construction products available for use today. Yet, architects and engineers have been held responsible for malpractice by specifying an inappropriate product, even though they relied upon the manufacturer's representations.[6] Designers can also be liable to contractors for failing to approve the use of an "or equal" product.[7]

§ 17:4 Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator

Architects and engineers generally act in one of three capacities: "(1) as agents of [the owner]; (2) as quasi-arbitrators; or (3) on their own, in the sense that they were not acting as agents or as quasi-arbitrators."[1] More specifically, the designer's various roles include acting in the capacity of:

1. An independent contractor in the preparation of the construction plans and specifications;
2. An agent of the owner in observing the construction work as it progresses and administering the contract; and
3. A quasi-judicial officer with certain immunity when acting

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the vast number and diverse nature of building materials used in the construction process. For example, the 1990 edition contains over thirty volumes with several thousand pages per volume. The products listed in this catalogue do not represent the entire universe of construction products as space is limited to those firms that distribute their products nationally and are willing to purchase advertising space in McGraw Hill's catalogue.

While the construction industry has lagged behind other industries such as manufacturing in developing new product delivery, there has been progress. For example, the Japanese have developed a "top-down" method of construction which, although costlier than traditional construction, permits a structure to be built in both directions at the same time. Piles are driven into the site and the first-floor slab is set; then the building is built upward as excavation continues below. This was the method of construction employed for the $1.65 billion Tokyo International Forum which was designed by the New York architectural firm of Rafael Viñoly Architects. The building was "topped-off" before excavation was completed. See 85 Architecture 110 (Oct. 1996).

[6]See Bloomsburg Mills, Inc. v. Sordoni Const. Co., 401 Pa. 358, 164 A.2d 201 (1960); Greenberg v. City of Yonkers, 45 A.D.2d 314, 358 N.Y.S.2d 453 (2d Dep't 1974), order aff'd, 37 N.Y.2d 907, 378 N.Y.S.2d 382, 340 N.E.2d 744 (1975). See also Tomson & Copeland, Malpractice Claims, Progressive Architecture 82 (1975). Design professionals may well have recourse against manufacturers for negligent misrepresentations. See Restatement Second, Torts § 522.

[7]See Waldinger Corp. v. CRS Group Engineers, Inc., Clark Dietz Div., 775 F.2d 781, 42 U.C.C. Rep. Serv. 172 (7th Cir. 1985). See also §§ 17:48 to 17:50.

[Section 17:4]

[1]Lundgren v. Freeman, 307 F.2d 104, 116, 6 Fed. R. Serv. 2d 945 (9th Cir. 1962). See also §§ 4:42 to 4:47 (discussing change order authorization).

as arbiter in resolving disputes between the owner and the contractor.[2]

Determining whether an architect or engineer is acting in its capacity as an agent, as distinguished from an independent contractor, requires an examination of the "control"[3] the designer has over its activities and the contractual definitions of legal relationships, of scope of work and of extent of owner delegation of authority.[4] An independent contractor typically is one who agrees to accomplish certain results, but is not controlled in the details, manner, or particular method of performing the task, whereas an agent is directed and controlled by the principal in performing to the details of the work. Professionals, such as architects and engineers, perform their design tasks as independent contractors due to the highly specialized skill and license requirements of their work.[5] Thus, an engineer performing design work which was incorporated into an architect's drawings was, nevertheless, construed to be an independent contractor.[6]

§ 17:5 Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as "independent contractor" for design services

Although the architect or engineer is perceived by many during the design phase as acting as the agent of the owner by translating the owner's general requirements into detailed construction documents, the designer's legal role during the design phase is that of an "independent contractor." Under state licensure statutes and state and local building codes, the designer has a role of unique responsibility that cannot be delegated except to other licensed professionals. Under building codes, the architect or engineer is the legal designer "of record." A licensed designer

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[2]Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278, 299-300, 136 Cal. Rptr. 603, 616 (5th Dist. 1977). See also § 17:52 (discussing contract administration) and §§ 17:79 to 17:84 (discussing design professional's role as arbiter of disputes). See also AIA Document A201-1997, ¶ 4.2.1 (architect is "owner's representative" during construction), ¶ 4.2.11 (architect interprets the contract documents and resolves disputes over interpretation), and ¶ 4.4 (architect's decision on claims).

[3]See §§ 15:22 to 15:28 (discussing concept of control).

[4]See Restatement Second, Agency § 220.

[5]See Restatement Second, Agency § 220, cmt. i.

[6]See Whitfield Const. Co., Inc. v. Commercial Development Corp., 11 V.I. 655, 392 F. Supp. 982, 1000 (D.V.I. 1975)). See also Snider v. Northern States Power Co., 81 Wis. 2d 224, 260 N.W.2d 260 (1977).

"of record" assumes an independent legal obligation to see that plans and specifications are competently prepared to achieve the owner's requirements and to comply with applicable laws and building codes.[1] The principal consequence of being classed as an "independent contractor" in performing design services is that a designer may be held liable to parties with whom there is no contractual privity[2] for negligence that results in injuries to persons or property and, in some jurisdictions, in economic loss.[3] Tort theories frequently used to impose liability upon designers in the absence of contractual privity are negligence in preparation of construction documents[4] and negligent misrepresentation.[5] Although liability traditionally has been based on professional negligence, liability to contractors based on implied warranty theories occasionally has been upheld.[6] The basic elements of proof are (1) the designer new that its contract documents would be relied upon by contractors in preparing bids; (2) the designer's duties in preparing the contract documents were not limited by contract to a standard below reasonable care; (3) the contractor

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[Section 17:5]

[1]For a detailed look at the host of design issues to be addressed by design professionals, see 2 The Architect's Handbook of Professional Practice §§ 3.6 to 3.8 (1994) (discussing design services, design parameters, and design documentation).

