Arkansas Construction Law Chapter 14

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Chapter 14
Professional Liability
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14.1 Scope of Chapter ........................................... 14-1
14.2 Contractual Bases for Professional Liability .... 14-3
14.3 Tort Bases for Professional Liability –
   Generally .................................................. 14-9
14.4 Professional Malpractice ............................ 14-11
14.5 Ordinary Negligence .................................. 14-14
14.6 Negligent Misrepresentation ...................... 14-15
14.7 Negligence Per Se .................................... 14-15
14.8 Tortious Interference .................................. 14-16
14.9 Other Tort Theories of Liability .................. 14-18
14.10 Considerations Relating to Particular
   Activities and Roles .................................. 14-21
14.11 Professional Liability Insurance ................. 14-25
14.12 Conclusion .............................................. 14-27

14.1 Scope of Chapter

This chapter discusses the most common legal bases for imposing liability on design professionals. Liability for claims arising from professional services of architects, engineers, and other design professionals typically stems either from contract or from tort,

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although tort theories account for a substantial majority of claims. Section 14.2 of this chapter deals with contractual liability of design professionals. Then, consistent with the dominant role that tort law plays, most of the remaining sections cover tort theories. Section 14.10 reviews particular activities and roles that design professionals commonly perform that often lead to liability claims, and Section 14.11 briefly discusses professional liability insurance. This chapter does not deal extensively with licensing and regulation of design professionals or lien rights of design professionals, mentioning them only as collateral matters.¹

The distinction between a contract and a tort basis of liability is more than a matter of legal theory.² Depending on which legal basis applies, the evidence required to prove a claim may vary significantly, as may the measure of damages and the availability of other forms of relief. Additionally, different defenses and limitations periods will apply.³ The applicable legal basis

¹ Chapter 10 of this Manual deals comprehensively with liens. Various chapters of Title 17 of the Arkansas Code Annotated govern the licensing and registration of design professionals, including: architects (Chapter 15); engineers (Chapter 30); interior designers (Chapter 35); landscape architects (Chapter 36); and surveyors (Chapter 48).
² See generally 5 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 17:12 (Westlaw 2015) (discussing several practical reasons for distinguishing between contract and tort as the basis of liability for design professional services).
³ See, e.g., Little Rock Sch. Dist. of Pulaski Cnty. v. Celotex Corp., 264 Ark. 757, 574 S.W.2d 669 (1978) on reh'g sub nom, Little Rock Sch. Dist. of Pulaski Cnty. v. Matson, Inc., 264 Ark. 757, 576 S.W.2d 709 (1979) (holding that the statute of limitations on negligent design applied to the question whether an architectural firm's efforts to address problems with a roofing system specified in plans prepared by the firm tolled
14. Professional Liability

of liability may also affect coverage under the design professional's errors and omissions insurance policy, particularly because the policy may exclude coverage for contractually assumed liability or liability based on a contractual standard that is higher than the tort standard of care. In some circumstances claims against design professionals may be pled alternatively in contract and in tort. Sometimes, the liability of the same design professional on a single project will be governed by contract principles for certain design services or claimants while liability for other design services or to other claimants will be governed by tort principles. But whether determined under contract law or tort law, almost any service provided by a design professional may give rise to a liability claim.5

14.2 Contractual Bases for Professional Liability

The most direct contractual basis for liability of a design professional involves a failure to perform services that the contract requires. In that situation, the client may recover for breach of contract. Thus, an engineering firm that did not deliver plans by the deadline specified in the contract was liable to the project owner for the foreseeable damages incurred by the owner as a result of the delay.6

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4 See 5 BRUNER & O'CONNOR, supra note 2, § 17:17.
5 See generally id., § 17:4.
6 W. William Graham, Inc. v. City of Cave City, 289 Ark. 105, 107-08, 709 S.W.2d 94, 96 (1986).
More often than not, however, claims against design professionals arise from allegations of defective performance rather than from an outright failure to perform. In these cases, no clear basis may exist for a breach of contract claim because the contracting parties often do not specify standards of performance or otherwise expressly address the potential liability of the design professional. Agreements for design services range from strikingly casual and informal understandings to comprehensive, formal agreements. The parties sometimes rely exclusively on oral contracts or abbreviated letter agreements. Many others rely on standard forms of agreements promulgated by industry organizations, especially the American Institute of Architects ("AIA") and the Engineers Joint Contracts Document Committee ("EJCDC"). Even relatively comprehensive agreements often fail to specify the standard of performance the design professional must satisfy or the extent of the design professional’s liability for adverse consequences of the services provided. Indeed, the popular AIA forms of owner-architect agreement did not specify a standard of care for professional services until 2007, and since then the AIA forms have simply incorporated a conventional tort standard of care.\(^7\)

