv-00930-TWP-TAB, 2012 WL 3139765 (S.D. In. Aug. 1, 2012)**

*The United States District Court for the Southern District of Indiana concluded that the architect was liable for building demolition when the architect failed to properly design the foundation of a hotel causing the hotel to be demolished.*

Sams commenced work to build a hotel in Indiana. Sams hired Environs, an architectural design firm, to build the hotel. The design of the hotel consisted of preparing plans and specifications for a six-story, steel-frame building. The hotel would also have a penthouse. The project manual noted that the hotel would be approximately 66,787 square feet. After the hotel was demolished because of defects in its foundation, Sams commenced this lawsuit against Environs.

The architect for Environs was contacted by a representative of Sams with the proposal to build the hotel at issue. They subsequently executed a contract on behalf of their companies on March 1, 2007. The contract called for Environs to provide Sams with "'professional services required for the design' of the hotel, which included, among other responsibilities 'architectural and engineering services' through a four phase process."[20] The contract consisted of four phases: design phase; construction document phase; bidding phase; and construction administration phase. During the design phase, Environs was to supply Sams with "'schematic design drawings and documents of the proposed layout' from which 'a final design will be developed to meet the requirements of the authorities having jurisdiction.'"[21] During the construction phase, Environs would prepare construction documents containing drawings and specification information and "included in these documents would be 'structural drawings for steel framing system including design of specific structural members.'"[22] In the construction administration phase, Environs agreed to visit the site three times and submit to Sams written reports and findings.

In early 2007, Sams wanted the foundational and structural design drawings "fast-tracked" to the Indiana Department of Homeland Security for its approval. Therefore, in April of 2007, Environs started preparing the foundational and design drawings. Environs prepared the drawings, which included drawings that showed the walls for the three towers in the building, two stair towers, and an elevator tower. The drawings showed "outlines of three concrete unit towers—two inferior shear wall stair towers and an elevator tower."[23]

On July 31, 2007, Environs sent to the Indiana Department of Homeland Security the first completed set of signed design drawings. Absent from the drawings was a lateral shear wall system "that would be used to resist lateral loads."[24] Environs' representative was aware that the lateral shear wall was needed and missing, but he thought it would be designed and provided by another contractor. In an effort to comply with Sams' request, Environs submitted the first set of drawings to "the State without finalizing the design of a lateral shear wall system."[25]

Environs sent other foundational drawings to the state. The state gave Environs "an initial design release for the foundation on August 6, 2007 and a broader release for the structural and architectural designs on August 30, 2007."[26] Sams hired Materials Inspection and Testing, Inc., (MIT) to conduct soil investigation tests. They issued a final report to Sams, which stated that "much of the soil at the site was soft and would need to be removed and replaced with engineered compacted fill prior to the start of construction."[27] They provided recommendations which stated that the general contractor should remove a minimum of ten inches of soil and a maximum of six feet and replace it with compacted fill. Environs drawings failed to provide guidance on the areas needing to be uprooted in order to accommodate MIT's recommendations.

As the court noted, the drawings by Environs failed to account for MIT's recommendations and therefore "the amount of soil which needed to be removed and filled with compacted fill was not done."[28]

Construction began on the hotel in September of 2007. In March 2008, cracks in the north tower were discovered. These were fixed but other cracks also became noticeable. Furthermore, a structural design inspector with the Allen County Building Department (ACBD) discovered inconsistencies in the design drawings and the ongoing construction of the hotel in March. As a result of these issues, a thorough inspection was conducted by the officials of the ACBD along with state inspectors.

During their inspection, they noticed several cracks in concrete slabs and cracks on the concrete masonry units in the north stair tower. As a result, a notice of condemnation was issued for the hotel. The notice was also given due to the "lack of inspections being initiated by Sams or the construction contractors during the pouring of the concrete as required by State law."[29] Sams was then required to consult a structural engineer to investigate the problems with the hotel. As a result of this, the structural engineers, one of which was MIT, concluded that three of the towers were designed improperly. There was not enough shear wall support and they had the incorrect type of footing. In addition, the hotel should have been constructed with "mat footings instead of wall footings."[30] After a final walk-through on February 2009, ACBD determined that the stair tower needed immediate attention and issued an order to have the hotel demolished on February 12, 2009. The hotel was then demolished.

First, the court determined whether Environs breached its contract with Sams by not designing a structure that would "adequately resist lateral loads, including wind shear, which it alleges was a substantial factor in causing ACBD to order the demolition of the building."[31] Sams argued that Environs breached the contract by "(1) submitting incomplete and inconsistent structural and foundational design drawings to the State and its contractors; (2) designing the Hotel in such a manner that fell below the professional standard of care; (3) failing to inspect the construction site at the appropriate times as required by the Contract."[32]

The court then proceeded to construe the terms of the contract. Environs attempted to argue that "the contract did not require it to provide specific system design of wall panels or to ensure that the wall panels were designed to ensure lateral wind shear because the system is a specific structural engineering service."[33] Sams said Environs was to provide this because it was the engineer of record; the court agreed. Paragraph II.f stated:

> *Construction documents shall include preparation and submittal of all correspondence, drawing specifications and date for review by franchise and authorities having jurisdiction for design of the building except civil design (site layout and design), sprinkler system design, final pool and spa design documents and landscape design.*[34]

Paragraph II.g. stated:

> *Construction Documents shall include structural drawings for steel framing system including design of specific structural members.*[35]

The court focused on the word "all" and then went on to say that because the provision "articulated that all drawing specifications be provided and did not further include structural engineering designs among the exceptions, it [wa]s clear that Environs [wa]s responsible for this type of design."[36] The court found such analysis further buttressed by the fact that "specific structural members" in paragraph II.g followed that of II.f.[37] The court continued by stating that taking the contract as a whole along with the above provisions obligated "Environs to ensure that

a lateral shear wall system design [was] properly disclosed on its construction documents."[38] The court said it should have been incorporated in the design.

Next, the court considered whether the inconsistent and incomplete drawings were in breach of the contract. The court stated that once Environs' architect "signed and stamped his seal on both structural and foundational drawings…he became the design professional on the project and certified that Environs [wa]s responsible for the overall structural design of the building as the engineer of record."[39] The court noted several design drawings at trial which were admitted into evidence that showed that the drawings to the state and the contractor were both incomplete and inconsistent. As a result, the court concluded that Environs "failed to provide plans suitable for the purposes for which they were prepared."[40]

The court also found that Environs breached the contract by not properly designing the footings of the three concrete towers in its submitted designs to the state. The court noted testimony that because of the size of the exterior of the hotel, mat footings would have been the appropriate footings to use. However, the court stated that none of Environs' designs called for mat footings.

Next, the court considered the requisite professional standard of care. The court stated the general rule that a design professional is bound to exercise reasonable care in preparing design drawings and specifications in a workmanlike manner. The court found this case unique because Environs also provided structural engineering services. Nevertheless, the court concluded that Environs' engineer still had to prepare his drawings and specifications "with the same professional level of care as a licensed engineer specializing in structural engineering."[41] After hearing testimony that Environs' engineer failed to meet the professional standard of care by undertaking structural engineering responsibilities without being a licensed engineer who specialized in structural engineering, the court found that Environs' architect was not qualified to do the project. While it was fine for Environs' engineer to serve as engineer of record, the court concluded that because he was not a licensed engineer specializing in structural engineering nor did he have the previous work experience or college courses for such a specialty he lacked the knowledge and training to design the hotel. The court said that Environs' engineer breached the standard of care by not involving other professionals when issues arose. "Environs' reluctance to involve a structural engineer at the initial stage of the design process, when it was responsible for the overall structural design of the building, was below the professional standard of care."[42] Therefore, Environs breached the contract.

As for causation, the court concluded that ACBD ordered the hotel demolished due to concern that the building was in danger of collapsing. The court was persuaded by the evidence that established the reason for the demolition of the building was the lack of "shear design incorporated within the three concrete towers coupled with the lack of mat footings underneath the stair towers."[43] The court, therefore, concluded that it was more likely than not that Environs' inadequate design of the concrete towers and foundational footings "was a substantial factor in causing ACBD's order to demolish the [h]otel."[44]

Pursuant to the contract, Environs would be paid $70,000 for its architectural services. A limited liability provision was also contained in the contract. This provision limited Environs' liability to its services rendered to Sams. Prior to the bench trial, the court considered the enforceability of this provision. The court found the provision enforceable and therefore ruled that the total amount of damages Sams may recover was $70,000 (from Environs).