[2]See E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 551 F.2d 1026, 21 U.C.C. Rep. Serv. 1061 (5th Cir. 1977), opinion modified on other grounds on reh'g, 559 F.2d 268 (5th Cir. 1977) (architect liable).

[3]See §§ 19:10 to 19:12.

[4]See A. R. Moyer, Inc. v. Graham, 285 So. 2d 397, 65 A.L.R.3d 238 (Fla. 1973) (holding architect liable to contractor for damage due to negligent preparation of contract documents).

[5]See Restatement Second, Torts § 522(1) (information negligently supplied for the guidance of others). See also Donnelly Const. Co. v. Oberg/Hunt/Gilleland, 139 Ariz. 184, 677 P.2d 1292 (1984) (rejected on other grounds by, Gipson v. Kasey, 214 Ariz. 141, 150 P.3d 228 (2007)) (applying § 522 of the Restatement Second, Torts to hold that construction contractor's complaint against architects that substantial errors in plans and specifications prepared by architects resulted in increased construction costs stated cause of action for negligent misrepresentation, despite lack of privity between contractor and architects, who prepared plans and specifications for property owner).

[6]See Eastern Steel Constructors, Inc. v. City of Salem, 209 W. Va. 392, 549 S.E.2d 266 (2001) (holding architect liable to contractor for economic losses arising out of defectively prepared plans and specifications on the basis of both professional negligence and implied warranty). A majority of jurisdictions continue to reject designer liability under an implied warranty theory because professional services are not comparable to the sale of goods. See City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978); Sears, Roebuck & Co. v. Enco Associates, Inc., 43 N.Y.2d 389, 401 N.Y.S.2d 767, 372 N.E.2d 555 (1977).

in fact relied upon the designer's contract documents in preparing its bid; (4) contract documents were negligently prepared by failure to comply with the requisite standard of care (for claims based on negligence) or were defective (for claims based on implied warranty); and (5) loss resulted from the negligently prepared or defective contract documents.[7]

§ 17:6 Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as agent during construction

It is during the contract administration and construction phases that the architect usually acts as agent for the owner within the scope of contractually delegated authority. But, it is not uncommon for owners to undervalue or even eliminate the architect's role in administering construction contracts.[1] The architect or engineer can provide a vast array of services during the administration and construction phases.[2] Possible services include: (1) advising the owner regarding contractor selection; (2) observing the work for compliance with the plans and specifications; (3) certifying contractor payment applications; (4) reviewing shop drawing submittals; (5) monitoring project scheduling; (6) certifying substantial and final completion; and (7) certifying grounds for contract termination for default.[3] The scope of the architect's agency authority is often defined by its contract with

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[7]See Conforti & Eisele, Inc. v. John C. Morris Associates, 175 N.J. Super. 341, 418 A.2d 1290 (Law Div. 1980), opinion aff'd, 199 N.J. Super. 498, 489 A.2d 1233 (App. Div. 1985).

[Section 17:6]

[1]The AIA has encouraged its membership to advise owners that it is not wise to skimp on these services, as a successful project may well depend upon the architect's involvement during construction. See Morog, Construction Contract Administration, 2 The Architect's Handbook of Professional Practice § 3.92 (1994). Moreover, the AIA notes that architects are also exposed to professional liability claims arising from construction of the project even if they are not on the project team during the construction phase. While this may be the case, the designer's exposure to liability greatly expands if it has responsibilities during the construction phase. Perhaps the most problematic situation is where the owner wishes to save money and yet have the architect perform some service during the construction phase. Under these circumstances the architect is often paid a little money to be, at best, a part-time watchdog which in many cases only serves to greatly increase the professional's exposure to liability claims without any real opportunity to lessen its risks by providing adequate and appropriate services.

[2]§§ 17:52, 17:79.

[3]The American Institute of Architects has identified more than 100 pos-

the owner. For example, paragraph 4.2.1 of the AIA Document A201-1997, General Conditions of the Contract for Construction states the following:

> The Architect will provide administration of the Contract as described in the Contract Documents, and will be Owner's representative (1) during construction, (2) until final payment is due, and (3) with the Owner's concurrence, from time to time during the correction period described in paragraph 12.2. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.[4]

The designer's status as agent or independent contractor can

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sible services that can be rendered from the predesign stage through post-construction phase. See Haviland, The Architect in the Building Enterprise, in 1 The Architect's Handbook of Professional Practice § 1.12 (1994).

[4]AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 4.2.1. Much of the remainder of article 4 is devoted to identifying the scope of the architect's responsibilities. For example, while the architect will visit the site to determine in general if the work is being performed in a manner consistent with the contract documents, the architect is not required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work (¶ 4.2.2); nor will the architect have control over, or charge of, and will not be responsible for the contractor's failure to perform (¶ 4.2.3); the architect will, however, certify what sums are due the contractor (¶ 4.2.5); the architect also has the authority to reject work which does not conform to the contract documents (¶ 4.2.6); the architect may also have the authority to require additional inspection or testing of the work (¶ 4.2.6); the architect will review and approve shop drawings, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the contract documents (¶ 4.2.7); and the architect will prepare change orders and be authorized to require minor changes in the work (¶ 4.2.8).

The Engineer's Joint Contracts Document Committee (the body responsible for drafting standard contracts for the engineering profession) identifies the engineer's status during construction as follows:

> 9.1 ENGINEER will be OWNER's representative during the construction period. The duties and responsibilities and the limitations of authority of ENGINEER as OWNER's representative during construction are set forth in the contract documents and shall not be extended without written consent of OWNER and ENGINEER.

