Chapter 10

LITIGATION AGAINST DESIGN PROFESSIONALS

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§ 10.1 INTRODUCTION ............................................................... 10–1
§ 10.1.1 Applicable Legal Concepts ........................................... 10–1
§ 10.1.2 Background: The Design and Construction Industries .... 10–2

§ 10.2 STANDARD OF CARE FOR DESIGN PROFESSIONALS ............................................ 10–4
§ 10.2.1 Ordinary and Reasonable Skill ...................................... 10–4
§ 10.2.2 Expert Testimony .......................................................... 10–7
  (a) General Principles ..................................................... 10–7
  (b) LeBlanc v. Logan Hilton Joint Ventures ......................... 10–8
  (c) Daubert-Lanigan Inquiry ............................................. 10–9

§ 10.3 STATUTE OF REPOSE—G.L. c. 260, § 2B .................. 10–9

§ 10.4 ECONOMIC LOSS DOCTRINE ..................................... 10–13

§ 10.5 COMMON ALLEGATIONS AGAINST DESIGN PROFESSIONALS ........................................ 10–16
§ 10.5.1 Professional Negligence .......................................... 10–16
§ 10.5.2 Implied Warranty Claims ........................................... 10–17
§ 10.5.3 Express Warranty Claims—“Assaying the Bird” .......... 10–18
  (a) Clear Proof .......................................................... 10–19
  (b) Case Studies .......................................................... 10–20
§ 10.5.4 Negligent Misrepresentation Claims ................................. 10–22
   (a) Elements of a Negligent Misrepresentation Claim ......................... 10–23
   (b) Discussion of Case Law Specific to Design Professionals ............... 10–25
   (c) Expert Testimony ........................................................................ 10–27
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Scope Note
This chapter addresses legal concepts applicable to litigation against architects and engineers. It discusses the standard of care, the significance of expert testimony, and common claims against design professionals. Defenses addressed by the chapter include the statute of repose and the economic loss doctrine.

§ 10.1 INTRODUCTION

§ 10.1.1 Applicable Legal Concepts

The design professional plays a critical and unique role in the design and construction process. While it may be assumed by practitioners that construction-specific canons of law uniformly apply to contractors and design professionals alike, engineers and architects are in some instances subject to differing principles of law and defenses in litigation.

This chapter focuses on certain legal concepts that have resonated in the author’s defense of architects and engineers. While there is much by way of precedent regarding this topic, this chapter will discuss the professional standard of care for architects and engineers, the significance (and, more often than not, necessity) of expert testimony, and common claims against design professionals, including a short discussion on two key guillotines of litigation: the Massachusetts Statute of Repose (G.L. c. 260, § 2B) and the economic loss doctrine. Many of the defenses discussed in this chapter are equally applicable to contractors and other members of the construction industry, but the chapter primarily addresses these topics in the context of design professionals.
§ 10.1.2  Background: The Design and Construction Industries

The design and construction industries have a rich history that in many ways accurately foretells the reality of the modern construction project. Fortunately, design professionals are no longer subject to the “eye for an eye” principles of the Code of Hammurabi:

229 If a builder build a house for some one, and does not construct it properly, and the house which built fall in and kill its owner, then the builder shall be put to death.

230 If it kill the son of the owner the son of that builder be put to death.

231 If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house.

232 If it ruin goods, he shall make compensation for that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.

233 If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means.


The architect as the “master-builder”—the single person in charge of the design and construction of the project—has evolved into a more circumscribed and specialized role, supplemented by other technical disciplines, including engineering. These disciplines continue to evolve as owners, design professionals, contractors, and other project participants consider and collaborate on project delivery methods.
A number of legal principles applied to design professionals have deep historical roots. Particularly significant is the predominant role of the contract in defining the rights, responsibilities, obligations, and risks of those involved in the construction project. Marcus Vitruvius Pollio, chief engineer to Julius Caesar and Emperor Augustus, known in his time as the “chief engineer of the civilized world,” advised as follows:

[A]s for principles of law, [an Architect] should know those which are necessary in the case of buildings have party walls, with regard to water dripping from the eaves, and also the laws about drains, windows and water supply. And other things of this sort should be known to architects, so that, before they begin upon buildings, they may be careful not to leave disputed points for the householders to settle after the works are finished, and so that in drawing up contracts the interests of both employer and contractor may be wisely safeguarded. For if a contract is skillfully drawn, each may obtain a release from the other without disadvantage.

Philip L. Bruner, “The Historical Emergence of Construction Law,” 34 Wm. Mitchell L. Rev. at 2 n.6. The contract remains the touchstone and framework for both a plaintiff’s right to assert a claim and a design professional’s defense. Inattention to detail in contractual language or other deficiencies will present significant challenges.

Another continuing theme is the complexity of the industry and the resulting body of law governing it. Philip L. Bruner, “The Historical Emergence of Construction Law,” 34 Wm. Mitchell L. Rev. at 12 (citations omitted). As is true in most industries, the design and construction industry has its own custom, practice, and technical vocabulary. For example, to say that an architect “approves” a submission by a contractor carries with it a specific industry meaning that could lead to misunderstanding by counsel unfamiliar with this lexicon.

Moreover, the realities of an actual construction project, such as the infamous “Big Dig,” involve overlapping roles and responsibilities of designers, contractors, and other project participants that are challenging to delineate and often interwoven in separate but linked contractual agreements that include a variety of risk transfer mechanisms and elaborate dispute resolution procedures. Design delegation of significant portions of the project to specialty trade subcontractors (e.g., building envelopes, soil mechanics, gas vapor barrier systems, environmental issues) and the use of ever-improving technologies (such as building information modeling during projects) require courts and practitioners to constantly

1st Supplement 2013
evaluate traditional legal approaches in representing their creative and specialized clients.