Traditionally, courts were reluctant to imply warranties or other terms into design contracts.\(^8\) When courts began to impose liability on design professionals for damages caused by their services, they tended to rely

\(^7\) See 5 BRUNER & O’CONNOR, supra note 2, § 17:13.30.

\(^8\) See, e.g., City of Mounds View v. Walijarvi, 263 N.W.2d 420, 423-25 (Minn. 1978).
on the tort standard of care for professional services. Although courts can achieve essentially the same result by implying a warranty or covenant of due care into a design services contract, the more common approach has been to recognize a tort duty stemming from the mere existence of the client-professional relationship.

Thus, during a period in which implied warranty claims were disfavored, the expanding reach of tort principles encouraged courts to impose a duty of care on design professionals consistent with that already established for other professions, especially medicine and law. This judicial penchant to rely on the tort standard of care means that, absent an express contract term establishing the underlying basis for a claim against the design professional, tort theories rather than contract ones have dominated the caselaw concerning the professional liability of architects and engineers. Section 14.3 provides a more complete overview of the development of tort law as the primary basis for design liability.

Tort dominance notwithstanding, there is an important contractual dimension to the professional liability story. To begin with, project owners sometimes insist on including express standards of care or liability provisions in contracts for design services. If a contract clearly establishes an agreed standard of care that is more demanding than the tort standard or if it requires the design to achieve a specific result, courts will normally enforce that special term in a breach of

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9 See White v. Pallay, 247 P. 316, 317 (Or. 1926); Bayne v. Everham, 163 N.W. 1002, 1008 (Mich. 1917).

contract action without regard to whether the designer committed professional malpractice under the tort standard. In other instances, design professionals negotiate terms restricting their liability exposure. Contemporary cases commonly defer to agreements that the parties negotiate limiting contractual liability for professional services. In other words, the courts usually enforce contract terms that impose a standard of care or performance that is either more or less demanding than the tort standard. The cases addressing contract-based limits, however, establish some important public policy restrictions on the ability of design professionals to contract around liability.

A leading case illustrating how courts analyze contractual liability for defective or ineffective design is

11 See, e.g., Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376, 379, 394 (S.D. Iowa 1973) (involving a contract that required performance "in accordance with the highest standards of the engineering profession"); Follansbee Bros. Co. v. Garrett-Cromwell Eng'g Co., 48 Pa. Super. 183, 189-91 (1911) (holding that, under a contract providing for commercial furnaces for a steel plant to be designed to be comparable to those previously constructed at a different site, the plaintiff could make out a prima facie breach of contract claim by showing that differences between the engineering plans furnished by the defendant for the plaintiff's plant and those used for the other plant accounted for the defects about which the plaintiff complained).

12 See, Circo, supra note 10, at 192-98.

13 See, e.g., Duncan v. Mo. Bd. for Architects, Prfl Eng'rs & Land Surveyors, 744 S.W.2d 524, 537-41 (Mo. Ct. App. 1988) (holding that the structural engineers' duty to assure a safe structural design was non-delegable); Estey v. MacKenzie Eng'g. Inc., 927 P.2d 86, 90 (Or. 1996), rev'd 902 P.2d 1220 (Or. Ct. App. 1995) (reasoning that a residential inspection firm's defense based on a contract term limiting the engineering firm's liability to the $200 contract fee "does not persuade us that plaintiff, a lay consumer, should bear the risk of the alleged negligence of a licensed professional engineer").
Arkansas Rice Growers Cooperative Association v. Alchemy Industries, Inc., decided by the U.S. Court of Appeals for the Eighth Circuit. The case involved the design of a rice hull processing plant in Stuttgart, Arkansas, pursuant to a contract governed by California law. Under the terms of the contract, one of the defendants was to provide the design of a plant for Arkansas Rice Growers "capable of reducing a minimum of 7 1/2 tons of rice hulls per hour to an ash and producing a minimum of 48 million BTU’s per hour of steam at 200 pounds pressure." At trial, Arkansas Rice Growers prevailed on a breach of contract theory, and the Eighth Circuit affirmed the trial court’s judgment because the evidence established that the plant, as designed, was not capable of meeting the performance standard that the contract required. The case did not turn on an assertion of professional negligence, but only on a breach of the quoted contract term, which the court characterized as a warranty.