EJCDC Document No. 1910-8, Standard General Conditions of the Construction Contract, ¶ 9.1 (1990). Like the AIA General Conditions, the EJCDC document contains a number of provisions setting forth the engineer's responsibilities during the construction phase, including site visits (¶ 9.2), authority to make clarifications or interpretations of the contract documents (¶ 9.4), authority to make minor variations in the work (¶ 9.5), rejecting defective work (¶ 9.6), reviewing shop drawings (¶¶ 9.7, 6.24 through 6.28), authority to prepare change orders (¶ 9.8 and Articles 10, 11, and 12), authority to certify applications for payment (¶ 9.9 and Article 14), the authority to determine actual quantities and classifications of unit price work (¶ 9.10). The EJCDC documents contain a specific provision relative to the limitations on engineer's authority and responsibilities. This paragraph states:

have significant consequences for all the contracting parties. Status as an agent can cause its principal to be bound to the designer's actions.[5] For example, in a dispute between, among oth-

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9.13 Neither ENGINEER's authority or responsibility under this Article 9 or under any other provision of the contract documents nor any decision made by ENGINEER in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise or performance of any authority or responsibility by ENGINEER shall create, impose or give rise to any duty owed by ENGINEER to CONTRACTOR, any Subcontractor, any Supplier, any other person or organization, or to any surety for or employee or agent of any of them.

The remainder of 9.13 sets forth specific limitations on the engineer's authority and responsibilities. For example, the engineer has no authority over nor shall be responsible for the contractor's means, methods, techniques, sequences or procedures of construction, or the safety precautions and programs incident thereto (¶ 9.13.2). Nor is the engineer responsible for any acts or omissions of the contractor (¶ 9.13.3). The engineer's review of the final application for payment is only for the purpose of determining generally that their content complies with the requirements of the contract documents (¶ 9.13.4). EJCDC Document No. 1910-8 was revised, renumbered, and reissued in 2002 as EJCDC Document C-700, Standard General Conditions of the Construction Contract (2002). The substance of the cited provisions remain generally the same.

Contract provisions limiting the designer's authority and responsibility can be significant. In Young v. Eastern Engineering and Elevator Co., Inc., 381 Pa. Super. 428, 554 A.2d 77 (1989), the Pennsylvania Superior Court held that the trial court properly granted summary judgment in favor of an architect on personal injury claims asserted by a worker who fell through a hole in drywall surrounding an elevator shaft. While the court remarked that there was a split of authority as to whether an architect was liable to a worker for injuries or death resulting from hazardous working conditions on a construction site, Pennsylvania law did not place a duty on the architect to protect workers from hazards absent an undertaking by contract or conduct to supervise and control the construction. The architect's contract required it to make periodic visits to the site to determine whether the work was proceeding in accordance with the contract documents. The contract contained no undertaking to assume a duty of supervision and control with respect to the actual construction, and did not impose on the architect the responsibility for safety at the construction site. As a result, the architect's role was such that it owed no duty to the worker relative to a safe work site and, therefore, was not responsible for the injuries. See also Marshall v. Port Authority of Allegheny County, 106 Pa. Commw. 131, 525 A.2d 857 (1987), order aff'd, 524 Pa. 1, 568 A.2d 931 (1990).

[5]There can be some confusion generated by the use of the terms "agent" and "independent contractor." Some courts use the term "agent" very broadly to encompass independent contractors. These courts find the relevant distinction to be the one between servant and independent contractor. See Arsand v. City of Franklin, 83 Wis. 2d 40, 264 N.W.2d 579, 583 (1978) ("An agent may be either a servant or an independent contractor, but the doctrine of respondent superior applies only if the agent is also a servant."). For purposes of the present discussion, the term "agent" will be used in contrast to "contractor" and, therefore, for our purposes, an independent contractor is not one type of agent but rather a separate legal designation.

Generally, the design professional's ability to bind its principal will be

ers, an architect and engineer over who was to bear the additional costs incurred by the contractor to reinforce concrete slabs due to an underdesign by the engineer, the United States District Court of the Virgin Islands stated:

> The proper party from whom it [the contractor] can collect turns on the question of whether [the engineer] was acting as an agent of [the architect] or an independent contractor. If he was the former, [the architect] is clearly liable to [the contractor] for $5,000 for the additional steel and reinforced concrete in the floor slabs. If, on the other hand, [the engineer] is found to have been an independent contractor. [the architect] is not liable for his mistake and [the contractors] may collect directly from [the engineers]. The general rule of liability is that a principal is liable for the negligent acts of his agent, but not for those of an independent contractor.[6]

The engineering consultant was construed to be an independent contractor, and thus solely responsible for his own negligent conduct. The court had little difficulty in concluding that the engineer's error in calculating the proper amount of reinforcing steel and concrete was an action over which the engineer had complete control.[7] Civil engineers are "a highly specialized group" and as skilled professionals, generally work under their own control as independent contractors.[8] The fact that the engineer's work was incorporated into the architect's drawings and distributed under the architect's name did not, in this instance, render the engineer an agent for the architect. The engineer's work was a "minute proportion" of the project which required "particular expertise" and which, among the knowledgeable parties, was immediately recognized as the engineer's contribution to the work.[9]

Architects and engineers may be liable to contractors and other

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limited to contractually authorized activities. See Walker v. Wittenberg, Delony & Davidson, Inc., 241 Ark. 525, 242 Ark. 97, 412 S.W.2d 621 (1966); Incorporated Town of Bono v. Universal Tank & Iron Works, Inc., 239 Ark. 924, 395 S.W.2d 330 (1965); Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 299 N.E.2d 359 (3d Dist. 1973); Volquardsen v. Davenport Hospital, 161 Iowa 706, 141 N.W. 432 (1913); Cutlip v. Lucky Stores, Inc., 22 Md. App. 673, 325 A.2d 432 (1974); Smith v. Board of Education of Parkersburg Dist., 76 W. Va. 239, 85 S.E. 513 (1915).