What remains constant is the need for an understanding of the basics in this area, and hopefully a meticulous nature to distill through the complexities. As stated by one legal commentator, “construction law today is a primordial soup in the melting pot of law—a thick broth consisting of centuries-old legal theories fortified by statutory law and seasoned by contextual legal innovations reflecting the broad factual realities of the modern construction process.” Philip L. Bruner, “The Historical Emergence of Construction Law,” 34 Wm. Mitchell L. Rev. at 13–14.

§ 10.2 STANDARD OF CARE FOR DESIGN PROFESSIONALS

§ 10.2.1 Ordinary and Reasonable Skill

In a typical construction project, the liability standard governing the reasonableness of a design professional’s conduct differs from the standard applicable to the owner and contractor. Generally, an owner provides an implied warranty to the contractor that the plans and specifications are free from defects. See United States v. Spearin, 248 U.S. 132, 136–37 (1918). The contractor is bound to the owner contractually to build according to a certain set of plans and specifications (contrast performance specifications, which would not result in a Spearin warranty) and will not be responsible for the “consequences of defects in the plans and specifications.” United States v. Spearin, 248 U.S. at 136–37 (cited by Alpert v. Commonwealth, 357 Mass. 306, 320 (1970) (“It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended.”)). In turn, contractors typically provide to the owner a variety of warranties and guarantees in the contract documents regarding their work on a given project.

In contrast, a design professional’s performance of services on a project is judged by a different liability standard. The general standard of care for design professionals in Massachusetts and in the majority of jurisdictions in the United States was set forth by the Supreme Judicial Court in Klein v. Catalano, 386 Mass. 701 (1982):

As a general rule, “[a]n architect’s efficiency in preparing plans and specifications is tested by the rule of
ordinary and reasonable skill usually exercised by one of that profession. . . . In the absence of a special agreement he does not imply or guarantee a perfect plan or satisfactory result. “Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance . . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.” Moreover, unlike a mass producer of consumer goods “an architect has but a single chance to create a design for a client which will produce a defect-free structure. Accordingly, we do not think it just that architects should be forced to bear the same burden of liability . . . as that which has been imposed on manufacturers generally.” We believe that unlike a manufacturer, an architect does not impliedly guarantee that his work is fit for its intended purpose. Rather he impliedly promises to exercise that standard of reasonable care required of members of his profession.

*Klein v. Catalano*, 386 Mass. at 718–19 (citations and footnote omitted). In so stating, the Supreme Judicial Court explicitly applied the above standard of reasonable care to even those situations that “involve routine [architectural] work similar to that involved in mass production.” *Klein v. Catalano*, 386 Mass. at 719 n.18.

Otherwise “the finder of fact will be forced in every case to determine, as a preliminary matter, whether the alleged architectural error was made in the performance of a sufficiently simplistic task. Defects which are found to be more esoteric would presumably continue to be tried under the traditional [negligence] rule. It seems apparent, however, that the making of any such threshold determination would require the taking of expert testimony and necessitate
an inquiry strikingly similar to that which is presently made under the prevailing negligence standard. We think the net effect would be the interjection of substantive ambiguity into the law of professional malpractice without a favorable trade-off in procedural expedience.”

Klein v. Catalano, 386 Mass. at 719 n.18 (quoting Mounds View v. Walijarvi, 263 N.W.2d 420, 425 (Minn. 1978)). In sum, architects and engineers do not warrant a perfect result. The duty of care is reasoned judgment in performing their services.

The parties’ agreement may determine whether a design professional’s conduct will be assessed by reference to professionals practicing in the same locality or to national firms and competitors. The Klein decision recognizes that a “special agreement” may alter the applicable standard of care. Language promising to provide the “highest,” “first-class,” or “non-negligent” services—or other language that purports to guarantee, warrant, or certify the quality of design services on the project—may create a heightened standard. In some jurisdictions, courts find terms such as “assure” and “ensure” to have such an effect. But see Malden Cliffside Apartments, LLC v. Steffian Bradley Associates, Inc., where the court ruled that a provision stating that “[the architect] shall use professional skill and care to assure that the Project is properly designed, constructed and tested” did not heighten the architect’s duty of care. See Malden Cliffside Apartments, LLC v. Steffian Bradley Assocs., Inc., 66 Mass. App. Ct. 1101 (2006) (unpublished decision; text available at 2006 WL 910358, at *5) (emphasis added).

Practice Note
The locality rule seems to be the preferred measure for assessing standard of care. A typical locality standard of care provision in an agreement would state as follows: “The consultant’s services shall be performed in a manner consistent with that degree of skill and care ordinarily exercised by design professionals performing similar services in the same locality, at the same site and under the same or similar circumstances and conditions.”

Practice Note
A heightened standard of care on a project could lead to issues with professional liability insurance (including, potentially, denial of coverage) and complicates the use of expert testimony.
§ 10.2.2 Expert Testimony

(a) General Principles


We generally require expert testimony because “laymen, including the jury, the trial judge, and ourselves, could not be, and are not, in a position to determine . . . the requirements of professional conduct” in relevant circumstances. Only in “exceptional cases,” where the malpractice “is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence,” do we not require expert testimony.