The Arkansas cases show that the terms of a design services agreement can determine liability either directly by governing what constitutes breach of contract or indirectly by establishing the character of the duty the professional owes under tort law. The case mentioned at the beginning of this section provides two examples of the direct impact of contract terms. First, the Arkansas Supreme Court held in that case that a design professional may be liable for breach of contract due to late performance of services. Second, the case dealt with a contractual limit on the extent of the design.

15 Id. at 566.
16 Id. at 569-70.
professional’s liability, which is another way in which a contract term can directly impact liability. The court held that such a limit is generally enforceable, but subject to the rule that limitation of liability clauses are disfavored and will, therefore, be construed narrowly.\footnote{Id. at 107-08, 709 S.W.2d at 95-96. For a more general discussion of how courts treat limitation of liability clauses in design services agreements, see Buck S. Beltzer, Melissa A. Orien, \textit{Are Courts Limiting Design Professionals' Ability to Limit Liability?}, \textit{Constr. Law.}, Spring 2010, at 17. For a further discussion of contractual limits on liability see Chapter 9 of this Manual.} Applying these principles, the Court held that a provision limiting the engineer’s liability for professional negligence did not thereby limit the engineer’s liability for breach of contract. A case involving an indirect effect of contract terms shows how a design professional’s duty of care in tort can be defined or circumscribed by the nature and extent of the services covered by the contract. In that case, the Arkansas Supreme Court held that engineers were not liable for the safe removal of sewer pipes because their contract did not charge them with the responsibility of supervising the work, even though the engineers had the authority to stop work that did not comply with contractual requirements.\footnote{See, \textit{e.g.}, Heslep v. Forrest & Cotton, Inc., 247 Ark 1066, 1074, 449 S.W.2d 181, 185 (1970).}

From the authorities discussed in this section, some important practical considerations emerge for the Arkansas lawyer assessing potential liability arising from the performance of professional design services. As a first step, the lawyer should review the parties’ contract to determine whether it includes any terms specifically governing liability of the design professional. Many contracts will either be silent on the topic or will simply
incorporate the common law tort standard of care. If that is the case, then the lawyer should focus on the applicable tort principles, as discussed in much of the remainder of this chapter. But if the contract establishes a standard of care that differs from the tort standard or it includes a warranty, performance guaranty, or other term imposing a special obligation on the design professional, a breach of contract claim, rather than or in addition to a tort claim, may be available. Contractual provisions limiting the liability of the design professional may control, subject to public policy considerations. Lawyers should also analyze the scope of the services and related roles that the design professional performs under the specific terms of the contract because the nature and extent of professional liability may be tied to a particular contractual responsibility.\(^{20}\)

14.3 Tort Bases for Professional Liability — Generally

Unlike contract law, informed as it is by such values as consent and promise and freedom of contract, tort law essentially concerns itself with duties that our legal system enforces for public policy reasons. As architecture and engineering became established as professions in the late 19th and early 20th centuries, courts rather comfortably turned to tort law to define certain legal responsibilities arising from the relationships between design professionals and their clients and others. The resulting imposition of tort liability recognizes that design activities often foreseeably impact the security and safety of persons and property and even economic expectations. These considerations account for the relative ease with which

\(^{20}\) See 5 Bruner & O’Connor, supra note 2, § 17:13.40.
courts adapted tort law to the liability of design professionals, a phenomenon that the earlier sections of this chapter have already noted. The legal analysis employs a fundamental formula that infuses the policy function of tort law. The judicial analysis begins with the question of whether the law should impose on the defendant a legal duty of care to the plaintiff; if so, a determination of liability requires proof that the defendant breached that duty and that the breach was the proximate cause of damages suffered by the plaintiff.21

Recognizing that those who retain design professionals do so with the implicit understanding that the services will be performed with the skill and care ordinarily possessed and exercised by those who are members of the relevant profession, some of the earliest cases extended the professional standard of care to claims against architects, engineers, and other design professionals. As the Court of Appeals has noted, "an action for damages arising from the professional services of an architect rarely excludes claims of professional negligence."22 As the sections that follow demonstrate, however, tort liability of design professionals may be based on a range of legal theories, beginning but not ending with professional malpractice law.