## Tort Liability

***Beacon Residential Community Association v. Skidmore, et al.,*** **211 Cal. App. 1301, 150 Cal. Rptr. 3d ( 2012)**

*The Court of Appeal, First District, Division 5, California concluded that design professionals owe a duty of care to third parties in the construction of residential condominiums.*

The defendants were design professionals that provided architecture, landscape architecture, and engineering services (civil, mechanical, structural, soils, and electrical) in the construction of 595 condominium units. The plaintiffs, which were the community association, alleged defects in the construction of the project caused by negligent architectural and engineering design and construction work performed by the defendants. Such allegations included water infiltration, inadequate fire separations, structural cracks, and other life safety hazards. The association also alleged "solar heat gain" as a defect, which meant that the units were uninhabitable and unsafe during periods of high temperatures. As a result, the community association alleged statutory building standard violations, negligence *per se*, and professional negligence.

The defendants moved to dismiss the complaint, which was granted by the trial court, which held that the defendants owed no duty to third parties. On appeal, the court had to decide whether the design professionals owed a duty of care to the residents since there was no privity of contract. The court stated:

> *The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, and the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendants conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing harm.*[45]

The court reversed the grant of the motion to dismiss. In deciding that the design professionals owed a duty here, the court engaged in the following analysis. First, the defendants attempted to limit their liability by including in their contract with the developer that no third party—including future residents—could enforce provisions contained in the contract. The court concluded that such limitation only "emphasize[d] the fact that [Defendants] were more than well aware that future homeowners would necessarily be affected by the work they performed."[46] Second, the court considered the foreseeability of harm to the residents by stating "[p]rofessional skill is required to prepare the design documents, and failure to exercise reasonable professional care in the design of residential construction presents readily apparent risks to the health and safety of the ultimate occupants."[47] Third, the court concluded that in analyzing the closeness of the connection between the defendants' conduct and the injury suffered, the fact that "others are alleged to have contributed to the injury should not serve to limit the responsibility of those whose training and experience uniquely qualify them to make decisions, and whose expertise the builder presumptively relies upon in implementing those decisions."[48] Fourth, the court stated that the community association alleged that the defects did pose a risk to health or safety. Finally, in analyzing the policy of preventing future harm, the court analyzed the following issues: 1) potential imposition of liability out of proportion to fault; 2) the possibility of the private ordering of the risk; and 3) the effect on the defendants of third-party liability. As to the first issue, the court concluded that the defendants have a limited defined field of potential risk—the condominium

owners—therefore, potential liability is not unlimited. Plus, the defendants have the ability to seek indemnification from other parties. Second, the court concluded that it is the defendants—not the homeowners—who have the ability to "privately order allocation of liability among themselves by contract or through structuring insurance coverage."[49] Third, the court concluded that it was the legislature that determined the effect that third-party liability can have on the policy balance between efficient loss spreading and the dislocation of resources.

The court then concluded that to the extent that the above considerations were not dispositive of the duty owed by design professionals to homeowners, California Civil Code § 895 *et seq* and California's "Right to Repair Statute" also provided for liability to purchases for design professionals.

***Brewer v. Stonehill & Taylor Architects,*** **940 N.Y.S.2d 55 (2012)**

*The New York Supreme Court's Appellate Division held that the architect did not create, or have constructive or actual notice of, allegedly dangerous defects and therefore cannot be held liable.*

In this case, the plaintiff was injured by loose molding on the floor near an elevator. The court stated that the plaintiff had been present near the elevator for over an hour and did not notice the loose molding until the plaintiff had fallen. Also, the court noted that the contractor, who was hired by the architect, had completed the work two weeks before the incident. An inspection after the project was done showed that there was no loose molding on the floor. Because the architects were able to establish that they did not create, nor had any sort of notice of loose molding, the court of appeals reversed the trial court's refusal to enter summary judgment for the architect.

***Meridian at Windchime, Inc. v. Earth Tech, Inc., & Others,*** **81 Mass. App. Ct. 128, 960 N.E.2d 344 (2012)**

*The appeals court of Massachusetts held that an engineering firm owed no duty of care to the developer because the engineering firm lacked actual knowledge that the developer was relying on its services.*

Meridian, a developer, brought suit against Earth Tech, an engineering firm employed by the city's planning board. Meridian appealed the trial court's grant of summary judgment in favor of Earth Tech.

Meridian was developing a subdivision. The city's planning board hired Earth Tech to ensure that the project would comply with the city's regulations. Earth Tech's job was to inspect and provide reports to the city regarding the project. Pursuant to city policy, Meridian had to pay for Earth Tech's services, but Earth Tech and Meridian were not in contract with each other.

In a memorandum provided to Meridian from Earth Tech, Earth Tech stated that it would conduct "inspection services on an as needed basis, when requested by the Planning Board."[50] The memorandum also reiterated that "approved definitive plans" governed and "[a]ny field changes from the definitive plan shall be discussed with Earth Tech. Any field change made by the contractor without prior approval of Earth Tech, will be performed at the contractor's risk. Earth Tech will decide if changes need approval from the Planning Board."[51] Finally, the memorandum provided that "Earth Tech, Inc. will provide a written report of the inspection to the Planning Board, noting completions and deficiencies. Any deficiencies will be immediately brought to the contractor's attention in the field for correction."[52]

Earth Tech was consistently on the site inspecting Meridian's contractor's work, and provided frequent reports to Meridian and the city regarding any deficiencies, tasks that were completed, and whether the work done by the contractor complied with the town rules and regulations. The contractor and Earth Tech had developed a close working relationship over the two years that Earth Tech inspected the project.

Later, it was discovered that Meridian's contractor had "improperly installed water lines, fire hydrants, granite curbing, manhole covers, and other features of the infrastructure."[53] Because of these problems, the work had to be redone, and at times ground had to be dug up to reach the defective infrastructure. Meridian maintained that:

> *Earth Tech did not identify the shortcomings and deficiencies with the contractor's work; and that if Earth Tech had conducted the inspections it was required to perform in a timely manner, Meridian would have been able to correct some of the deficiencies at far less cost by avoiding the need to dig and re-grade the surface.*[54]

First the court analyzed legal duty. The court said "duty is 'determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.'"[55] In determining foreseeability, the court noted that it is an objective standard and calls "for consideration of whether the injured party's reliance on the services performed by the negligent party was reasonable."[56] In addition, the court noted that the "determination whether the plaintiff's reliance on the services performed by the negligent party was known to that party is not satisfied by evidence that the plaintiff believed that the defendant was aware of its reliance."[57] The negligent defendant has to have actual knowledge that the plaintiff was relying on its services.

The court stated that Earth Tech, the negligent party here, had "no authority or responsibility for the methods and procedures of construction selected by the Contractor."[58] The court also cited the memorandum sent to Meridian by Earth Tech that stated that "any deviation from the approved subdivision plans in the construction of the infrastructure for Windchime, without prior approval of Earth Tech, will be performed at the contractor's risk."[59] Finally, the court noted that Meridian had its own engineer for the project. "The fact that the project engineer may have failed to honor its contractual obligations to Meridian does not, standing alone, justify Meridian's reliance on the work performed by Earth Tech."[60]

In conclusion, the court said that a professional employed by a town to provide inspection services for the construction of a subdivision owed no duty of care to a developer or the developer's contractor when there is no contract between the two unless it was foreseeable and reasonable "for the developer or its contractor to rely on the services provided to the town by the professional, and the professional had knowledge that the developer or its contractor was [actually] relying on the professional's services."[61] The court upheld the trial court's grant of summary judgment.

### Completed and Accepted Doctrine and Third Parties

***Neiman v. Leo A. Daly Co.,* 210 Cal. App. 4th 962, 148 Cal. Rptr. 3d 818 (2012)**

*The California Court of Appeals ruled that the completed and accepted doctrine precludes third-party liability for patent defects once an architect completes his or her work and it is accepted.*

The plaintiff brought suit against an architect who designed and oversaw the construction of a theater on a community college campus. The plaintiff fell on some stairs at the theater. The

trial court entered summary judgment in favor of the architect based on the "completed and accepted doctrine. Under this doctrine, once a contractor has completed its work and the owner has accepted it, the contractor is not liable to third parties injured as a result of a patent defect in the contractor's work."[62]

On appeal, the plaintiff argued that she raised a genuine issue of material fact regarding whether the lack of contrast marking stripes on the stairs was latent or patent; the court disagreed. The court stated that "when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous defect is an intervening cause for which the contractor is not liable."[63] If an owner inspects the completed work, however, and does not notice any defects, then the owner lacks adequate information to represent to the world that the construction is sufficient—hence, such a defect is deemed latent—and the completed and accepted doctrine is therefore inapplicable.