*LeBlanc v. Logan Hilton Joint Ventures*, 463 Mass. at 329 (citations omitted). Expert testimony is necessary also to establish that there was a breach of that duty of care and that the breach caused damages to the plaintiff. *Esturban v. MBTA*, 68 Mass. App. Ct. 911, 911–12 (2007) (“jurors [need] the assistance of an expert detailing not only what standards and codes apply, but also how the ‘narrow design’ did not meet the standards or codes and whether there was a causal relationship between that design and the plaintiffs’ injuries”). As an example, in *Atlas Tack*, the court correctly recognized that the plaintiff’s claim (engineering malpractice for the handling of a settlement of a claim stemming from an environmental cleanup) required expert proof of negligence regarding the engineering firm’s services in supervising and implementing the cleanup. *Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. at 227.

Practice Note

Counsel should not hesitate to challenge pro forma expert disclosures. The *Atlas Tack* plaintiff disclosed an engineering expert in its interrogatories that was stricken by the motion judge as inadequate.

[The witness] is expected to testify concerning the consequences of the negligence of [the engineering firm], including the price differential of the cost of removal of the waste as special waste versus the cost
of removal of the waste as hazardous waste, approximately $500,000.00 and related matters. [The witness] is also expected to testify as to the negligence of the [engineering firm], the applicable standards for engineering work, including engineering work in regard to the implementation of a consent decree and work orders flowing from a consent decree, and the supervision thereof, and the shortcomings of [the engineering firm] with respect to the same.

Atlas Tack Corp. v. Donabed, 47 Mass. App. Ct. at 223–24. The Appeals Court agreed, on account of the complex engineering issues (as is often the case in construction matters) coupled with factual allegations of negligent conduct that spanned over several years. Practitioners should not hesitate to move to strike similar disclosures as inadequate, incomplete, and vague.

(b) LeBlanc v. Logan Hilton Joint Ventures

LeBlanc v. Logan Hilton Joint Ventures, 463 Mass. 316 (2012) reaffirmed that expert testimony is generally required in design professional malpractice cases but may not be required in “exceptional cases” involving obvious or gross risk. LeBlanc v. Logan Hilton Joint Ventures, 463 Mass. at 329.

LeBlanc concerned the death of an electrician who was attempting to repair an electrical transformer at the Logan Airport Hilton Hotel. The electrical transmission equipment, also referred to as “switchgear,” did not include warning signage as required by the design professional’s specifications. During an inspection of the site a subcontractor independently recommended signage, which was not installed. The design team agreed and submitted a letter to the electrical subcontractor to that effect, directing that the wording and placement of the signs be submitted as a shop drawing. It is unclear whether a shop drawing ever was submitted, but in any event the required warning signage was not on the switchgear when the electrician was electrocuted.

The court held narrowly that the evidence demonstrated that the design team had actual knowledge of the deficiencies (i.e., the lack of warning signage) in the workmanship on the project, and failed to report the deficiencies (which was a contractual duty) to the owner. Moreover, the deficiencies presented were an obvious risk to safety. Thus, expert testimony was not needed in this case to prove that the design team’s noncompliance was a breach of the professional standard of care. LeBlanc v. Logan Hilton Joint Ventures, 463 Mass. at 328–31. The court also found there was a genuine issue of material fact as to causation.
LeBlanc v. Logan Hilton Joint Ventures, 463 Mass. at 331. However, the court also admonished that

[i]f the claim of negligence here were that the Design Team did not know, but should have known, of the deficiencies in the switchgear, we would conclude, given both the scope and the limitations of the Design Team’s contractual responsibilities, that laymen could not reasonably infer without expert evidence that its failure to learn of the deficiencies constituted professional malpractice.


While some plaintiff’s counsel may interpret this decision as curtailing or perhaps even nullifying the general principle that expert testimony is required to support the elements of proof in a professional malpractice action, a correct and complete reading of the decision only affirms the longstanding and sound proposition that in the majority of malpractice actions, expert testimony is needed to aid the factfinder in assessing questions of professional standard of care.

(c) Daubert-Lanigan Inquiry

The touchstone of admissibility for standard of care opinions is “whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony” so that the court may ensure that the expert “ha[s] sufficient knowledge of the practices of other [professionals] to assert that the average qualified practitioner would, or would not, take a particular course of action in the relevant circumstances.” Palandjian v. Foster, 446 Mass. 100, 106 (2006) (citations omitted).

When a proponent of expert testimony incorporates scientific fact into a statement concerning standard of care, the science may be subject to a Daubert-Lanigan inquiry. Palandjian v. Foster, 446 Mass. at 108–09.

§ 10.3 STATUTE OF REPOSE—G.L. c. 260, § 2B

General Laws c. 260, § 2B provides, in relevant part, that
action of tort for damages arising out of any deficiency or neglect in the design-planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earliest of the dates of: (1) the opening of the improvement for use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

The statute is an absolute bar to litigation and generally limits the time (to six years) in which a lawsuit may be brought against persons such as architects or other professionals providing design services for a construction project. Scott v. Harnischfeger Corp., 12 F.3d 1154, 1159 (1st Cir. 1994) (explaining that the purpose of the statute is to protect providers of individual expertise who render particularized services for design and construction: “Certain actors obviously fall within the statute . . . . These actors include architects, engineers and contractors.”); see also Klein v. Catalano, 386 Mass. 701, 710 (1982) (“In establishing the six-year limit, the Legislature struck what it considered to be a reasonable balance between the public’s right to a remedy and the need to place an outer limit on the tort liability of those involved in construction.”).