14. Professional Liability

14.4 Professional Malpractice

Professional malpractice is not directly addressed in Arkansas statutes, but rather arises under general negligence and intentional tort theories.\textsuperscript{23} Likewise, Arkansas cases rarely address malpractice of a design professional directly. A recent case to directly refer to design professional malpractice did so only to determine when the statute of limitations began to run; the statute applicable in that case was for negligence.\textsuperscript{24}

In the case of negligence and other tort based causes of action, the statute of limitations is three years.\textsuperscript{25} The limitations period begins to run when the negligent act occurred.\textsuperscript{26} However, Arkansas has a statute of repose that limits lawsuits based on engineering or architectural work on real property or improvements to real property.\textsuperscript{27} This statute of repose generally limits actions in contracts to no more than five years after substantial completion of the project.\textsuperscript{28} In the instance of personal injury or wrongful death, a suit may not be brought in tort or in contract later than four years after substantial completion except that when the injury occurs in the third year after substantial completion, the suit may be filed within one year of the date the injury occurred but must be brought within five years of substantial completion.\textsuperscript{29} However, these limitations shall not apply in the case of fraudulent concealment of the design

\textsuperscript{24} Bryan v. City of Cotter, 2009 Ark. 457, 344 S.W.3d 654.
\textsuperscript{26} Bryan, 2009 Ark. at 5-6, 344 S.W.3d at 656-57.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
deficiency. Further, if a design or set of plans has not been used within three years of being furnished, no action may be brought for deficiency of the design.\(^3\)

Establishing negligence of an architect or engineer is largely the same as with any other actor in that it must be established that a duty existed and that a breach of the duty was the proximate cause of some measure of damages.

A design professional assumes professional duty when providing plans or drawings for a project.\(^3\) While, ordinarily, a design professional’s duty is limited to the design, the contractual arrangement between the owner and the contractor can give rise to a duty of care in the performance of additional tasks set forth in the contract. For example, an agreement that the architect would provide “adequate supervision of the execution of the work to reasonably insure strict conformity with the working drawings, specifications and contract documents,” gave rise to a duty to the owner whereby the architect would exercise reasonable care to ensure that the work was performed in accordance with plans and specifications.\(^3\) Similarly, where the architect’s contract specified that he was to supervise the work and had authority to stop work due to safety concerns, a duty to the workers arose with respect to ensuring safe working

\(^{30}\) *Id.*

\(^{31}\) *Id.*


\(^{33}\) See Walker v. Wittenberg, Delony & Davidson, Inc., 242 Ark. 97, 107, 412 S.W.2d 621, 631 (1967) (concerns gave rise to a duty to the workers who were the intended beneficiary of the safety provisions).
conditions.\textsuperscript{34} Under Arkansas caselaw, the duty to exercise reasonable care is owed to the intended beneficiaries of the task to which the duty attaches.\textsuperscript{35} The duty can apply to the project owner\textsuperscript{36} as well as other intended beneficiaries such as workers and the general public.\textsuperscript{37}

The duty owed by members of the relevant profession is to exercise the ordinary skill and diligence exercised by others in the profession.\textsuperscript{38} However, the courts have declined to extend to design professionals the principle that the skill possessed is measured by someone in the same or similar locality as is the case with medical professionals.\textsuperscript{39} The courts noted that if such a rule were extended, there could be certain localities with no standard of care and others, where only one professional practiced, where a designer would be judged by his or her own standard.\textsuperscript{40} Further, the professional has a duty to warn of special dangers

\textsuperscript{34} Erhart v. Hummonds, 232 Ark. 133, 134, 334 S.W.2d 869, 870 (1960).
\textsuperscript{35} See Walker, 242 Ark. at 107, 412 S.W.2d at 631; Erhart, 232 Ark. at 134, 334 S.W.2d at 870.
\textsuperscript{37} See Hill Constr. Co. v. Bragg, 291 Ark. 382, 725 S.W.2d 538 (1987) (insufficient design of support structure contributed to the fall of a steel column which injured a worker); Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983) (due to the architect's failure to see that contractor's submitted drawings designated heavier material than required by the specifications, the structure collapsed while under construction due to excess weight causing injury to a worker).
\textsuperscript{39} Hill Constr. Co., 291 Ark. at 389-390, 725 S.W.2d at 542-543; Carroll-Boone Water Dist., 280 Ark. at 574, 661 S.W.2d at 353.
\textsuperscript{40} Id.
inherent in the work that may not be known to others such as construction personnel. The designer does not guarantee that the design or plan will be perfect or even that the result will be satisfactory, only that ordinary care and skill were used in their preparation. The determination of the degree of skill and care required is one for the jury.