[6]Whitfield Const. Co., Inc. v. Commercial Development Corp., 11 V.I. 655, 392 F. Supp. 982, 998 (D.V.I. 1975). See also Dumas v. Lloyd, 6 Ill. App. 3d 1026, 286 N.E.2d 566 (1st Dist. 1972); Owings v. Rose, 262 Or. 247, 497 P.2d 1183, 57 A.L.R.3d 821 (1972).

[7]Whitfield Const. Co., Inc. v. Commercial Development Corp., 11 V.I. 655, 392 F. Supp. 982, 999 (D.V.I. 1975).

[8]Whitfield Const. Co., Inc. v. Commercial Development Corp., 11 V.I. 655, 392 F. Supp. 982, 999-1000 (D.V.I. 1975).

[9]Whitfield Const. Co., Inc. v. Commercial Development Corp., 11 V.I. 655,

third-parties for harm caused by their acts in their capacity as an owner's agent.[10] There are, however, a number of obstacles that are sometimes encountered by contractors seeking recovery from designers due to errors and omissions committed as agents for their clients. Contractors have been denied recovery against agent architects where (1) they previously have sought recovery from the owner for the same claim,[11] and are collaterally estopped to seek recovery from the architect for the same loss; or (2) they seek recovery in tort for economic loss damages. In *Huber, Hunt & Nichols, Inc. v. Moore,*[12] a contractor was denied recovery against an architect for increased costs incurred on a construction project where the architect was acting as an agent of the owner and the contractor had already sought recovery against the owner. Because the contractor failed to distinguish between claims against the architect in its capacity as an independent contractor (improper design), as an agent of the owner (construction supervision), and as an arbiter (resolving disputes), the contractor's evidence against the architect was excluded, thereby hindering recovery:

> . . . Contractor has not segregated and has made no apparent effort to segregate delays and resulting damage, if any, which were attributable to Architects' alleged negligence in preparing the initial plans and specifications and the Architects' alleged negligence in supervising the work. There is a substantial legal difference. . . . In our view, Architects can be held liable for their negligent acts in the capacity of an independent contractor. The general rule in California is that a professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties even if though there is no privity of contract between the third person and the professional person and even though the client does not complain about the quality of the professional service. . . . We do not say that under these circumstances Architects cannot be held liable for damages proximately caused by negligence in preparing plans and specifications. What we do say is that Contractor, in attempting to prove its case, was required to distinguish between those alleged acts of negligence by

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392 F. Supp. 982, 1000 (D.V.I. 1975).

[10]See Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F.2d 1298, 1310 (5th Cir. 1986) ("[U]nder Mississippi law, architects, engineers, and possibly others who act as agents are not immune to third-party suits in tort.").

[11]See Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278, 136 Cal. Rptr. 603 (5th Dist. 1977). See also Lundgren v. Freeman, 307 F.2d 104, 6 Fed. R. Serv. 2d 945 (9th Cir. 1962).

[12]Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278, 136 Cal. Rptr. 603 (5th Dist. 1977).

> Architects in their capacity as independent contractors and their negligent acts as agents of the Owner in supervising the work and their acts as quasi-judicial arbiters in resolving disputes between the Owner and Contractor. Here, Contractor made no such effort.[13]

Contractors seeking tort damages for economic loss against a designer acting in his capacity as an owner's agent also can encounter difficulties unless they can establish that the designer breached some duty to or acted outside delegated authority from the owner. In *Bagwell Coatings, Inc. v. Middle South Energy, Inc.*,[14] a fireproofing contractor on a nuclear power station claimed that the power company's construction manager/agent disrupted its work and caused it damages.[15] In rejecting the contractor's tort claims against the agent, the court held:

> While [the subcontractor] may have suffered adverse effects from these managerial decisions by [the construction manager/agent], such adverse consequences to [the subcontractor] did not establish a breach by [the construction manager/agent] of its contract with [the owner] or any duty to [the owner] arising therefrom. Nor is it established that [the owner] did not in fact profit from [the construction manager/agent's] decisions, even considering the damages for which [the owner] is liable to [the subcontractor]. On a huge, complicated construction project such as Grand Golf, with many different subcontractors working, the owner may reasonably determine that the project as a whole will be completed faster and at substantially less overall cost if it changes the scheduling agreed on with one or more subcontractors, notwithstanding that the owner will ultimately have to bear the thus increased cost of one of the subcontractors. The latter cost may be far less than the total savings to the owner arising from the change. If the owner can reasonably so determine, then so can the party it has charged with acting

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[13]Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278, 136 Cal. Rptr. 603, 616-617 (5th Dist. 1977). See also Lundgren v. Freeman, 307 F.2d 104, 116-117, 6 Fed. R. Serv. 2d 945 (9th Cir. 1962) ("As agents, architects are not here liable for decisions made by them, acting within their powers as agents, because Lundgren [contractor] has elected his remedy. . . . A widely-held view is that by suing the principal, the plaintiff has elected to rely on the principal's financial resources, evidently on the reasoning that the agent should not be sued twice, once by the principal for the amount of the judgment the principal has paid, and again by the plaintiff.").

[14]Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F.2d 1298 (5th Cir. 1986).