In Dighton v. Federal Pacific Electric Co., 399 Mass. 687, 694 (1987), the Supreme Judicial Court set forth the following two-part test in determining whether a particular actor was protected under Section 2B:

- whether the actor is within the class of parties protected by the statute; and
- whether the acts are encompassed within the statutory reference to design planning, construction, or general administration of an improvement to real property.

Generally, manufacturers and suppliers of products are not subject to the protections afforded by Section 2B. But see Ford v. Pizza Romano, Inc., No. 925842, 993 WL 818691 (Mass. Super. Ct. Dec. 29, 1993) (Cratsley, J.) (applying Section 2B protection to a manufacturer because it custom-designed and manufactured a lift that had failed). See also Cournoyer v. MBTA, 744 F.2d 208 (1st Cir. 1984) (Section 2B applied to a prefabricated, mass-produced building).

Massachusetts courts have been clear in including any and all claims that relate to a deficiency or neglect in design or construction under the protection of the repose period set forth in Section 2B.
The fact that a defendant caused the deficiency by gross negligence, wanton conduct, or even knowing and intentional wrongdoing makes no difference as Section 2B is written. Section 2B disclaims any interest either in equities in favor of the person harmed or in the degree of culpability of the wrongdoer.

We must look, therefore, at the nature of the claims that fall within the scope of the plaintiff’s complaint to determine whether there is any that does not relate to a deficiency or neglect in design or construction.

Sullivan v. Iantosca, 409 Mass. 796, 798–99 (1991). Sullivan carved out a narrow exception in holding that Section 2B did not bar a deceit claim made against a seller of real estate. A builder in its capacity as a seller of property is not protected by Section 2B for its actions or inactions as a seller. See also Kozikowski v. Toll Bros., 354 F.3d 16, 21–22 (1st Cir. 2003) (dismissing two deceit claims alleging that a builder “misrepresented that [the plaintiffs’] home was constructed in compliance with state and municipal building codes and was safe and fit for occupancy”). In Kozikowski, the court rejected a misrepresentation claim as barred by Section 2B, holding that the plaintiffs could not maintain a misrepresentation claim against a builder because the certificate of occupancy had issued more than six years prior to the plaintiffs’ claims. Kozikowski v. Toll Bros., 354 F.3d at 21–22. The Kozikowski court held that Section 2B granted protection to “designers, builders, planners and the like” and, as such, the plaintiff could not maintain a misrepresentation claim when more than six years had expired since the certificate of occupancy had issued for the home. Kozikowski v. Toll Bros., 354 F.3d at 21–22.

This same principle guided the Appeals Court in Saveall v. Adams, 36 Mass. App. Ct. 349 (1994). In Saveall, the court rejected a misrepresentation/fraud allegation against a builder where the plaintiffs had alleged that the builder had made express and implied representations and promises that the residence and surrounding development were constructed “in accordance with all approved and filed plans and drawings and specifications,” when in fact the construction was not completed in accordance with these promises. Saveall v. Adams, 36 Mass. App. Ct. at 352. The Appeals Court held that this claim was barred by Section 2B. Saveall v. Adams, 36 Mass. App. Ct. at 352.

The following is a sampling of cases applying Section 2B:

- McDonough v. Marr Scaffolding Co., 412 Mass. 636, 642–43 (1992) (“To allow the plaintiffs to recast their negligence claim in the form of a warranty claim in order to circumvent the operation...
of the repose statute would nullify the purpose of the repose provision altogether.

- *Milligan v. Tibbetts Eng’g Corp.*, 391 Mass. 364 (1984) (holding that extension of a road constituted an improvement to real property that was subject to Section 2B);

- *Rosario v. M.D. Knowlton Co.*, 54 Mass. App. Ct. 796, 802–03 (2002) (holding that “[the plaintiff’s] breach of warranty actions are identical to his negligence causes of action, which were rightly disposed of by summary judgment, and so are also barred by § 2B”);

- *Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng’rs, Inc.*, 45 Mass. App. Ct. 120, 124 (1998) (looking to the “gist” of the action in ruling that a breach of contract of claim was in essence a cause of action in professional malpractice barred by Section 2B, while finding that a design professional’s postconstruction “negligent acts of general administration” fell within the repose aspect of Section 2B, even when those services were performed five years after the project, a wastewater plant, opened for use);


§ 10.4 ECONOMIC LOSS DOCTRINE

The economic loss doctrine (also known as the economic loss rule) is a well-established rule of law in Massachusetts and across the country. This rule applies to dismiss certain types of actions that seek tort recovery for purely economic losses. A recent appellate decision aptly summarizes its principles and key Massachusetts precedent applying the rule:

In accord with the majority of jurisdictions which have addressed the issue, Massachusetts has long adhered to the rule that “purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage.” Economic loss includes “damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property.”


“The distinction . . . drawn . . . is not arbitrary, and does not rest on the ‘luck’ of the one plaintiff in having an accident causing a physical injury [or property damage]. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.”

. . .

. . . When a person is injured, “the cost of an injury and the loss of time or health may be an overwhelming misfortune,” and one the person is not prepared to meet. In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or . . . experiences increased costs in performing a service. Losses like these can be insured. . . .

. . .
Contract law, and the law of warranty in particular, is well suited to commercial controversies . . . because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product.

*East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. at 871–73 (citations and footnote omitted). In Massachusetts, these same principles are applied in the context of construction. The *Wyman* court explained that

> The rule applies not only to the purchase and sale of products but also to claims of negligence against a “builder of houses or other realty structures.” *McDonough v. Whalen*, 365 Mass. 506, 511, 313 N.E.2d 435 (1974) (“there is no sound reason to treat a builder of houses or other realty structures differently from a manufacturer of chattels”). In *Aldrich v. ADD Inc.*, *supra* at 223, 770 N.E.2d 447, the Supreme Judicial Court expressly approved the application of the economic loss rule to causes of action for negligence arising from condominium construction. *See Berish*, 437 Mass. at 267–268, 770 N.E.2d 961 (addressing application of the economic loss rule to a condominium builder).