First, the court concluded that there is no issue regarding whether the community college "accepted" the stage. The work on the stage was completed on March 16, 2006, and the stage was opened to the public on March 30, 2008—the date of the plaintiff's injury. The court, therefore, concluded that the stage was "accepted."

Second, the court considered whether the lack of contrast stripe markings was a latent or patent defect. The court noted that the purpose of the contrast stripes is to ensure that each thread is visible when viewed from descent. While the architect's plans and specifications called for contrast stripes on the stairs, the court stated that a reasonable inspection of the stairs would have disclosed that such stripes were missing. The court said there was no evidence that the community college did not have access to the plans and specifications and also conducted a walk-through of the stage on June 15, 2006. The court, therefore, concluded that as a matter of law, the defect was patent because an owner exercising ordinary care would have noticed such a defect.

Third, while the plaintiff did not argue on appeal that the theater was "completed," the court noted that while the work did not comply with the plans and specifications, the architect ruled the project complete in June 2006 and the stage opened to the public afterwards. Also, at the time of the plaintiff's injury, the architect was no longer providing services to the property. The architect's negligence was irrelevant when analyzing what constitutes "completed" within the "completed and accepted" doctrine. Consequently, the project was "completed."

Fourth, the plaintiff argued on appeal that the lack of markings on the stairs was latent. Specifically, the plaintiff argued that the community college, the architect, the contractor, and a representative from the Division of the State Architect failed to notice the markings' absence on a walk-through in June 2006. The court noted that had the markings been in place, they would have been noticed; therefore, their absence was an obvious and apparent condition.

### The Privity Issue

***Greater LaFourche Port v. James Const. Group, L.L.C.,*** **104 So.3d 84, 2011-1548 (La.App. 1 Cir. 9/21/12)**

The Court of Appeals of Louisiana, Fifth Circuit concluded that absent privity of contract, a contractor cannot maintain a cause of action against an engineer based on breach of contract between the contractor and a third party. However, an engineer can be liable for the engineer's independent negligence.

The Greater LaFourche Port Commission (Port) entered into a written contract with a professional engineering services company (engineer) to provide services for the construction of

a steel sheet piling bulkhead and mooring bits. The Port and James—the construction company—entered into a written contract for the construction of the project. The engineer was to oversee the project, providing "necessary professional services," which included "design phase" and "bidding & construction phase" services.[64] The contract between the Port and James allowed for completion of the project within 300 days. There were delays, and the contract was amended multiple times to allow for an extended time to complete the project. The site was ultimately completed 133 days past the deadline the parties established. A liquidated damages provision of the contract penalized the construction company at a rate of $2,000 per day for every day the project was not completed. The damages from this provision totaled $266,000.

The Port and James reached a settlement, but James maintained an action against the engineer. James claimed that it detrimentally relied on certain representations by the engineer to the effect that James would not be required to complete the project within the time frame established in one of the addenda and the liquidated damages provision would be waived. The trial court granted summary judgment in favor of the engineer; an appeal followed.

The court concluded that James could not maintain a cause of action against the engineer for breach of the construction contract because James and the engineer were not in privity of contract. However, the court went on to say that such absence of privity is not required when allegations establish that there was independent negligence on the part of the engineer. This court, applying precedent, reasoned that:

> *Where the damage sued for is the defectively performed work itself, the action is strictly a contractual one and only those who are in privity with the contractor have an action against him. However, where the damage sued for is not the defective work but is instead damage caused by the defective work, a tort action against the contractor is proper when the elements for delictual recovery are present.*[65]

The court concluded that independent of the contract between the Port and the engineer, there were serious factual issues as to whether the engineer was negligent in representing to James that the Port would waive the damages provision and not enforce the agreed upon completion date. Summary judgment was therefore reversed and remanded.

### *Fried v. Signe Nielsen Landscape Architect, PC,* No. 28770/02, 2012 WL 163832 (Supreme Court, Kings County, Jan. 19, 2012)

*The Supreme Court, Kings County, New York concluded that an engineer owes a duty to the general public to use professional care in designing a structure based on his or her expertise.*

The plaintiff, acting as guardian *ad litem*, brought suit against 36 defendants after her daughter drove a vehicle off a pier, causing the vehicle to enter a bay. As a result, her daughter suffered catastrophic injuries. The main defendants included: 1) New York City (city); 2) the New York Economic Development Corporation (EDC); 3) Signe Nielsen Landscape Architect, PC (Nielsen); and 4) Han-Padron Associates Consulting Engineers (Han-Padron). There was a settlement between the plaintiff, the city, and EDC for $8.25 million.

At trial, the plaintiff argued that the pier was negligently designed because it lacked vehicle-resistant barriers at the perimeter of the pier, allowing a vehicle to leave the pier and enter into the water. A jury returned a verdict in favor of the plaintiff, concluding that the pier was "negligently designed in that vehicle-resistant barriers were not included at the perimeter, and that Han-Padron and EDC were each negligent in not including vehicle-resistant barriers in the

design for Pier 4, but that Nielsen was not negligent."[66] The jury also determined that Fried was also negligent in the driving of the vehicle on the pier and that such negligence was a substantial factor in the incident. The city did not appear on the jury sheet—as all agreed that the city would be vicariously liable for EDC.

The jury made two findings of fault. The jury found that EDC was 75% at fault, Ms. Fried was 20% at fault, and Han-Padron was 5% at fault. As between the defendants, EDC was determined to be 90% at fault and Han-Padron was 10% at fault. Such an allocation, according to the court, was precautionary because of application of the General Obligations Law and a Civil Practice Law and Rules article in the state. The plaintiff and defendants then moved to set aside parts of the verdict.

Important was the court's analysis regarding Han-Padron's liability. On the day of the incident, EDC was in possession of the pier pursuant to a lease it had with the city, as owner, since February 1, 1986. An old pier was demolished and Han-Padron was employed by "EDC to design a new pier, including the piling system and concrete deck."[67] As a result, Han-Padron hired Nielsen to help with designing the parking and pedestrian esplanade. The jury also heard from a traffic consultant, Philip Habib (Habib), who was retained by EDC.

Han-Padron argued that they were entitled to judgment as a matter of law because they "did not owe Fried or any other party a duty to design, recommend or specify vehicle resistant barriers for the Pier."[68] They contended that they were not "contractually obligated to design, recommend, or specify vehicle resistant barriers for the Pier," nor did they have a "professional obligation to design, recommend or specify the construction of vehicle resistant barriers."[69] Han-Padron also argued that EDC made the final determination as to what types of barriers to construct, as they retained Habib to consult on such issues.

The court first concluded that the jury could find that failure to include a vehicle-resistant barrier was negligence because the parties had planned and designed it over a period of three years and "that virtually no attention was given to the risk that one of the several hundred vehicles expected to use the pier on any given day might, because of weather, collision, emergency, or just negligence, leave the pier and enter the water."[70]

The court then considered whether Han-Padron was liable for this negligence based on their assertion that they did not owe Fried a duty to design, recommend, or specify resistant barriers. The court, citing a line of cases, stated that "[a]n architect must 'use the degree of care in design that a reasonably prudent architect would use to avoid an unreasonable risk of harm to anyone likely to be exposed to the danger.'"[71] The court seemed to grapple with whether a contractor owed a duty to the general public for his or her negligent designs. The court stated that "there is little in the decided cases on the nature and extent of a contractor's roles and responsibilities with respect to a negligent design that will warrant a determination that the contractor owed a duty to the general public to use reasonable care in the design."[72] The court then focused on the nature, control, and participation of the architect to determine if a duty to the public ought to be imposed. Applying these principles the court said there was considerable evidence presented at trial regarding the respective roles of the parties. Han-Padron was to design the concrete deck and substructure. Nielson was hired by Han-Padron "to design 'everything above the concrete deck,' including the architectural finishes, public access and parking layout for the pier."[73] Han-Padron argued that it was EDC that made the final determination on what types of barriers to use in construction of the pier, relying on its own traffic engineering consultant, Habib. Habib, according to Han-Padron, "was responsible for addressing any issues he detected with respect to vehicular safety."[74]

The court cited Habib's testimony that he did not consider himself a member of the design

team because he did not have input into the final determination as to usage of any barriers or fences. The court then said that while Habib may have been the most qualified person to determine whether vehicular resistant piers were needed, there was insufficient evidence that he was to make a final determination on whether the pier needed any barriers. The court also cited statements made by Mr. Padron. "Normally with the type of work that my firm does, the client doesn't have the internal expertise to thoroughly review it; they rely on us."[75] The court said that Han-Padron did not cite any evidence that would suggest that EDC did not rely on Han-Padron for design decisions. "That the contract between EDC and Han-Padron does not explicitly refer to vehicle-resistant barriers or transportation engineering services does not establish that EDC did not rely on Han-Padron to design a pier, parking lot and pedestrian esplanade that was reasonably safe for motorists and pedestrians."[76] The court also appeared to reject the completed and accepted doctrine, saying that "A contractor is not absolved from liability to a third party for injuries occurring after the work is completed even when the owner accepts the work as completed."[77] The court stated that a contractor is liable if the plans are "so patently defective" that a contractor of ordinary prudence should be placed on notice of its potential to be dangerous.