[15]Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F.2d 1298, 1311-12 (5th Cir. 1986). Bagwell claimed that Bechtel did not permit it to perform its fireproofing work in advance of the placement of obstructions by other trades. Bagwell also claimed that Bechtel did not schedule the contractor's work sufficiently in advance so as to enable it to effectively and efficiently organize and plan its work. Bagwell also complained that Bechtel "haggled over minutia while assuring Bagwell that it would be fairly compensated."

in its stead and for its interests with respect to the project. Indeed, such a representative may have a *duty* to the owner to take such action on its behalf. [The subcontractor] has presented no substantial evidence of a breach of duty by [the construction manager/agent] to [the owner], nor has it demonstrated any ultimate harm suffered by [the owner] as a result of [the construction manager/agent's] complained of actions. Having failed to establish a breach by [the construction manager/agent] of a duty to [the owner], [the subcontractor] cannot recover [economic loss] from [the construction manager/agent] in tort.[16]

§ 17:7 Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as agent during construction—Imputing designer's actions to owner

The designer's status as agent can bind the owner to the extent of the agency.[1] The knowledge of an architect agent can, in some cases, be imputed to the owner, thereby either denying the owner

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[16]Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F.2d 1298, 1312 (5th Cir. 1986). The court prefaced its analysis with the observation that:

> The damages sought are for economic losses of the same general type as contractor quasi-contract damages (as opposed to damages for physical harm to persons or property) and there is no third-party beneficiary of the architects' or engineers' contract with the owner nor any special factor establishing on the part of the architect or engineer any duty other than that owed under or arising from his contract with the owner.

Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F.2d 1298, 1310-11 (5th Cir. 1986). See Seattle Western Industries, Inc. v. David A. Mowat Co., 110 Wash. 2d 1, 10, 750 P.2d 245 (1988) (holding an engineer's duty of care to third parties extends at least as far as the duties assumed by him in the contract with the owner); Davidson and Jones, Inc. v. New Hanover County, 41 N.C. App. 661, 255 S.E.2d 580 (1979) (holding an architect, in absence of privity of contract, may be sued by third party for economic loss foreseeably resulting from breach of architect's common-law duty of due care in performance of his contract with the owner); Moundsview Independent School Dist. No. 621 v. Buetow & Associates, Inc., 253 N.W.2d 836 (Minn. 1977) (engineer's liability to contractor with regard to supervision of the construction site is determined by obligation enumerated in contract with owner).

[Section 17:7]

[1]The exact nature of the designer's status can be crucial. Project representatives, for example, generally have less authority than design professionals. See Lemley v. U.S., 317 F. Supp. 350 (N.D. W. Va. 1970), order aff'd, 455 F.2d 522 (4th Cir. 1971); Missouri Portland Cement Co. v. J. A. Jones Const. Co., 323 F. Supp. 242 (M.D. Tenn. 1970), judgment aff'd, 438 F.2d 3 (6th Cir. 1971); Acoustics, Inc. v. Trepte Constr. Co., 14 Cal. App. 3d 887, 92 Cal. Rptr. 723 (2d Dist. 1971).

recovery or exposing it to liability.[2] An agent's approval of work with knowledge of defects can prohibit an owner from later recovering from the contractor for defective work.[3] However, courts have been reluctant to so bind owners without clear proof of delegated authority.[4] For example, a product manufacturer's attempt to impute an architect's knowledge about asbestos insulation to an owner was rejected where the architect was not acting as the owner's agent during the design phase:

> An architect is an agent of the owner only for those matters regarding the architect's supervision over the construction of the building. . . . [The manufacturer] asserts that the architect *could* have issued a change order regarding his selection of products during the supervision of the construction phase. [The manufacturer] emphasizes that the contract between [the owner] and the architect provides that the architect shall be the agent of the owner during construction. Thus, by [the manufacturer's] argument, the knowledge held by the architect regarding the development of the plans and specifications becomes imputable once construction begins. This argument undermines the legal distinction the law provides for the different roles of an architect. The Court sees no justification for imputing the architect's knowledge about the selection of building materials to an owner simply because construction begins

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[2]See Lindbrook Const., Inc. v. Mukilteo School Dist. No. 6, 76 Wash. 2d 539, 458 P.2d 1 (1969) (architect's knowledge of changed condition imputed to owner); Trane Co. v. Gilbert, 267 Cal. App. 2d 720, 73 Cal. Rptr. 279 (2d Dist. 1968) (notice of limited warranty given to mechanical engineer bound owner); Fifteenth Ave. Christian Church v. Moline Heating & Const. Co., 131 Ill. App. 2d 766, 265 N.E.2d 405 (3d Dist. 1970) (designer's knowledge of industry custom chargeable to owner).

[3]See Eastover Corp. v. Martin Builders, 543 So. 2d 1358, 1362-63 (La. Ct. App. 4th Cir. 1989) (architect knew or should have known of improper spacing of sewer pipe hangars as it was a patent defect and such knowledge was imputable to owner; thus, owner's acceptance of work with constructive knowledge of patent defect precluded recovery from contractor); Kala Investments, Inc. v. Sklar, 538 So. 2d 909 (Fla. 3d DCA 1989) (stating contractor not liable after building accepted by owner if defect is patent; however, contractor may be liable if defect is latent); Casey v. Hoover (State Report Title: Casey v. Wrought Iron Bridge Co.), 114 Mo. App. 47, 89 S.W. 330 (1905) (holding where work accepted, contractor is no longer liable).