14.5 Ordinary Negligence

In situations where the design professional does not owe a professional duty of care, there may still be potential liability for ordinary negligence. An illustrative example would be where an architect is visiting a jobsite and accidentally leaves something in a path where workers are walking and someone trips or an engineer forgets to set the brake on his car and it rolls into a person or piece of equipment. As these injuries did not occur in the performance of creating plans or other tasks assigned by the contract, the professional duty of care would not apply. In such a case, however, the individual could be liable for ordinary negligence. Ordinary negligence occurs when a party fails to act as a reasonably careful person would act. In the scenarios used as examples, it would be argued that a reasonably careful person would not leave things in travelled footpaths and would set a vehicle's brake, respectively, and if the jury were to find a failure to do so resulted in

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44 See Section 14.4 supra.
an injury, then the professional could be held liable for negligence.

14.6 Negligent Misrepresentation

Arkansas does not recognize a cause of action for negligent misrepresentation.\textsuperscript{46} A claim of misrepresentation is a claim based in fraud and requires a showing of intent.

14.7 Negligence Per Se

A design professional's failure to comply with a building code or other law or regulation may constitute negligence per se, especially if the code, law, or regulation serves to protect public safety.\textsuperscript{47} There is, however, no uniform principle that such a failure necessarily constitutes negligence per se.

The Arkansas cases recognize the doctrine of negligence per se, especially if the acts that form the basis for the claim "are declared by law to be negligence per se, or are such as to induce an inference of negligence in all reasonable minds."\textsuperscript{48} Many of the cases treat a violation of law to be evidence of negligence but not necessarily negligence per se.\textsuperscript{49} Presumably, these general principles apply in Arkansas to instances in which the services or actions of a design professional allegedly fail to comply with applicable building codes or

\textsuperscript{46} S. Cnty, Inc. v. First W. Loan Co., 315 Ark. 722, 871 S.W.2d 325 (1994).
\textsuperscript{47} See generally 5 BRUNER & O'CONNOR, supra note 2, § 17:15.
\textsuperscript{48} Humphreys v. Reed, 234 Ark. 861, 864, 355 S.W.2d 281, 283 (1962).
other laws governing design activities or other professional services.

14.8 Tortious Interference

While Arkansas law does not provide specific guidance with respect to tortious interference by a design professional, there is still a risk for the design professional given the activities often undertaken on a project. The most likely scenario where a design professional may be liable for tortious interference is where the professional makes a negative assessment of a contractor's work or recommends termination of a contractor. In such a situation, an architect or engineer may face liability for both compensatory and punitive damages to a terminated contractor.\(^5\)

For a claim of tortious interference with a contract or with a business expectancy, the claimant must prove (1) it has suffered damages; (2) it had a valid contractual relationship or business expectancy; (3) the defendant knew of the contract or business expectancy; (4) by intentional and improper interference, the defendant caused a disruption or termination of the contract or business expectancy; and (5) the disruption or termination was the proximate cause of the claimant's damages.\(^6\)

It is important to evaluate the manner in which the design professional acted. Under Arkansas law, there must be a wrongful act giving rise to the tortious interference. In evaluating whether or not the conduct was wrongful, the courts will consider the nature of the

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\(^6\) AMI Civ. 403 (2015).
14. Professional Liability

conduct, motive, the plaintiff's interest, the interest sought to be advanced by the defendant, the balance of social interests in freedom of action versus the claimant's interests, proximity of the conduct to the interference, and the relationship between the parties.\textsuperscript{52} While the Arkansas cases do not provide specific direction with respect to design professionals, the role that design professionals sometimes play in evaluating work can certainly provide a situation where a tortious interference claim would arise, especially if termination of a contractor were recommended, as typically all five of the required elements would likely exist. The claim would arguably hinge on whether the conduct was wrongful.