*Wyman v. Ayer Props., LLC*, 83 Mass. App. Ct. at 25–26. Similarly, however, the doctrine will not preclude a claim in tort against a builder that involves personal injury or “other property damage,” which are elements of damages that must be proved by the claimant.

A component of the rule is that injury or damage must occur to person or property beyond the defective product or structure itself. *See McDonough v. Whalen, supra* at 513, 313 N.E.2d 435; *Berish, supra* at 268, 770 N.E.2d 961. Recovery for harm to the product or structure itself, without more, falls within the remedial range of contract and warranty law and not within the more uncertain range of reasonable foreseeability governing tortious negligence damages. *See, e.g., Bay State–Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, *supra*. 

**Example**

A contractor sues your client, an architect, for delay damages on a construction project because of negligent errors and omissions in the design of a building. Such a negligence claim would be barred by the economic loss rule: the court would expect the contractor to turn to the party with which it is in privity, typically the owner, to recover for its economic losses. The reasoning is that the contractor negotiated the terms and conditions of its engagement with the owner and agreed to build according to the design provided for the building, subject to, among other terms, the dispute resolution and risk transfer mechanisms in its contract. It is assumed that the contractor insured for certain risks on the project and negotiated a price point for its work based on these terms. And so, the reasoning goes, a contractor should not be able to absolve itself from its contractual obligations (and limits) with the owner by seeking damages for economic losses from parties with which it has no contract.

What constitutes damage to “other property” is an often-litigated aspect of this rule. In a lengthy opinion, the U.S. District Court for the District of Massachusetts (Wolf, J.) held that in determining property damages, courts should look to the “integrated product,” and that the product should be defined from the “purchaser’s perspective.” Sebago, Inc. v. Beazer East, Inc., 18 F. Supp. 2d 70, 90–93 (D. Mass. 1998). In Sebago, the court determined that a defective insulation product was integrated into the buildings and so the relevant products from the purchaser’s perspective were the buildings. Therefore, the plaintiffs could not allege damage to the buildings as damage to “other property.” The plaintiffs’ claims therefore were barred by the economic loss rule. See also Superior Kitchen Designs, Inc. v. Valspar Indus., Inc., 263 F. Supp. 2d 140 (D. Mass. 2003) (holding that damage to property belonging to others does not prove noneconomic loss by plaintiff); Pro Con, Inc. v. J&B Drywall, Inc., No. 03-2063, 2006 WL 4538648 (Worcester Super. Ct. Jan. 30, 2006) (Wexler, J.). Counsel should note that what is considered “other property” continues to be litigated and therefore should be researched carefully.

It is also important to note that the recent appellate decision in Wyman, based on the court’s reading of the Supreme Judicial Court’s rulings in McDonough v. Whalen, 365 Mass. 506, 512–13 (1974) (holding that sewage flowing over land was damage to “other property”), Aldrich v. ADD, Inc., 437 Mass. 213 (2002) (condominium case), and Berish v. Bornstein, 437 Mass. 252 (2002) (condominium case), seems
to indicate a shift in the application of this rule, especially in the context of condominium cases. In Wyman, where there was no other property damage, the court allowed a “condominium unit owners’ association [to] recover damages in tort from a responsible builder-vendor for negligent design or construction of common area property in circumstances in which damages are reasonably determinable, in which the association would otherwise lack a remedy, and in which the association acts within the time allowed by the applicable statute of limitations or statute of repose.” Wyman v. Ayer Props., 83 Mass. App. Ct. at 30. The Supreme Judicial Court has granted review of this decision and it remains to be seen whether and how this ruling may be upheld.

§ 10.5 COMMON ALLEGATIONS AGAINST DESIGN PROFESSIONALS

§ 10.5.1 Professional Negligence

When a construction project has gone awry and litigation has ensued, the most common claim against a design professional is one for negligence. A threshold issue with any negligence claim is the question of legal duty of care, see Lyon v. Morphew, 424 Mass. 828, 832 (1997), which is an inquiry of law. Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 629 (1989).

Predictably, Massachusetts courts turn to the project contract documents to determine the scope and limitations of the legal duty of care of an engineer, architect, or other design professional. “It is settled that a claim in tort may arise from a contractual relationship.” Parent v. Stone & Webster Eng’g Corp., 408 Mass. 108, 113–15 (1990) (citations omitted). In Parent, which concerned an electrician employee who was injured while testing an electrical distribution panel (the panel did not warn of high voltage), the Supreme Judicial Court examined the contract and related attachments and memoranda to determine whether the engineering firm’s contractual duties as a project manager to the owner included responsibilities that created a duty of care to the plaintiff, a third party not in privity with the design professional. Parent v. Stone & Webster Eng’g Corp., 408 Mass. at 113–15.

The court “held that 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.’” Parent v. Stone & Webster Eng’g Corp., 408 Mass. at 114 (quoting Banaghan v. Dewey, 340 Mass. 73, 80 (1959)). A recent decision by the Supreme Judicial Court affirms this principle.
Where a contractual relationship creates a duty of care to third parties, the duty rests in tort, not contract, and therefore a breach is committed only by the negligent performance of that duty, not by a mere contractual breach. See Anderson v. Fox Hill Village Homeowners Corp., 424 Mass. 365, 368, 676 N.E.2d 821 (1997), quoting Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 144, 10 N.E.2d 82 (1937) (“Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort.”).