[4]See Board of Ed., Union Free School Dist. No. 5, Town of Greenburgh, Westchester County v. A. Barbaresi & Son, Inc., 25 A.D.2d 855, 269 N.Y.S.2d 823 (2d Dep't 1966) (architect's certificate only establishes "actual final completion"); City of Midland v. Waller, 430 S.W.2d 473 (Tex. 1968). Sometimes confusion can result over the scope of the imputation analysis. Milton J. Womack, Inc. v. House of Representatives of State, 509 So. 2d 62 (La. Ct. App. 1st Cir. 1987), writ denied, 513 So. 2d 1208 (La. 1987) and writ denied, 513 So. 2d 1211 (La. 1987) (architect's error in preparation of drawings would not be imputed to owner as architect was acting as an independent contractor and thus owner was not responsible to pay contractor early completion bonus).

on the building as specified and designed.[5]

§ 17:8 Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as agent during construction—Scope of designer's authority

Owners cannot be bound by the acts of their agents which are outside the scope of their express, implied, or apparent authority.[1] It is not uncommon for disputes to arise due to the designer's overt or tacit authorization of a change to the work which is later rejected by the owner. For example, in *Construction Equipment Lease Co. v. United States*,[2] the contract "changes" clause stated that only the contracting officer had authority to issue a change order to the contract. Although the government engineer orally authorized a change to the contract, the United States Claims Court ruled that the statement was not binding on the government because the engineer did not have the requisite authority to modify the contract.[3]

As a federal contract case, *Construction Equipment* presents a strict application of the principle of actual authority normally not encountered in private contracting. In federal government contracting, specific regulations set forth the express authority of government agents. In most cases, federal contracting officers have specified limits on their authority which include actual dollar amounts or types of transactions which they can authorize.[4] Contracting officers can also appoint representatives such as resident engineers, contracting officers representatives (CORs), officers in charge of construction (OICCs), resident officers in charge of construction (ROICCs) and inspectors. Each particular

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[5]Blue Cross and Blue Shield of South Carolina v. W.R. Grace & Co., 781 F. Supp. 420, 424 (D.S.C. 1991). See also Hines v. Farr, 235 S.C. 436, 112 S.E.2d 33 (1960); Palmer v. Brown, 127 Cal. App. 2d 44, 273 P.2d 306, 315-16 (2d Dist. 1954) (Architect improperly received compensation from contractor while supervising contractor's work for owner); Fuchs v. Parsons Const. Co., 172 Neb. 719, 111 N.W.2d 727, 733 (1961); Lunow v. Fairchance Lumber Co., 389 F.2d 212 (10th Cir. 1968); Home Furniture, Inc. v. Brunzell Const. Co., 84 Nev. 309, 440 P.2d 398 (1968).

[Section 17:8]

[1]Public owners usually can be bound only under express or implied authority but not apparent authority. See §§ 4:42 to 4:47.

[2]Construction Equipment Lease Co. v. U.S., 26 Cl. Ct. 341, 38 Cont. Cas. Fed. (CCH) ¶ 76328, 1992 WL 103607 (1992).

[3]Construction Equipment Lease Co. v. U.S., 26 Cl. Ct. 341, 38 Cont. Cas. Fed. (CCH) ¶ 76328, 1992 WL 103607 (1992).

[4]See F.A.R. § 1.603, 48 C.F.R. § 1.603.

representative has his or her own specified level of express authority. As a result, contractors and others doing business with the federal government are well advised to check the limit of authority of the government personnel with whom they do business. Unlike dealing with agents of private owners, there is little opportunity for a contractor to claim that a government agent had apparent authority:

> Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. The scope of his authority may be explicitly defined by Congress or may be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations on his authority.[5]

In private contracting, the situation is somewhat different. Owners can be bound by the acts and decisions of their agents even though beyond the express authority of the agency. Under the doctrine of apparent authority,[6] an owner can be bound by the acts of its agent outside the scope of its authority.[7] Apparent authority requires some conduct on the part of owner which would permit a reasonable to a conclusion by third parties that the

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[5]See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L. Ed. 10, 175 A.L.R. 1075 (1947). See also Appeal of Abbott W. Thompson Associates, D.O.T.C.A.B. No. 1098, 81-1 B.C.A. (CCH) ¶ 14879, 1981 WL 7227 (D.O.T. Cont. Adj. Bd. 1981) (designer was not entitled to extra compensation as regional government architect that issued change order did not have authority from contracting officer); but see WRB Corp. v. U. S., 183 Ct. Cl. 409, 1968 WL 9146 (1968); Williams v. U. S., 130 Ct. Cl. 435, 127 F. Supp. 617 (1955) (implied authority found for orders of a Contracting Officer Representative (COR) as the contracting officer impliedly ratified CORs decision).

[6]See § 4:45.

[7]The Restatement of Agency defines apparent authority in the construction setting:

> When a design professional exceeds his express or implied authority in dealing with third parties, and misrepresents that he has authority, the contractor will seek to establish that the design professional had "apparent authority." If established, the owner will be liable for the acts of the design professional.

Restatement Second, Agency § 27. See also Bryan & Sons Corp. v. Klefstad, 237 So. 2d 236 (Fla. 4th DCA 1970); Davis v. Bush & Lane Piano Co., 124 Or. 585, 265 P. 417 (1928); Employers Liability Assur. Corp. v. Sheftall, 97 Ga. App. 398, 103 S.E.2d 143 (1958); V. L. Nicholson Co. v. Transcon Inv. and Financial Ltd., Inc., 595 S.W.2d 474, 27 Cont. Cas. Fed. (CCH) ¶ 80250 (Tenn. 1980); Amritt v. Paragon Homes, Inc., 9 V.I. 570, 474 F.2d 1251 (3d Cir. 1973). See also Hussey, Gay & Bell v. Georgia Ports Authority, 204 Ga. App. 504, 420 S.E.2d 50 (1992) (no evidence that owner held engineer out as having authority to agree to pay for repair work, therefore, no express or apparent authority).

agent has actual authority to act.[8] Statements or comments by the agent alone usually are insufficient to create apparent authority unless made in the presence of the principal.[9] It is not uncommon for an owner to be bound by unauthorized acts of its agent, under the doctrine of apparent authority, where the owner placed the agent in a position such that the inference of actual authority was reasonable.[10] An owner which permits its engineers to request and supervise additional excavating in contravention of a contract provision requiring a written change order signed by the owner, can be held responsible for the engineer's actions.[11] An owner can also be responsible for its agent's unauthorized acts if it, after the fact, ratifies the actions.[12]

The doctrine of implied authority is somewhat more limited than apparent authority.[13] An agent, such as an architect or engineer, is impliedly authorized to undertake those acts which are necessary and incidental to accomplishing duties expressly

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[8]An owner can be held bound by the unauthorized acts of individuals with apparent authority to act on their behalf. See Ja Dan, Inc. v. L-J, Inc., 898 F. Supp. 894 (S.D. Fla. 1995) (contractor bound by unauthorized individual that had been permitted to hold himself out as a "supervisor").