The court therefore concluded that Han-Padron "owed a duty to motorists and pedestrians to use reasonable care in the design so as not to expose them to an unreasonable risk of foreseeable harm."[78]

### Insurance: Professional Services Exclusion

***D.I.C.E. v. State Farm Insurance Company,*** **No. L-11-1006, 2012 WL 1154639 (Ohio Ct. App. Apr. 6, 2012)**

*The Court of Appeals of Ohio, Sixth District, Lucas County concluded that the professional services exclusion in the business liability policy did not cover the defective design claims by the plaintiff.*

The plaintiff sustained serious injuries when his foot was crushed by a "high speed packout machine" owned by his employer, MINTEQ (formerly called Quigley Company, Inc.). The machine is a dry project filing station which utilized a fill hopper, hydraulic lift platform, and a roller conveyor system. D.I.C.E. completed drawings of the hydraulic lift for Quigley. Quigley gave Diehl a rough sketch of the hydraulic system that it wanted. Diehl then completed drawings of the system and then subcontracted the manufacturing of the machine.

The plaintiff "was standing on the roller conveyor system adjacent to the hydraulic lift mechanism when the forks of the hydraulic lift platform descended and crushed his feet between the conveyor system and the forks of the hydraulic lift."[79] The plaintiff suffered severe injuries to his feet, causing a partial amputation of his left foot, including all of his toes. Dean Diehl, the owner of D.I.C.E., testified that "he did not envision employees standing on the roller conveyor system."[80] There was also testimony from the plant manager that prior to the incident, "employees were permitted to stand on the rollers adjacent to the forks on the lift."[81]

The plaintiff then filed suit against D.I.C.E. for failure to design, formulate, or supply a mechanism which would have prevented the incident. State Farm defended D.I.C.E., but reserved rights under the professional exclusion provision of the policy in the event D.I.C.E. was found liable. D.I.C.E. filed for a declaratory judgment against State Farm seeking coverage under its policy for the plaintiff's claims. D.I.C.E. purchased this business insurance policy from State Farm. There was no dispute that the policy was in place at the time of the incident. The policy provided

D.I.C.E. with business liability limits of $1,000,000 and a $5,000 limit for medical payments. There were several exclusions where the policy did not apply, including "professional services." The relevant provision for "professional services" reads:

> *to bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments. This includes but is not limited to:*
>
> *(a) legal, accounting or advertising services;*
> *(b) engineering, drafting, surveying, or architectural services, including preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, charge orders, design or specifications.*[82]

The trial court determined that there was no coverage for D.I.C.E because the plaintiff's claims were based on the theory of defective design. Reaching this conclusion, the trial analyzed the policy in its entirety. The court noted that "products-completed operations hazard" was covered under the business liability coverage section of the policy and that there was no separate coverage for "products-completed operations hazard." Further, the State Farm policy stated that the professional services exclusion applied to business liability coverage and that "products-completed operations hazard" was under business liability coverage. As a result, "products-completed operations hazard" was subject to the professional services exclusion.

D.I.C.E. was then found liable, pursuant to arbitration, and the plaintiff and his wife were awarded a total of $425,000. Based on this award, the plaintiff then filed a motion for reconsideration of the trial court's decision because the arbitrator premised the damages on Ohio's products liability statute and not on professional services. State Farm countered by stating that such claims by the plaintiff were based on defective design of the machinery. The trial court agreed with State Farm; appeal followed.

The appeals court concluded that State Farm was entitled to summary judgment. The court reasoned that D.I.C.E. performed a professional service as defined by the policy. Specifically, the court noted that D.I.C.E. completed drawings and sent them to subcontractors. The court concluded that the plaintiff's claims were therefore barred under the professional services exclusion. The plaintiff unsuccessfully attempted to argue that the professional services exclusion operated to exclude professional design claims and not strict products liability claims. The plaintiff argued that the exclusion contained in D.I.C.E.'s policy did not apply to claims brought in strict products liability for defective design. The court found otherwise, concluding that the State Farm policy makes "no distinction between claims brought under the theory of either professional negligence or strict liability. Rather, it operates to exclude all claims for bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments."[83] Therefore, there was no coverage afforded for the plaintiff's claims.

### *Patrick Engineering, Inc. v. Old Republic General Insurance Co.,* 2012 IL App (2d) 111111, 362 Ill. Dec. 640 (2012)

*The Appellate Court of Illinois, Second District concluded that an insurer must analyze each insured's activities separately in deciding whether a professional services exclusion applies.*

ComEd entered a consulting services agreement with Patrick Engineering, Inc. (Patrick). The agreement stated that Patrick would provide engineering design services to ComEd. Pursuant to the agreement, Patrick had to get commercial general liability insurance for ComEd. ComEd

directed the engineer to design utility poles along a street. While working, ComEd smashed through an underground sewer facility at four separate locations. Afterwards, an action for negligence was commenced by the city against ComEd.

ComEd "tendered its defense to Old Republic Insurance Company (Old Republic), the insurer with which Patrick had procured CGL insurance, requesting that Old Republic defend and indemnify it in the underlying litigation."[84] ComEd stated to Old Republic that it was an additional insured under the policy. ComEd also tendered its defense to Patrick. Patrick then sought to have Old Republic defend and indemnify ComEd in the action. Old Republic denied coverage, relying on the CGL policy's professional-services exclusion.

Both parties then commenced suit against Old Republic, seeking to have Old Republic defend and indemnify ComEd. Old Republic counterclaimed, arguing that the CGL policy did not provide coverage for ComEd. Each party then filed a motion for summary judgment. The parties accepted that ComEd was covered for damages relating to nonprofessional or labor-based services, that Patrick was the only person to provide professional services, and that ComEd provided no professional services.

Old Republic, however, denied coverage, arguing that ComEd's actions fell within the professional services exclusion. Old Republic contended that because the damage arose out of Patrick's professional services and the policy did not cover damages arising out of such services ComEd was also barred because the work was on behalf of Patrick. The trial court agreed with Old Republic on summary judgment.

On appeal, the court reversed. The court mentioned some of the provisions named in the policy. The Separation of Insureds provision read:

> *Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage part of the first Named Insured, this insurance applies:*
>
> *(a) As if each Named Insured were the only Named Insured, this insurance applies:*
> *(b) Separately to each insured [i.e., any additional insured under Section II of the additional-insured endorsement] against whom claim is made or 'suit' is brought.*[85]

The Professional Exclusion stated that:

> *This insurance does not apply to 'property damage' arising out of the rendering of or failure to render any professional services by you [Patrick] or any engineer, architect or surveyor who is either employed by you [Patrick] or performing work on your [Patrick's] behalf in such capacity.*[86]

The court stated that "[c]ourts have interpreted separation-of-insureds clauses to provide each insured, whether named or additional with separate coverage."[87] Such a provision, the court continued, "shows that that the insurer recognizes an obligation to additional insureds distinct from its obligation to named insured. This means that it is as though each insured is separately insured with a distinct policy, subject to the liability limits of the policy."[88]

The court noted that the duty to defend arises when the facts alleged "potentially fall" within the terms of the policy. The duty to indemnify only arises when the facts "actually fall" within the coverage. "[A]n exclusion may bar coverage, i.e., may release an insurer from its duty to indemnify, only where the application of that exclusion is clear and free from doubt."[89] The court stated that when there is any doubt whether the exclusion applies when indemnification is concerned, then the exclusion will not apply and the claim will be covered. The court analyzed the separation-of-insureds clause and determined that applicability of the policy exclusion had to be determined to each insured separately. If the additional insured did not undertake professional services, then the insurer had to provide insurance.