However, Arkansas recognizes a defense to tortious interference where the defendant (1) has an interest in, or duty to, the entity with which the claimant claims a contract or business expectancy, (2) acted in furtherance of that interest or duty, and (3) acted without bad faith.\textsuperscript{53} As a result, a party's agent cannot be liable for tortious interference if it is acting within the scope of its agency.\textsuperscript{54} Typically, when evaluating a contractor's work or approving bids, a design professional is acting as an agent of the owner and, as long as the professional acts within the defined scope of the agency, the design professional should not be liable for tortious interference. Conversely, if the scope of agency is

\textsuperscript{52} AMI Civ. 404 (2015).
\textsuperscript{53} AMI Civ. 403 (2015).
exceeded or action is taken in bad faith, the design professional can be liable.55

14.9 Other Tort Theories of Liability

Aside from negligence and tortious interference, there are generally only two other torts that would apply to the conduct of a design professional: defamation and fraud. While Arkansas caselaw is not well developed with respect to these torts, they are applicable in the context of project design.

In the context of the work of a design professional, defamation is quite similar to tortious interference, with the primary difference being the lack of a contract or business expectancy by the claimant. As with tortious interference, a claim of defamation is most likely to result from an assessment of a contractor's work or, additionally, when a contractor's bid is not accepted based on comments by the design professional. In such a case, a contractor may not lose a contractual or business relationship, but may suffer some loss nonetheless such as not being awarded the initial contract or the loss of future contracts.

With a claim for defamation, a claimant must prove (1) that it sustained damages, (2) that the defendant made a false statement of fact concerning the claimant, (3) that the statement was defamatory, that is, false and harmful, (4) that the defendant knew the statement was

55 Dimaria Constr., Inc., 351 N.J. Super. 558, 799 A.2d 555 (finding the architect liable for tortious interference where he improperly blamed the contractor for delays which were caused by numerous changes requested by the architect and an interior designer which resulted in termination of the contractor's contract).
false or negligently failed to determine its truth, and (5) the statement proximately caused the claimant’s injury.\textsuperscript{56} However, similar to tortious interference, there is a defense, known as qualified privilege, where the defendant who made the statement has an interest in the undertaking or has a duty to communicate with the person to whom the statement was made.\textsuperscript{57} If the qualified privilege is applicable, the claimant must prove the statement (1) was not reasonably related to the undertaking, (2) was not made in furtherance of the defendant’s interest in the undertaking, (3) was more than necessary to further the defendant’s interest in the undertaking, and (4) was made out of ill will or was made with a lack of belief in its truthfulness.\textsuperscript{58}

A possible reason for the lack of Arkansas caselaw regarding defamation by a design professional is the existence of the qualified privilege. Architects and engineers are typically agents of the project owner or have contractual duties imposed with respect to the project such as reviewing bids, inspecting work and deciding disputes between the owner and the contractor. However, it is important for the design professional to keep statements closely related to and in furtherance of the project and to ensure that there is a reasonable basis for truth in the statement.

Fraud claims, also referred to as deceit, against architects and engineers are not particularly common as there are limited circumstances in which such a claim could arise. A claim of fraud requires a showing that (1) a

\textsuperscript{57} AMI Civ. 409 (2015).
\textsuperscript{58} Id.
statement of material fact that was known to be false or whose truth had no sufficient basis was made with the intent to induce action or inaction by the claimant in reliance on the statement, (2) the claimant did act or fail to act in reliance on the statement, and (3) the claimant suffered damages as a result. While there is a lack of Arkansas cases regarding design professionals, other jurisdictions with similar requirements can illustrate likely scenarios. Liability for fraud can occur if an architect holds himself or herself out as having a special skill he or she does not have and additional expenses are incurred to compensate for the lack of skill. Additionally, fraud can be found if an architect states that a project can be completed for a sum when the architect does not believe it to be true. Another common situation for fraud or deceit occurs when a design professional makes statements regarding the adequacy of a method or material that the professional knows to be inadequate.

Additionally, in certain circumstances, silence regarding a material fact can be considered to be deceit if the other factors are met. In the situation where the parties have a relation of trust or confidence or where there is an inequality of knowledge, silence could be actionable. While there are no Arkansas cases directly applying this to a design professional, it is certainly conceivable that a design professional-owner

61 Id.
relationship could be one of trust or confidence and that a design professional could be in a position of unequal knowledge compared to an owner or a contractor.