[9]See 2 Williston on Contracts (3d ed.) pp 222-24 § 277A.

[10]See Frank Sullivan Co. v. Midwest Sheet Metal Works, 335 F.2d 33 (8th Cir. 1964) (sending agent to get the job started and providing agent with documentation necessary to prepare and accept bids was sufficient for finding an apparent authority). See also Electric Service Co. of Duluth v. Lakehead Elec. Co., 291 Minn. 22, 189 N.W.2d 489 (1971) (apparent authority may be implied from the contract with the owner, without representations to third parties).

[11]See W. E. Garrison Grading Company v. Piracci Construction Company, Inc., 289 N.C. 296, 222 S.E.2d 695 (1976). This situation also gives rise to a conclusion that the owner impliedly waived the contract requirement of a written change authorization. See also J. R. Graham & Son, Inc. v. Randolph County Bd. of Ed., 25 N.C. App. 163, 212 S.E.2d 542 (1975); Jenkins Const. Corp. v. Department of Transp. and Development, 492 So. 2d 89 (La. Ct. App. 1st Cir. 1986), writ denied, 496 So. 2d 1042 (La. 1986). See also E. Paul Kovacs & Co., Inc. v. Alpert, 180 Conn. 120, 429 A.2d 829 (1980) (owner held responsible for agent's agreement with contractor where owner's conduct held the agent out as having the authority to contract).

[12]See Dan Rice Const. Co. v. U.S., 36 Fed. Cl. 1, 40 Cont. Cas. Fed. (CCH) ¶ 76954 (1996) (contracting officer that silently listened in on telephone conversation where unauthorized government employee authorized change constituted binding ratification of directive); Lindbrook Const., Inc. v. Mukilteo School Dist. No. 6, 76 Wash. 2d 539, 458 P.2d 1 (1969); Fletcher v. Laguna Vista Corp., 275 So. 2d 579, 581 (Fla. 1st DCA 1973).

[13]See § 4:44.

authorized.[14]

When an architect or engineer, within the scope of delegated express or implied authority, authorizes, accepts, or rejects work, such actions normally will bind the owner.[15] When acting within such authority and when otherwise complying with its contract obligations, an agent designer is not liable to either the owner or third parties for the economic consequences of its decisions. For example, an architect who, within the scope of its authority, required a contractor to correct sill heights in the restoration of a commercial building, was not personally responsible for any additional costs in the absence of an important expression to become responsible therefore.[16] But to the extent that an architect's actions are outside the scope of its authority, then the owner will not be bound, unless it made certain representations permitting a conclusion of apparent authority or the architect's acts are implied as incidental to its express authority. Thus, an architect's unauthorized grant of an extension of time to a contractor does not bind the owner and the owner still may seek liquidated damages from the contractor:

> The architect's authority is limited. He may not direct the work to be done otherwise than is provided by the plans and specifications, except as he has been given authority so to do therein or by the contract. Unless so authorized, he is powerless to relieve the contractor from complying with his undertaking in order to make it easier for him or for any other purpose, if this be detrimental to the

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[14]See Bethlehem Fabricators, Inc. v. British Overseas Airways Corp., 434 F.2d 840 (2d Cir. 1970). In a case where contracting officer informally designated another government employee to perform the approval of additional work, said employee was cloaked with implied authority so as to bind government, particularly where his actions were ratified by the payment of some of the work he approved. See Miller Elevator Co., Inc. v. U.S., 30 Fed. Cl. 662, 39 Cont. Cas. Fed. (CCH) ¶ 76635 (1994), dismissed, 36 F.3d 1111 (Fed. Cir. 1994).

[15]See Restatement Second, Agency § 328; City of Granville v. Kovash, Inc., 118 N.W.2d 354 (N.D. 1962) (architect's certificate that "work completed in a satisfactory manner" barred city's claim against contractor for freezing sewer mains placed at too shallow depths); Diamond B Const. Co., Inc. v. City of Plaquemine, 673 So. 2d 636 (La. Ct. App. 1st Cir. 1996) (binding owner to pay contractor due to engineer's acceptance of work even though owner thought work was not in compliance with contract).

[16]See Hogan v. Postin, 695 P.2d 1042 (Wyo. 1985). However, even though there was evidence that the owner recommended certain windows to the architect, as the contractor presented no evidence that the architect was bound by the recommendation, the architect's approval of the defective windows was not imputed to the owner. City of Wahpeton v. Drake-Henne, Inc., 215 N.W.2d 897 (N.D. 1973) (holding that the city did not waive compliance with the contract requirements through engineer's certification of completion, and thus city was not barred from recovering against the contractor).

owner.[17]

The designer is not the owner's agent for all purposes in the construction of a building. Its powers and duties are limited by the terms of the contract of employment, and by relevant terms of the contract between the owner and the contractor.[18] Being only a limited special agent of the owner, a designer's acts in excess of authority will not bind the owner as principal.[19]

§ 17:9 Designer's three distinct professional roles: Independent designer, agent administrator and quasi-adjudicator—Designer as interpreter and arbiter

The designer's third customary role is as an independent quasi-adjudicator of disputes between the owner and contractor to the extent provided in the contract documents. Many construction contracts give the architect or engineer, as the party knowledgeable about design intent, the authority to interpret the contract documents.[1] The complexities of the construction documents and the construction process demanded that the designer, as the party

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[17]Incorporated Town of Bono v. Universal Tank & Iron Works, Inc., 239 Ark. 924, 395 S.W.2d 330, 333 (1965). See also Smith v. Board of Education of Parkersburg Dist., 76 W. Va. 239, 85 S.E. 513 (1915).