Critical to the court was not necessarily that ComEd was carrying out the plans of Patrick, but that the ComEd did labor-related nonprofessional work. Such work did not exclude coverage under the policy. The standard was critical in the court's determination here. As stated by the court, "Given that an insurer must defend an insured if a suit merely potentially falls within the terms of the policy and that an exclusions' applicability must be free from doubt in order to preclude coverage, we reverse the trial court's grant of summary judgment to Old Republic..."[90] Therefore, Old Republic had to provide coverage for the claim.

## Economic Loss Rule

***Barzoukas v. Foundation Design, Ltd.,* 363 S.W.3d 829 (2012)**

*The Court of Appeals of Texas concluded that the economic loss rule does not automatically preclude as a matter of law recovery between contractual strangers. Facts that establish the scope of work to be performed, the allocation of risk, and the identities of parties to any contracts are important in determining application of the economic loss rule.*

The plaintiff sued the builder, Heights Development, and the engineer of record for the house's foundation design, Foundation Design and Larry Smith (collectively, the "engineers"), and others for numerous alleged problems with his house. Specifically, the plaintiff sued the engineers for negligence, negligent misrepresentation, fraud and fraudulent inducement, conspiracy, and exemplary damages.

The plans originally called for 15-foot piers to support the house's foundation. However, after construction started, Smith sent a letter to Heights Development changing the plans to allow for 12-foot piers because supposedly "hard clay stone was encountered" while drilling the holes for the piers. The plaintiff contended that the justification for the more shallow poles was false and that Smith knew them to be false. As a result, the plaintiff alleged that Heights Development used the letter to persuade the city to allow the home's construction to continue after an inspector initially rejected the foundation because of the more shallow 12-foot piers. The plaintiff stated that the house's foundation had never been approved by the city.

Experts in the case indicated that the piers were deficient because they were too shallow, not located properly under the house, were crooked, and did not make proper contact with the I-beams to support the house. Repair damages were estimated to be about $25,000.

The plaintiff settled with all defendants except for the engineers. The court granted summary judgment in favor of the engineers—without specifying its reasons. Later, however, the court decided to allow the plaintiff to sever his claims against the engineers (the procedural posture of the grant of summary judgment followed by the severance is unclear). The plaintiff appealed the grant of summary judgment.

The court offered some history of the settled law regarding the economic loss rule in Texas. The settled factors are:

1. the economic loss rule forecloses strict liability claims based on a defective product that damages only itself but not other property;
2. the economic loss rule also forecloses a negligence claim predicated on a duty created under a contract to which the plaintiff is a party when tort damages are sought for an injury consisting only of economic loss to the subject of the contract;
3. economic losses are more appropriately addressed through statutory warranty actions or common law breach of contracts suits instead of tort claims;

4. the economic loss rule applies when losses from an occurrence arise from the failure of a product and damage is limited only to the product;
5. the economic loss rule applies to parties who are not in privity—for example, a remote manufacturer and consumer.
6. the economic loss rule does not preclude recovery completely between contractural strangers in a case not involving a defective product;
7. the economic loss rule is not a general rule of law; it is a rule in negligence and strict liability cases;
8. a contractual stranger can maintain an action against a contracting party for breach of an independent duty;
9. the economic loss rule does not "swallow" every claim between contracting parties and commercial strangers; and
10. it is undecided whether purely economic losses are recoverable.

The engineers first argued that economic losses falling within the subject matter of their contract with the builder foreclosed tort claims against subcontractors under the economic loss rule. They cited *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84 (Tex. App. Houston [1st Dist.] 2007). The court found this case distinguishable from the case at bar because in *Pugh* the economic loss rule was considered in claims of negligence and strict liability by consumers against the remote manufacturer of a defective product. The court said this case was different because the plaintiffs were not alleging tort claims against a remote manufacturer, but were maintaining claims based on the engineer's professional negligence in approving piers that were shorter than the original plans. The issue for the court, therefore, was whether the economic loss rule "preclude[d] recovery completely between contractual strangers in a case not involving a defective product."[91]

Second, the engineers argued that the plaintiff's negligence and negligent misrepresentation claims were precluded because the parties who have contracted with each other allocated for these risks. The court said that the engineers were assuming the following: 1) a contractual chain that began with the plaintiff and ended with Smith; and 2) "risk allocations within this chain that need protection from the disruptive effects of a freestanding negligence claim by the homeowner against a subcontractor."[92] The court found the first assumption unpersuasive because the exact role of Smith was not clear in the record because it was not certain who contracted with whom. The court considered an affidavit that stated that Smith was the engineer of record for the design of the house's foundation, but "may have done such work individually or under different entities."[93] The plaintiff's Seventh Amended Petition also listed different entities related to Larry Smith. The court also stated that the letter "is typed on letterhead reading 'Larry Smith Engineering' and is signed by Larry F. Smith above a signature block that reads, 'Larry F. Smith, P.E. Registered Professional Engineer."[94] The letter does not mention "Foundation Design, Ltd."[95]

The court also stated that it could not tell from the four corners of the summary judgment pleadings how the contract between Heights Development and the plaintiff addressed changes to the plans:

> *The existence, terms and scope of any subcontract involving the foundation design are unresolved on this record. So too is the identity of the parties to the purported subcontract. Also unresolved is whether the asserted subcontract encompasses Smith's post-design conduct in approving a change in pier depth after construction as underway.*[96]

The court said that discussion of risk allocation among entities involved in the building of the house was speculation.

The court found the second assumption also unpersuasive, stating that:

> *[p]erhaps Smith or an entity related to him agreed to indemnify Heights Development for damages arising from Smith's negligent performance of foundation-related engineering activities. Perhaps not. Perhaps other risk allocation mechanisms exist. Perhaps not. At this juncture, any discussion of risk allocation among the entities involved in the construction of [Plaintiff's] house is speculation based on a threadbare record.*[97]

The court ultimately concluded that summary judgment in favor of the engineers was inappropriate because the economic loss rule was fact-specific and no allocation of risks had been identified by the parties to the contract. In addition, facts were unclear as to: the identities of the parties to any subcontract concerning the foundation; whether the change from 15 to 12-foot piers was within the scope of any subcontract concerning the foundation; and whether changing the depth caused a loss unrelated to a subcontract covering the foundation's plans and specifications.

***Leis Family Ltd. Partnership v. Silversword Engineering,*** **126 Hawaii 532, 273 P.3d 1218 (2012)**

*The Intermediate Court of Appeals of Hawaii concluded that privity is not required for the economic loss doctrine to apply.*

This case dealt with the design, construction, and installation of a thermal energy system. Double P., the owner of Premier Place, hired the "General Contractor to provide contractor services related to the system."[98] The general contractor subcontracted with Dorvin D. Leis Company, Inc. (Dorvin) to provide mechanical, engineering, and construction services, and Dorvin subcontracted with Silversword Engineering, Inc. (Silversword) to design the system. The contract between Dorvin and Silversword contained a limitation of liability provision, which limited Dorvin's liability to compensation received. Silversword then contracted with Manuel for design assistance and with Morikawa for electrical engineering assistance.

The system encountered many problems. A suit, brought by the owners, was filed against Silversword and the designers for professional negligence. The designers filed for summary judgment, concluding that the economic loss doctrine barred the owners' claims against them. Judgment was entered in favor of the designers; an appeal followed.

First, the court concluded that in Hawaii, application of the economic loss doctrine is not dependent on whether parties are in privity of contract. The appellant-owners argued that the trial court erred in applying the economic loss doctrine since there was no privity between the designers and the owner of the thermal system. Second, the appellant-owners had argued that the economic loss doctrine was inapplicable because their claims were that the designers violated a legal duty separate from that of a contractual one. The court dismissed this as well, concluding that the law does not impose a duty in tort if it were to distort the contractual relationship between the parties. The court continued by stating that the owners had an opportunity to negotiate contractual rights with the general contractor and subcontractors and failed to do so. The court cited Silversword's limited liability provision with Dorvin as an example. Third, the court concluded that the deviation from industry standard exception to the economic loss doctrine generally does not apply to design professionals because contract law is best able to handle issues with defective or substandard work. The deviation from industry standard would

have allowed a design professional to be held liable for purely economic losses if they fell below the standard of care, which would be commensurate with industry standards. The court declined to extend this exception to design professionals. The court therefore affirmed the circuit court's ruling.