Certainly, the plaintiff must prove other elements—breach of the duty of care, causation, and damages—to successfully establish a claim of negligence. However, as noted herein, there are significant burdens of proof on a plaintiff in bringing a viable professional negligence claim (for example, the need for expert testimony) and legal barriers of which to be aware, such as the limitations periods set forth in G.L. c. 260, § 2B and the economic loss rule, discussed in § 10.3, and § 10.4, above.

Practice Note
To avoid such barriers, plaintiff’s counsel may try to plead otherwise garden-variety professional negligence claims as claims based in contract or as negligent misrepresentations. As discussed in the succeeding sections, such attempts by plaintiffs (or codefendants) are scrutinized carefully by courts. Counsel for design professionals should not hesitate to challenge these efforts to repackage negligence claims.

§ 10.5.2 Implied Warranty Claims

When the elements of breach of implied warranty and negligence claims against a design professional are the same, the breach of implied warranty claim will be treated as duplicative of the negligence claim.

In the absence of an express warranty, a design professional agrees “by implication to do a workmanlike job and to use reasonable and appropriate care and skill doing it,” Klein v. Catalano, 386 Mass. 701, 720 (1982), which represents an implied warranty “to exercise the standard of care required by the profession.” Klein v. Catalano, 386 Mass. at 720. Such a claim is not considered a
claim in “contract” and is subject to tort-based statutes of repose and limitations, and settled negligence principles of duty, breach, causation, and injury.

- In *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers*, 396 Mass, 818, 827–28 (1986) (capsized ship/cocktail lounge during blizzard), the Supreme Judicial Court dismissed statements by a design professional (for example, that the design would be “adequate and sufficient for the purposes for which it was intended”) as supporting anything beyond an implied warranty of reasonable care (negligence). In contrast, the court held that other statements (for example, the design professional asserting, after rejecting a design modification suggested by the owner, that the design was adequate without the suggested modifications) imposed the higher standard of care associated with an express warranty.

- In *Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Engineers, Inc.*, 45 Mass. App. Ct. 120, 124 n.7 (1998) (wastewater treatment plant with permitting issues), the Appeals Court dismissed the implied warranty claim as duplicative of a professional malpractice/negligence claim. The plaintiff’s claim that there was a breach of professional duty in “an ‘improper design base’ for the Coca-Cola plant, and thereafter a continuous failure ‘without interruption for over five years . . . to resolve the problem,’” was one of negligence.

**Practice Note**
You may see claims against designers for breach of implied warranty of habitability for builder-sold homes and condominium units, as adopted in *Albrecht v. Clifford*, 436 Mass. 760 (2002), and *Berish v. Bornstein*, 437 Mass. 252 (2002). These claims should be dismissed as inapplicable to design professionals, who cannot be classified as “builder-vendors.” In any event, the warranty is tort-based, often duplicative of a negligence allegation, and subject to the three-year statute of limitation and six-year statute of repose set forth in G.L. c. 260, § 2B. *Berish v. Bornstein*, 437 Mass. at 264.

**§ 10.5.3 Express Warranty Claims—“Assaying the Bird”**

“[An] express warranty promises that a specific result will be achieved—in contrast to a promise implied by law—namely, that the work of the professional conforms to the standards of his or her profession.” *Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng'rs, Inc.*, 45 Mass. App. Ct. 120, 128 (1998). In other words, the “standard of performance is set by the defendants’

Express warranty claims against design professionals are frequently alleged to avoid the application of less generous limitations periods, such as the three-year statute of limitations and six-year repose period set forth in G.L. c. 260, § 2B, discussed in § 10.3, above. *Klein v. Catalano*, 386 Mass. 701, 720 (1982) (rejecting express warranty claim). Courts aware of this litigation tactic will review with precision the “gist” of the claim, see *Hendrickson v. Sears*, 365 Mass. 83, 85 (1974), and not the “form” of the proceeding, in determining whether an asserted claim for breach of express warranty is no more than a tort-based claim dressed in the guise of contract. “A plaintiff may not, of course, escape the consequences of a statute of repose or statute of limitations on tort actions merely by labeling the claim as contractual. The court must look to the ‘gist of the action.’” *Anthony’s Pier Four, Inc. v. Crandall Dry Dock Eng’rs, Inc.*, 396 Mass. 818, 823 (1986).


(a)  **Clear Proof**

The Supreme Judicial Court recognizes the potential chilling effect of finding express warranties in the provision of design services. The court analyzed the express warranty allegations in *Klein v. Catalano*, 386 Mass. 701 (1982) (not finding an express warranty) and *Anthony’s Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818, 823 (1986) (finding an express warranty in one of the three allegations put forth by plaintiff) by referencing two medical malpractice cases cautioning that proof of express warranties in otherwise professional malpractice claims should be “clear.”

It is not hard to see why the courts should be unenthusiastic or skeptical about the contract theory. Considering the uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises. Statements of opinion by
the physician with some optimistic coloring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries. If actions for breach of promise can be readily maintained, doctors, so it is said, will be frightened into practicing “defensive medicine.” On the other hand, if these actions were outlawed, leaving only the possibility of suits for malpractice, there is fear that the public might be exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken. The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof.