[18]See AIA Document A201-1997, ¶ 4.1.2 ("Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without the written consent of the Owner, Contractor, and Architect."), and ¶ 4.2.1 ("The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents . . . .").

[19]It is possible that an architect is not an agent for the owner at all times or for all purposes during the construction phase. See Prichard Bros., Inc. v. Grady Co., 428 N.W.2d 391, 48 Ed. Law Rep. 990 (Minn. 1988).

[Section 17:9]

[1]See AIA Document A201-1997, General Conditions of the Contract for Construction.

> 4.2.11 The architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. . . .
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> 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent and reasonably inferable from the Contract Documents and will be in writing or in the form of Drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.
>
> 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

The designer's exercise of authority ordinarily is subject to judicial or arbitrator review. See Morin Bldg. Products Co., Inc. v. Baystone Const., Inc., 717 F.2d 413

most familiar with design requirements, purposes and details, and construction methods, serve as "a competent neutral body . . . in making the law of the building contract a statement of the reasonable expectations of both parties."[2]

As one might expect, asking an individual, who is paid by the owner and performs a number of tasks as the owner's agent, to render impartial decisions on matters in dispute between the contractor and owner raises the specter of potential conflict of interest.[3] In some instances, the designer as quasi-arbiter may have to reexamine positions taken as the owner's agent.[4] It takes a conscientious and honorable individual to successfully wear so many hats.

Recognizing the difficult role the designer fills as an arbiter and borrowing from precedent established for judicial officials, designers acting as quasi-arbitrators are granted immunity from suit for their decisions.[5] The purpose espoused for providing immunity is to free designers from the fear of harassment and of lawsuits due to their decisions, and thereby to permit them to utilize their own unfettered judgment in deciding the merits of matters submitted for decision.

There are limits to this immunity. The designer's dual position as an agent of the owner and quasi-arbitrator differentiates its role from judges or other public officials who act judicially or quasi-judicially. The designer is employed and paid by the owner, and is often called upon to judge the sufficiency, accuracy, and adequacy of its own plans and specifications, which can create strong pressures to be unfair to the contractor. The designer

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(7th Cir. 1983) (rejection of siding for aesthetic reasons was unreasonable because building was used for a strictly utilitarian purpose and specification called for "mill finish sheet" which would result in some nonconformity of appearance); NSC Contractors, Inc. v. Borders, 317 Md. 394, 564 A.2d 408 (1989) (decision to withhold payment to contractor because of decision that brick work did not match was reviewable); Federated Dept. Stores, Inc. v. J.V.B. Industries, Inc., 894 F.2d 862 (6th Cir. 1990).

[2]See Havighurst, The Nature of Private Contract 97 (1961).

[3]See §§ 18:6 to 18:9.

[4]See Lundgren v. Freeman, 307 F.2d 104, 117, 6 Fed. R. Serv. 2d 945 (9th Cir. 1962).

[5]See Wilder v. Crook, 250 Ala. 424, 34 So. 2d 832 (1948); Bever v. Brown, 56 Iowa 565, 9 N.W. 911 (1881); Jones v. Brown, 54 Iowa 74, 6 N.W. 140 (1880); Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 1884 WL 13922 (1884); Craviolini v. Scholer & Fuller Associated Architects, 89 Ariz. 24, 357 P.2d 611 (1960); Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor, 61 A.L.R.6th 445., § 4[a]; Liability of architect or engineer for improper issuance of certificate, 43 A.L.R.2d 1227, § 2.

always should be protected when acting in good faith, however erroneously. Such protection should be enough. If the designer acts fraudulently, or with willful and malicious intent to injure the contractor, liablility should follow.[6] Further, the designer is not immune from liability for unjustifiably failing to make any decision. Pursuant to most standard form contracts, the designer must make reasonably prompt decisions acting in its capacity as a quasi-arbiter. If the designer fails to meet this contractual undertaking, there is no immunity from suit.[7]

§ 17:10 Standard of care: Duty of care

The design professional's standard of care is deceptively simple. Like many standards having wide application, the designer's standard references a mean. The designer owes a duty to perform services with the degree of skill, learning and experience that ordinarily is possessed by similarly situated professionals in the community.[1] The designer's standard of care requires neither perfection nor a warranty of a particular result. Rather, it expresses an expectation that the designer will discharge her professional duties with the care ordinarily exercised by others of her profession. As the California Supreme Court stated:

> The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. On the other hand, those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchased service, not insurance.[2]

Hidden within this prosaic concept that professionals are to be

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[6]Lundgren v. Freeman, 307 F.2d 104, 118, 6 Fed. R. Serv. 2d 945 (9th Cir. 1962).

[7]See E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 551 F.2d 1026, 21 U.C.C. Rep. Serv. 1061 (5th Cir. 1977), opinion modified on other grounds on reh'g, 559 F.2d 268 (5th Cir. 1977).

[Section 17:10]

[1]See RCDI Const., Inc. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D. N.C. 2001), aff'd, 29 Fed. Appx. 120 (4th Cir. 2002) (discussing the standard).

[2]Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954). See also Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896) ("The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required service at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, judgment and taste, reasonably and without neglect.").