### Duty to Allow Opposing Party Opportunity to Inspect Defective Product

***New Jersey Municipal Environmental Risk Management v. Killam Associates Consulting Engineers,*** **No. L-484-09 , 2012 WL 3870316 (N.J. Super. Ct. App. Div. Sept. 7, 2012)**

*The Superior Court of New Jersey, Appellate Division concluded that while failure to preserve evidence a party knows will be meaningful for the other party's defense is grounds for spoliation, dismissal is only the appropriate remedy when the prejudice cannot be addressed by a lesser remedy.*

The plaintiffs brought suit against the engineers who designed and installed the pipeline. The piping developed a leak, causing contamination of soil and groundwater. Tests were done, some of the piping was removed, and an expert for the plaintiffs recommended certain remediation procedures. The defendant engineers were not notified of the leak. The defendants first received notice that the case would be litigated after the complaint was filed. At that time, none of the piping that was removed was available. There was no explanation as to what happened to the piping.

The trial court dismissed the complaint because the plaintiffs lost or destroyed the pipe that caused the leak, did not give the defendants an opportunity to inspect it or observe its removal, and the defendants could not properly muster a defense to the plaintiffs' claims of negligent installation and design. The appellate court sided with the trial court as far as the spoliation claim was concerned, concluding that:

> [t]he potential for litigation to identify the responsible party or parties and importance of that pipe to them had to be apparent to plaintiffs. After all, there is direct evidence that litigation against the contractors responsible for the pipe was contemplated within months of the occurrence and years before the complaint was filed.[99]

However, the court reversed the trial court for dismissing all claims against the defendants, arguing that there was an alternative basis for recovery independent of the rupture in the primary pipe and that the pictures taken and the plaintiffs' expert report may allow the defendants the ability to muster a defense. The trial court did not consider this and therefore the court concluded that the record was not fully developed to the extent that dismissal was warranted. The court, therefore, reversed and remanded so that the trial court could consider the proper remedy for spoliation.

### *Nullum Tempus* and Time-Based Defenses

***State v. Lombardo Bros. Mason Contractors, Inc.,*** **307 Conn. 412, 54 A.3d 1005 (2012)**

*The state's usage of* nullum tempus *will defeat time-based arguments such as repose and limitation statutes absent express language that the state is waiving such time periods.*

The state brought suit against over 20 defendants, including engineers and design professionals, arguing for damages for the allegedly defective design and construction of a library

at the University of Connecticut Law School. The project was completed in 1996 and it was soon thereafter that problems arose with water intrusion. After years of problems, the state paid for corrective work, totaling $15 million, and filed suit to recover these damages. The trial court concluded that the rule of *nullum tempus* ("no time runs against the king") was never adopted by the common law of Connecticut and therefore the state's claims were barred. Consequently, the court also concluded that the statutes of repose and limitations barred the state's claims. Summary judgment was therefore entered in favor of defendants; the state appealed.

The court stated that *nullum tempus* had been part of the common law since the second half of the nineteenth century and that the trial court erred when it rejected it. The court then concluded that because *nullum tempus* defeats all of the defendant's time-based claims, the trial court improperly granted summary judgment in favor of the defendants. Having concluded that *nullum tempus* defeated all time defense claims, the court proceeded to analyze various arguments by the defendants as to how repose periods applied in spite of *nullum tempus*.

The defendants first argued that the repose periods applied to the state by necessary implication. But the court concluded that for the time periods to apply to the state, it had to be express language, meaning that the court must conclude that it was the only interpretation due to a statute's wording. The court found this unpersuasive because there was no express language in the statutes cited by the defendants that the legislature decided to abrogate *nullum tempus* by applying statutes of repose or limitations to the states. The court stated that it would assume that if the legislature disagreed with cases that rule that the state is not bound by statutory limitations periods, it would have amended the relevant statutory limitation statutes and made them applicable to the state. Such failure to do so compelled the court to conclude that the legislature agrees with the courts that statutory limitation periods do not apply to the state. One of the defendants also attempted to argue that the Commissioner of Public Works waived the doctrine of *nullum tempus* by agreeing to be bound to the seven-year statute of repose, which was applicable to professional designers. The court similarly dismissed this as well, concluding that the commissioner lacked the statutory authority to waive *nullum tempus* against the state. The trial court was therefore reversed.

### Certificates of Merit

***Robert Navarro & Associates Engineering, Inc. v. Flowers,*** **No. 08-10-00236, 2012 WL 4380958 (Tex. Ct. App. Sept. 26, 2012).**

*The Court of Appeals of Texas, El Paso concluded that the plaintiff failed to satisfy the certificate of merit statute by failing to attribute a specific act, error, or omission to each engineering firm.*

Flowers Baking Co. (Flowers) filed suit in a single petition asserting claims against Robert Navarro & Associates Engineering, Inc. and Bath Engineering Corporation (collectively, the "appellants"). The petition arose out of construction of a new warehouse at the Flowers' facility. Flowers hired Navarro to provide it with "architectural, civil engineering, structural, mechanical, and electrical design and construction documents, including drawings and specifications."[100] Flowers also contended that Bath was to prepare certain documents for the project as well. The appellants were to identify and provide for water and sewage connections to the warehouse. It was later discovered that when the project was complete, there were no existing and accessible water and sewage lines. As a result, Flowers alleged that it incurred serious and unexpected costs in implementing another alternative. Flowers alleged professional negligence and breach of contract against Navarro and negligent misrepresentation against Bath. The appellants moved to

dismiss the complaint for failure to attribute conduct to each defendant. The trial court denied the motion, prompting the appeal.

The court noted that in an action against a licensed or registered professional, the plaintiff must satisfy Chapter 150 and:

> *file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:*
>
> *(1) is competent to testify*
> *(2) holds the same professional license or registration as the defendant; and*
> *(3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's;*
>
> > *(A) knowledge;*
> > *(B) skill;*
> > *(C) experience;*
> > *(D)education;*
> > *(E) training; and*
> > *(F) practice.*[101]

The court stated that an affidavit must also set forth specifically for each theory of recovery for which damages are sought the negligence or other action, error, or omission of the licensed or registered professional. The court stated that the failure of a plaintiff to abide by this will result in dismissal of the complaint and such dismissal may be with prejudice. Flowers filed a single certificate of merit, sworn by Gerald Spencer, and it established the requisite duty of a professional engineer. However, the appellants contend that the statute required an affiant to attribute a specific act, error, or omission to each defendant. Mr. Spencer stated in his affidavit that:

> *Therefore it is my opinion that the failure to confirm the actual location and existence of the water and sewer lines that are indicated on Drawing Sheet No. Mo. 1 constitutes professional negligence by Robert Navarro and Associates Engineering* ***and/or*** *Bath Engineering Corporation.*[102]

The use of "and/or," according to the appellants, establishes that Flowers failed to attribute a single act or omission to each defendant as required by the statute. The court agreed and remanded the case back to the district court to determine whether Flowers' failure to file a certificate of merit in accordance with the statute warranted dismissal with prejudice.

### *M-E Engineers, Inc. v. City of Temple,* 365 S.W.3d 497 (2012)

*The Court of Appeals of Texas, Austin concluded that a professional engineer's certificate of merit affidavit was sufficient to establish that the engineer was qualified to testify, that the engineer practiced in the same field as the defendant engineer, and that a certificate of merit was not required to reference every defendant in the lawsuit or a factual basis for every claim.*

The litigation arose after a newly built police station started having problems with its heating, ventilation, and air conditioning. The city hired a general contractor and an architect. The architect contracted with M-E Engineers, Inc. (M-E) "to provide mechanical, electrical, and plumbing engineering services for the project."[103] M-E provided such services through Allen Y. Tochihara, a licensed professional engineer and M-E principal. Having issues with the HVAC system, the city

commenced litigation against M-E, Tochihara, the general contractor, and the architect under negligence and contract theories. Pursuant to Chapter 150 of the civil practice and remedies code, the city attached a certificate of merit from Bill M. Long, a licensed professional engineer. Long "opined that 'these errors and omissions were caused by a lack of supervision and enforcement of the contract documents by the Engineer, which constitutes negligence in the practice of engineering.'"[104] Long identified Tochihara as the "engineer," but failed to mention M-E in the certificate. Both Tochihara and M-E then filed motions to dismiss. The city then amended its pleadings prior to the hearing and included: "(1) negligence by Tochihara; (2) vicarious liability of M-E for Tochihara's negligence, by virtue of Tochihara's status as the company's employee, and agent and principal; (3) breach of contract by M-E; and (4) breach of warranties by M-E." The district court then denied the motion to dismiss; an appeal followed.