Sullivan v. O’Conner, 363 Mass. 579, 582–83 (1973) (citation and footnote omitted). The Clevenger court added the following:

“Clear proof” does not require proof of special consideration for the promise nor does it heighten the burden of proof. What it does require is that the trier of fact give attention to particular factors in deciding whether the physician made a statement which, in the context of the relationship, could have been reasonably interpreted by the patient as a promise that a given result or cure would be achieved. The factors relevant in such an appraisal and their respective values or weights will vary with circumstances of given cases.


(b) Case Studies

The cases below illustrate how courts handle express warranty claims, which often are fact-intensive inquiries.

In Klein, the plaintiff was injured when plate-glass panels of a door struck him and shattered. The court held that the defendant architect “merely agreed to provide specifications,” rather than guaranteeing a specific result. Klein v. Catalano,

In *Kingston Housing Authority*, involving allegations that the general contractor failed to follow contract specifications in building an apartment complex, the Appeals Court dismissed two breach-of-express-warranty allegations:

- that the contractor unintentionally failed to conform to contract specifications; and
- that the contractor intentionally deviated from the contract specifications and concealed the deviation.

*Kingston Hous. Auth. v. Sodonato & Bogue*, 31 Mass. App. Ct. 270, 273–74 (1991). The court, which “read the complaint by its gist, rather than its label,” held that these allegations were facile circumventions of the limitations periods set forth in G.L. c. 260, § 2B. But see the Superior Court decision in *Massachusetts Highway Department v. Walsh Construction Co. of Illinois*, No. 015746BLS, 2003 WL 1689624, at *6 (Suffolk Super. Ct. Feb. 10, 2003), which read the *Kingston* court’s rejection of the first claim as “mudd[ying] the water for trial judges.” (The court in *Massachusetts Highway Department* opined that there was an express warranty in the contract documents where the contractor was required to construct an airtight plenum.)

*Anthony’s Pier Four* concerns the capsizing (during the Blizzard of 1978) of a ship that served as a cocktail lounge for the popular restaurant, Anthony’s Pier Four. The ship was anchored to an underwater cradle. The court considered three express warranty assertions and dismissed all but one:

- repeated assurances by one of the design professionals that the cradle design would work (without the two additional pilings suggested by the owner) sufficiently alleged an express warranty precluding summary judgment;
- another design professional’s silence during these repeated assurances did not support an express warranty; and
- a statement by a design professional at the beginning of the project that the design could work (“that it was possible to secure the ship”) was “a statement of opinion by a design professional” that it was possible to meet the requirements, not a promise that the finished design would perform according to the requirements, and likewise did not support an express warranty.
Similarly, the court in *Coca-Cola Bottling* handled the issue of warranties carefully. There, a manufacturer sued an engineering firm for breach of express and implied warranties in the design, construction, and operation of the manufacturer’s wastewater treatment plant. The court noted that the issue was “close,” but held that there was an issue of fact as to whether an express warranty resulted from repeated assurances by the design professional that the system was going to work, that there was no need to try something drastically different, and that the installed system would comply with permit requirements. *Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng’rs, Inc.*, 45 Mass. App. Ct. 120, 129 (1998). In finding that this was a close question of fact, the court instructed the trial judge on retrial to plainly set forth the following choice to the jury:

whether (i) the plaintiff’s reasonable understanding of the defendant’s statements was that the defendant *promised* that its postconstruction work *would* bring the discharge water within permit limitations, or whether (ii) the plaintiff’s reasonable understanding of the defendant’s statements was that the defendant’s work conformed to professional standards and therefore, in the opinion of the defendant, such work *should* bring about the desired result, in which event there would be no recovery.

*Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng’rs, Inc.*, 45 Mass. App. Ct. at 130. If the jury found that a category (i) type of promise was made by the defendant, then there was an express warranty. See also *Mass. Hous. Opportunities Corp. v. Whitman & Bingham Assocs., PC*, 83 Mass. App. Ct. 325, 330 (2013) (no express warranty).

### § 10.5.4 Negligent Misrepresentation Claims

Massachusetts courts’ treatment of negligent misrepresentation claims in construction litigation is confusing and fact-specific. This is true as well across the country, and counsel on both sides of the “v.” will have no difficulty finding precedent to support their positions. Patrick L. Bruner & Patrick J. O’Connor, *Jr., Bruner and O’Connor on Construction Law* § 17:27 (West 2013).

From the perspective of counsel for design professionals, it is evident that the misrepresentation theory of liability (as opposed to negligence) is commonly alleged to avoid the application of the economic loss rule, discussed in § 10.4,
above, and that the ready acceptance of this theory thwarts and is rendering obso-
lete the sound objectives of the economic loss rule.

Often, counsel will see claims of this type made by contractors and subcontractors
where there is no privity with the sued design professional. The claims usually are
alleged in the context of delays and other increased costs incurred on the project.
They may read as broadly as “errors and omissions” in the design documents or
faulty dissemination of project information, even when the disseminated infor-
mation is an expression of professional interpretation, judgment, or opinion.

In defending against such claims, counsel should note that in *Nycal v. KPMG
Peat Marwick, LLP*, 426 Mass. 491, 495–96 (1998) the Supreme Judicial Court
adopted Section 552 of the Restatement (Second) of Torts as the appropriate test
for adjudicating negligent misrepresentation claims in the professional context.
*See also Nycal v. KPMG Peat Marwick, LLP*, 426 Mass. at 497 (rejecting fore-
seeability test as leading to indeterminate liability, and near-privity rule as too
restrictive). Note as well that a “failure to perform a contractual duty does not
give rise to a tort claim for negligent misrepresentation.” *Cumis Ins. Soc’y, Inc.

