**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 11: Defective Design, Materials, or Equipment**

This lesson considers the liability of design professionals for design defects and the liability of manufacturers and suppliers for defects in materials and equipment. While many construction industry cases are litigated every year on these matters, they essentially apply well-established contract and tort principles. Lawyers representing clients in connection with claims of defective design, materials, or equipment must understand the alternative theories of liability, and they must review the relevant cases in the applicable jurisdiction to determine which theories and which defenses may be viable. This lesson draws on two companion articles written by practitioners and published in 2003 for overviews of the available theories of liability.

In *Construction Defect Claims Against Design Professionals and Contractors,* 23 Constr. Law. 9 (Spring 2003), by John W. Hays, read the entire segment under the heading “Claims Against Design Professionals.” This part of the article discusses multiple bases of design professional liability, both in tort and contract. (You may defer reading the rest of the article, under the heading “Claims Against the Contractor and Installer/Subcontractor,” until Lesson 12, which addresses defective construction.)

Next, read *Construction Defect Claims against Manufacturers and Suppliers*, 23 Constr. Law 15 (Spring 2003), by Daniel S. Brennan. This article reviews the bases of manufacturer and supplier liability under the construction cases. You will notice substantial overlap in the leading contract and tort theories in these two articles. For manufacturers and suppliers, however, the Uniform Commercial Code and product liability law often take center stage.

Over the years since these two articles were written, courts have rendered countless additional decisions on liability for defective design, materials, and equipment in construction industry cases. New and updated statutory provisions have also been enacted and applied in construction industry cases, some involving aspects of the Uniform Commercial Code and newer consumer protection laws. The basic principles and considerations relevant to these issues, however, remain. For detailed discussions of recent cases and authorities on many of these matters, see Chapters 9 (volume 3) and 17 (volume 5) in Phillip L. Bruner & Patrick J. O’Connor, Jr., *Bruner & O’Connor on Construction Law* (Westlaw Aug. 2023).

One issue that has been especially challenging for the courts concerns the economic loss rule, which both the assigned articles mention. The economic loss rule comes up repeatedly in construction industry cases, not only those involving defective design, equipment, and materials. The rule often precludes recovery in tort when the plaintiff incurs economic losses without suffering personal injury or property damage. The underlying policy often articulated is that, except in limited situations, contract law rather that tort law should afford protection for purely commercial interests. The reported opinions can be uniquely difficult to reconcile in the context of the complex network of interdependent relationships among participants in construction projects. A common situation that has generated much debate arises when a project participant sues a design professional with whom the plaintiff has no contract, as when a general contractor or a subcontractor claims to have suffered purely economic damage because of a design error made by the owner’s architect. See Jeffrey L. Goodman & Courtnery E.C. Ringhofer, *Economic Loss Doctrine: An Analysis of the Rule’s Applicability to Design Professionals*, 70 Drake L Rev. 297 (2022); Carl J. Circo, *Placing the Commercial and Economic Loss Problem in the Construction Industry Context*, 41 J. Marshall L. Rev. 39 (2007).

For Review and Discussion

1. Based on the assigned readings, how effectively can design professionals, manufacturers, and suppliers use contractual provisions to avoid or limit their liability for defects?
2. Construction industry participants asserting defect claims against design professionals, manufacturers, and suppliers sometimes argue for third-party beneficiary status to secure a remedy under contract law. What policy considerations do (or should) courts consider in such cases when deciding whether to characterize the plaintiff as a third-party beneficiary?
3. According to Hays and Brennan, what are some of the clearest examples of tort claims against design professionals, manufacturers, and suppliers that are subject to an economic loss rule defense? What are some of the clearest examples of tort claims against design professionals, manufacturers, and suppliers that are not subject to an economic loss rule defense?