Tochihara and M-E raised four issues on appeal. First, they sought dismissal of the city's claims against M-E because Long's certificate only mentioned Tochihara and not M-E. For their second and third issues, they argued that the district court abused its discretion in failing to dismiss all of the city's claims against them because Long's certificate failed to demonstrate that he was qualified to testify to the opinions contained in the certificate. Lastly, they argued that Long's certificate lacked the factual bases for these claims.

First, the court noted that in Long's certificate he stated that he was a professional engineer licensed in Texas, actively engaged in the practice of mechanical engineering, and that he practices in the design of heating, ventilating, air conditioning, and plumbing systems—same as Tochihara. Long continued by stating that he had reviewed Tochihara's specifications and drawings, and his opinions were based on his review of such documents. The court noted that Long had 11 numbered paragraphs that attributed defects or deficiencies in the system to Tochihara.

The appellants next argued that the certificate failed to establish that Long practiced in the same field as the defendants. The court stated that it cannot say that the district court abused its discretion because the certificate indicated that Long was actively engaged in the practice of mechanical engineering and that he practiced in the design of heating, ventilating, air conditioning, and plumbing systems. The court also stated that the district court considered the 11 numbered paragraphs that showed deficiencies and defects attributed to Tochihara to show that Long was knowledgeable in the subject area. Similarly, the court also concluded that the district court did not abuse its discretion in concluding that Long's certificate demonstrated that his opinions were based on his personal knowledge, skill, education, experience, and training after having read the project specifications and drawings. The court stated that this satisfied Chapter 150.

The appellants further contended that Long failed to reference M-E. The appellants argued that Long was required to mention both M-E and Tochihara separately and attribute acts of negligence to each. In addition, they argued that Long failed to provide a "factual basis" relating to the city's contract and warranty theories of recovery against them. The appellants, according to the court, seemed to argue that the certificate must "set forth facts that would satisfy each element of any legal theory or claim on which the plaintiff intends to rely—including each element of the City's contract and warranty claims."[105] The court disagreed, concluding that the "certificate must identify and verify the existence of any professional errors or omissions that are elements or operative facts under any legal theory on which the plaintiff intends to rely to recover damages."[106] The court stated that the city's pleadings stated that Tochihara committed numerous errors and omissions in designing the HVAC system and that, predicated on such errors and omissions, the city sought damages against him and against M-E through vicarious liability. The court, therefore, concluded that the certificate satisfied the statutory requirements.

### Affidavit of Merit

***Sirianni v. Network Management, Ltd.,*** **No. L–0458–11, 2012 WL 3155531 (N.J. Super. Ct. App. Div. Aug. 6, 2012)**

*The Superior Court of New Jersey, Appellate Division concluded that, absent extraordinary circumstances, failure to provide Affidavit of Merit within 120 days mandated dismissal of complaint with prejudice.*

On February 27, 2009, the plaintiff was injured after completing repairs on a cell tower. As he exited the platform, a hatch door suddenly fell onto his head, causing him serious injuries. The plaintiff brought suit against KMB Design Group, LLC (KMB) and Volver Engineering (Volver) alleging that they were both engaged in the business of designing, manufacturing, and distributing cell towers, doors, and latches for the cell tower where plaintiff was working. KMB and Volver filed their answer on April 15, 2011. On July 13, 2011, the plaintiff filed an amended complaint against the defendants, alleging that the two negligently designed the door of the cell tower.

On May 11, 2011, the plaintiff's counsel wrote to the defendants asking them if the defendants were alleging that the plaintiff's claim needed an affidavit of merit. Counsel for the defendants responded on August 10, 2011, stating that their clients were indeed engineers and that any claim based on negligent design would need an affidavit of merit. They said that from their calculation, an affidavit of merit would need to be filed by August 13, 2011. In their July 6, 2011 answers to the plaintiff's interrogatories, the defendants stated that they were hired to perform engineering services. On November 14, 2011, KMB and Volver had not received an affidavit of merit and therefore filed a motion to dismiss. While the plaintiff could have received an additional 60-day extension, the defendants argued that the time had passed for the 60-day extension, bringing the total days that an affidavit would need to be filed to 120 days after the defendants filed their answer.

The plaintiff filed the affidavit of merit on November 29, 2011 and asked the judge to deny the defendants' motion. During the December 2, 2011 hearing, the plaintiff argued that he did not know until he received the letter dated August 10, 2011 that the defendants were engineers, and that he did not have any drawings or anything else that an expert could actually look at to determine whether this was a professional malpractice case. The judge denied the defendants' motion, concluding that because the plaintiff did not know the defendants were engineers, the plaintiff had demonstrated exceptional circumstances; the defendants appealed.

On appeal, the court noted that "[i]f a plaintiff fails to file the affidavit of merit within 120 days, his 'complaint will be dismissed with prejudice unless extraordinary circumstances prevented a timely filing.'"[107] The court said there was no confusion as to whether the defendants were engineers who provided engineering services because the defendants provided interrogatory answers stating that they were indeed engineers who had performed engineering services. Also, the court stated that the defendants notified the plaintiff within the 120-day period that the plaintiff would need an affidavit of merit. As for drawings, the court noted that the plaintiff failed to ask for engineering drawings. As a result, the court reversed the trial court, concluding that the complaint ought to have been dismissed.

### Statute of Limitation and Relation Back

***Graney v. Caduceus Properties, LLC,*** **91 So.3d 220 (2012)**

*The District Court of Appeal of Florida concluded that an amendment adding the engineering company and its principal did not relate back to the filing of the original complaint.*

The owner and the lessee brought action against the architect arising out of a defective heating, ventilation, and air conditioning system on July 24, 2006. This followed after the certificate of occupancy was issued for the building in August 2005. The architect then brought third-party claims against the engineering company that designed the system and its principal on March 7, 2007. On June 3, 2010, after the four-year statute of limitations had run, the owner and the lessee amended the complaint to directly add claims against the engineering company and principal. The engineering company raised the statute of limitations as a defense. The circuit court entered judgment in favor of the owner; the engineering company appealed.

The court stated that the four-year statute of limitations begins to run for actions involving completed construction projects when the owner takes possession of the property, the date the certificate of occupancy is issued, the date of completion or termination of the contract between the design professional, or whichever is last. The court continued by stating that if the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered. The court stated that the certificate of occupancy was issued on August 5, 2005, and the record showed that the owner and lessee were aware of the problems associated with the HVAC system by September 2005. As a result, the statute of limitations ran no later than September 2009. The action commenced by the owner and lessee was June 3, 2010, almost nine months after the statute of limitations had expired. The court said that the issue was whether the action against the engineering company related back.

The court concluded that an amendment will relate back where the defendant knew or should have known that the plaintiff was guilty of a misnomer or mistake as to the identities of the potential defendants. The court stated that the owner and the lessee were aware of the identities of the engineering company and its principal and their roles in the design and approval of the HVAC system. The court said this was not a case where the defendants misled the plaintiff into believing that the correct defendant was already sued. As a result, claims filed by the owner and lessee did not relate back, and the trial court was reversed.

The Florida Supreme Court subsequently accepted jurisdiction of this case and have set it for oral argument.

### Arbitration Provisions

***Avenbury Lakes Homeowners Ass'n., Inc. v. Avenbury Lakes, Inc.*****, Nos. 11CA009958, 11CA009964, 2012 WL 2087191 (June 11, 2012)**

*The Court of Appeals Ohio, Ninth District, Lorain County concluded that the arbitration provision was not enforceable because the amount at issue exceeded the arbitration agreement's limit.*

Avenbury Lakes Homeowners Association (association) brought the following action against developer Avenbury Lakes, Inc. (developer) for breach of implied warranty and negligence for deficiencies and poor workmanship in construction of the community's clubhouse. The developer asserted claims against the architect and engineer that provided HVAC services. The association

then amended their complaint and brought suit against the architect and engineer alleging breach of implied warranty, negligence, and breach of contract. The architect then filed a third-party complaint against the engineer alleging breach of contract, negligence, contribution, and indemnification. The engineer filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction because there was an arbitration agreement in place between him and the architect.