There are two Massachusetts cases that are considered of particular importance
in assessing negligent misrepresentation cases in the design professional context:
*Craig v. Brooks*, 351 Mass. 497 (1967), which is commonly cited for the propo-
sition that a cause of action for negligent misrepresentation is an exception to the
economic loss rule, and *Nota Construction Corp. v. Keyes Associates, Inc.*, 45
Mass. App. Ct. 15 (1998), which applies principles articulated by the *Craig*
court to a design professional.

**Practice Note**

Although the *Craig* and *Nota* decisions are perhaps the most cited
cases in assessing negligent misrepresentation claims in the design
professional context, it is of note that *Craig* was decided before the
Supreme Judicial Court’s adoption of Section 552 of the Restate-
ment in *Nycal*, and the *Nota* court did not seem to rely on *Nycal* in
issuing its decision.

**(a) Elements of a Negligent Misrepresentation Claim**

There are several components needed to successfully set forth a claim for negli-
gent misrepresentation, and opposing counsel should not hesitate to challenge
such claims on several fronts. Section 552 of the Restatement (Second) of Torts
(1977) ("Information Negligently Supplied for the Guidance of Others") states in
part as follows:
One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.


Note that in certain circumstances a court may find a statement of opinion or failure to disclose actionable. An opinion could be actionable if the speaker possesses superior knowledge concerning the subject matter of the misrepresentation, or where the opinion is “reasonably interpreted by the recipient to imply that the speaker knows facts that justify the opinion.” Stolzoff v. Waste Sys., Inc., 58 Mass. App. Ct. 747, 760 (2003). Or a promise may be actionable if “the promisor had no intention to perform the promise at the time it was made.” Cumis Ins. Soc’y v. BJ’s Wholesale Club, Inc., 455 Mass. 458, 474 (2009). Similarly, a failure to disclose could be actionable. See Nota Constr. Corp. v. Keyes Assoc., Inc., 45 Mass. App. Ct. at 18–19.

Finally, the claimant’s reliance on the alleged misrepresentation must be “justifiable.” A party that explicitly contracted that it would not rely on certain representations cannot later claim it relied on those representations to its detriment. Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 59–60 (2004).
(b) Discussion of Case Law Specific to Design Professionals

As stated above, there are two leading cases in this area. In Craig v. Everett M. Brooks Co., 351 Mass. 497 (1967), a general contractor brought negligent misrepresentation claims against a civil engineer (surveyor) for three categories of misrepresentations.

The first involved the engineer’s failure to provide certain information in its real estate development plans; in particular, the plans failed to disclose a fourteen-foot hill and an area of peat. The court rejected these claims as insufficient because there was no evidence that the engineer had undertaken the duty to show soil conditions (area of peat) or precise contours of the topography (fourteen-foot hill) with sufficient accuracy for reliance by the general contractor. Therefore, the contractor was not justified in relying on the engineer to disclose this information.

The second involved an incorrect placement of stakes that the contractor relied on in building roads. The evidence demonstrated that two catch basins were designated at the wrong locations and had to be rebuilt, and that a road was staked eight feet from the proper location and had to be rebuilt. The court held that the general contractor had demonstrated grounds for a negligent misrepresentation claim with respect to the stakes’ placement.

The third involved the engineer’s alleged promise that the ground would be staked by a certain date and it was not, causing delay damages to the general contractor. The court found that this was not an actionable representation.

In Nota Construction Corp. v. Keyes Associates, Inc., 45 Mass. App. Ct. 15 (1995), the court assessed a site subcontractor’s claims against an architect in preparing the plans and specifications for an elementary school. The site subcontractor claimed that the architect made three material misrepresentations:

- The allowance section of the specifications for the project estimated a certain quantity of ledge for excavation, which proved to be inaccurate. The court held the estimated quantity was a nonactionable opinion and noted that the specifications provided mechanisms for additional compensation and equitable adjustment in the event additional ledge was encountered, evidencing that the specifications were not vouching for the accuracy of the amount of the allowance. Nota Constr. Corp. v. Keyes Assoc., Inc., 45 Mass. App. Ct. at 17.

- An inaccurate representation regarding the location and depth of ledge in the septic system was actionable, however, because there
was evidence that the architect had “superior knowledge based on the results of test borings in its possession showing the exact location and depth of the ledge.” *Nota Constr. Corp. v. Keyes Assocs., Inc.*, 45 Mass. App. Ct. at 18.


For example, in *KDK Enterprises v. Peabody Construction Co.*, the court dismissed claims by a painting subcontractor attempting to create an actionable representation from information provided in the plans and specifications (specifically, that the project required a Level 4 drywall when really what was applied was a Level 5 drywall). The representation in the contract documents was a matter of “judgment” not “susceptible of actual knowledge”:

> The determination as to what combination of drywall surface would produce an acceptable surface finish in view of the painting specifications and critical lighting requirements, is, in the view of the Court, a matter of judgment. It is a matter upon which the architect is asked to render his professional opinion, given his education, training and experience. It is not akin to a statement concerning the location and quality of subsurface ledge, *Nota Construction Corporation v. Keyes Associates*, 45 Mass. App. Ct. 15 (1998), or the designation of an area of land for the building of a road. *Craig v. Everett M. Brooks Co.*, 351 Mass. 497 (1967).
(c) **Expert Testimony**

Just as in any professional negligence claim, expert testimony would be required to show that care was not exercised in transmitting project information (except for the exceptional case involving “obvious or gross” malpractice).

The *Nycal* court attached import to comment a of the Restatement (Second) of Torts § 522 (1977), which explains the duty of care as follows:

> [T]he duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect.


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