The court issued judgment concluding that the proceedings be stayed pending the outcome of the arbitration; an appeal followed.

The architect argued that his claims were not subject to arbitration; the court agreed. The court concluded that the arbitration agreement between the architect and engineer prevented arbitration for claims in excess of $100,000. The court reasoned that the architect's claims fell outside of the arbitration agreement because the developer filed a statement of damages alleging damages in the amount of $698,118.82. Because the developer sued the architect, and the architect subsequently sued the engineer, the court concluded that the amount in question exceeded the $100,000 and was therefore not subject to arbitration.

### *Jones v. Mainwaring,* No. 09–12–00324–CV, 2012 WL 6643849 (Dec. 20, 2012)

*The Court of Appeals Texas, Beaumont concluded that a valid arbitration provision was enforceable.*

The plaintiffs hired the architects to design and supervise construction of their home. The architectural agreement between the parties provided that "[a]ny claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration."[108] After various issues arose with their home, the plaintiffs sued the architects seeking damages, attorneys' fees, interest, and costs. The architects then sought to have the trial court enforce the arbitration agreement. The plaintiffs resisted, saying that:

> *the arbitration agreement was not enforceable because [the architect], when the parties entered the architectural agreement, was not a licensed architect in the State of Texas. [The plaintiffs] also argued that the choice-of-law provision in the architectural agreement, which provided that Louisiana law governed the agreement, was unconscionable.*[109]

The trial court concluded that the arbitration agreement between the parties was not enforceable, and therefore denied the architect's motion to compel arbitration; an appeal followed.

First, the court concluded that the plaintiffs' claims were based in large part on the actions or omissions of the architects under the architectural agreement. The court concluded that the parties' arbitration clause was broad. Therefore, the architects established the existence of an arbitration agreement that, if valid, the plaintiffs' claims would fall within.

Next, the plaintiffs argued that the architect was not registered with the state and therefore the entire architectural agreement was unenforceable, including the arbitration agreement. The architect argued that the arbitration provision was severable from the underlying agreement, making it enforceable even if the underlying agreement proved later to be unenforceable. The court found this persuasive and concluded that the validity of the arbitration agreement was an issue to be decided by the arbitrator.

The plaintiffs next contended that the choice of law provision was unconscionable. The court stated that: "[I]n considering an arbitration clause, unconscionability must specifically

relate to the [arbitration clause] itself, not the contract as a whole, if [unconscionability is] to defeat arbitration."[110] The court noted that the choice of law provision was not located in the arbitration clause but was contained in miscellaneous provisions that pertained to the agreement as a whole and did not relate to the arbitration clause. As a result, the court concluded that the unconscionability argument related to the contract as a whole and not specifically to the arbitration clause.

The plaintiff also attempted to argue that the architects waived the right to arbitrate by agreeing to reinstate the case and to continue the case. The court stated that nothing contained in the order reinstating the case or the parties' motion to continue the case established that the architect intended to give up the right to arbitrate. The court stated that, while the architects filed an answer and participated in some discovery, the parties acknowledged that discovery remained incomplete. Therefore, the architects, according to the court, did not substantially invoke the litigation process. The trial court was reversed.

# Endnotes

[1] LeBlanc, 463 Mass. at 318, 974 N.E.2d at 37.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at 319, 874 N.E.2d at 38.
[7] *Id.* at 320, 874 N.E.2d at 39.
[8] *Id.*
[9] *Id.* at 321, 874 N.E.2d at 39.
[10] *See,* n.6.
[11] *Id.* at 324, 874 N.E.2d at 41.
[12] *Id.*
[13] *Id*. at 325, 874 N.E.2d at 41.
[14] *Id.* at 328, 874 N.E.2d at 43 (quoting *Parent v. Stone & Webster Eng'g Corp.,* 408 Mass. 108, 113–114, 556 N.E.2d 1009 (1990)) (citation omitted).
[15] *LeBlanc*, 463 Mass. at 328, 974 N.E.2d at 44.
[16] *Id.* at 331, 974 N.E.2d at 45.
[17] *Id.*
[18] *Id.* at 331, 974 N.E.2d at 46.
[19] *Id.*
[20] *Sams Hotel Group*, at *1.
[21] *Id*. at *2.
[22] *Id*.
[23] *Id.* at *2.
[24] *Id.* at *3.
[25] *Id.*
[26] *Id.* at *3.
[27] *Id.*
[28] *Id.* at *4.
[29] *Id.*
[30] *Id.*
[31] *Id.* at *6.
[32] *Id.*
[33] *Id.* at *7.
[34] *Id*.
[35] *Id.*
[36] *Id.*
[37] *Id*.
[38] *Id.*
[39] *Id.* at *8.
[40] *Id.* at *8.

[41] *Id.* at *10.
[42] *Id*. at *11.
[43] *Id.* at *13.
[44] *Id.*
[45] *Beacon Residential Community Association*, 211 Cal. App. 4th at 1308 (quoting *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650–651, 320 P.2d 16).
[46] *Id*. at 1313.
[47] *Id.*
[48] *Id*. at 1314.
[49] *Id.* at 1316.
[50] *Meridian*, 81 Mass. App. Ct. at 130, 960 N.E.2d at 346.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 131, 960 N.E.2d at 347.
[54] *Id*.
[55] *Id.* at 132, 960 N.E.2d at 348 (quoting *Vaughan v. Eastern Edison Co*., 48 Mass. App. Ct. 225, 229, 719 N.E.2d 520 (1999)).
[56] *Id*. at 133, 960 N.E.2d at 348.
[57] *Id.* at 134, 960 N.E.2d at 349.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 135, 960 N.E.2d at 350.
[62] 210 Cal. App. 4th at 964, 148 Cal.Rptr. 3d at 819.
[63] *Id.* at 969, 148 Cal. Rptr. 3d at 823.
[64] *Greater LaFourche Port Comm'n*, 104 So.3d at 85.
[65] *Id.* at 90 (quoting *Gurtler, Hebert, and Co., Inc. v. Weyland Machine Shop, Inc.*, 405 So.2d 660, 662 (La.App. 4 Cir.1981)) (citation omitted).
[66] *Id*. at *2.
[67] *Id.* at *3.
[68] *Id*. at *4.
[69] *Id.*
[70] *Id.* at *6.
[71] *Id.* at *11 (quoting *Richards v Passarelli*, 77 AD3d 905, 909 [2d Dept 2010]).
[72] *Id.*
[73] *Id.* at *12.
[74] *Id.*
[75] *Id.* at *13
[76] *Id.* at *14.
[77] *Id.*
[78] *Id.*
[79] *Id.* at *1.
[80] *Id.*
[81] *Id.*
[82] *Id*. at *2.
[83] *Id.* at *7
[84] *Patrick Engineering, Inc*., 362 Ill. Dec. at 642.

[85] *Id.* at 644.
[86] *Id.* at 645.
[87] *Id.* at 646.
[88] *Id.*
[89] *Id.* (quoting *St. Paul Fire & Marine Insurance Co. v. Antel Corp.,* 387 Ill.App.3d 158, 167, 326 Ill.Dec. 516, 899 N.E.2d 1167 (2008)).
[90] *Id.* at 648.
[91] *Barzoukas*, 363 S.W.3d at 837.
[92] *Id*. at 837.
[93] *Id*.
[94] *Id*.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 837-38.
[98] *Leis Family Ltd. Partnership*, 126 Hawaii at 534, 273 P.3d at 1220.
[99] *New Jersey Municipal Environmental Risk Management*, 2012 WL 3870316, at *6.
[100] *Robert Navarro & Associates Engineering, Inc*., No. 08-10-00236, 2012 WL 4380958 (2012).
[101] *Id.* at *3.
[102] *Id.* at *4.
[103] *M-E Engineers, Inc*., 365 S.W.3d at 498.
[104] *Id.* at 499.
[105] *Id.* at 505.
[106] *Id.* at 506.
[107] *Sirianni*, 2012 WL 3155531, at *4.
[108] *Jones*, 2012 WL 6643849, at *1.
[109] *Id.* at *1.
[110] *Id.* at *3. (internal quotations omitted) (citations omitted).