While these additional tort theories are not addressed much, if at all, in Arkansas law with respect to design professionals, it is worth noting that there is no special analysis necessary to apply such claims to an architect or engineer and analysis with other types of professionals can be applied.

14.10 Considerations Relating to Particular Activities and Roles

While almost any act or omission by a design professional in connection with a construction project may become a basis of liability, some particular activities and roles occasion the most serious or the most common liability risks. One of the leading texts on construction law catalogs 40 distinct situations resulting in claims against design professionals.\(^6\) This section addresses a few of the most significant.

For analytical purposes, common claims against design professionals may be divided roughly into three categories. First are those brought by the client for damages allegedly arising out of defective professional services. In the second category are claims for damages based on bodily injury or property damage. The plaintiffs in bodily injury cases may include construction workers, bystanders, or occupants of the project following

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\(^6\) See Justin Sweet & Marc M. Schneier, Legal Aspects of Architecture, Engineering, and the Construction Process 249-50 (9th ed. 2013) (listing 26 common claims made against design professionals with respect to the design phase and another 14 with respect to the construction phase).
completion. Subsequent purchasers of the project and owners and occupiers of neighboring land may bring claims for property damage. The final category involves claims for purely economic loss brought by participants in the project other than the design professional’s client.

In cases not involving errors or omissions in plans and specifications, a key consideration often is whether the services complained of are within the scope of services included in the contract between the design professional and the client. Provided that the contract is clear in specifying the responsibility of the design professional, the contemporary cases tend to respect the contractual choices that the parties make.\(^{65}\)

Claims brought by the client based on alleged defects in the services provided by the design professional typically assert a breach of the professional standard of care. Earlier sections of this chapter discuss the law governing claims in that category. There is scant Arkansas caselaw on other claims by clients. Presumably, the client may base a claim on any act or omission within the contractual scope of services. For example, the failure of a design professional to render contractual services in a timely manner may lead to liability.\(^{66}\) Similarly, a design professional may be liable to the client for a faulty cost estimate.\(^{67}\)

Claims brought by those other than the client and that arise out of bodily injury or property damage also commonly turn on whether the injury or damage is attributable to some act or omission of the design

\(^{65}\) See generally 5 BRUNER & O’CONNOR, supra note 2, §§ 17:18 & 17:39.


\(^{67}\) Clark v. Madeira, 252 Ark. 157, 477 S.W.2d 817 (1972).
professional in performing activities within the scope of services covered by the contract between the design professional and the client. Of course, if a defective design is the proximate cause of the personal injury, then the design professional may be held liable on that basis.\(^68\) Liability may also attach if the design services agreement assigns responsibility for project safety to the project architect or engineer, whether or not the injury is attributable to defective design. This was particularly the case in the past, because many older forms of design services agreements routinely assigned to the project architect or engineer considerable authority to supervise the construction work. A contract provision that can be fairly read to put the design professional effectively in charge of project safety provides a basis for construction workers and others to recover damages for bodily injury arising out of unsafe working conditions.\(^69\) Most modern contracts for design services, however, especially those based on standard contract forms promulgated by the leading professional organizations for architects and engineers, take great pains to exclude from the scope of the design professional's services any responsibility for on-site safety or for construction means or methods.\(^70\) Arkansas courts would likely follow contemporary authority tending to recognize that design professionals have limited responsibility for safety on the job site under the terms of many design services agreements in common use today.

The final broad category of claims commonly brought against design professions—those for purely

\(^{68}\) See Hill Constr. Co., supra note 37 (design of anchor bolts and base plates contributed to the fall of a steel column).

\(^{69}\) See Erhart, 232 Ark. at 137, 334 S.W.2d at 872.

\(^{70}\) See generally 5 BRUNER & O'CONNOR, supra note 2, §§ 17:52-17:54.
economic loss suffered by project participants who are not clients of the design professional—involves the application of the economic loss rule under tort law. General contractors, subcontractors, and other participants frequently assert that the project architect or engineer retained by the owner owes to them tort duties of care with respect to any professional services that may impact them.\textsuperscript{71} Thus, general contractors and subcontractors frequently sue the owner's architect or engineer either for breach of the professional standard of care or for negligent misrepresentation when the design professional's acts or omissions cause or contribute to problems during the construction phase. Courts across the country are deeply divided over the principles that govern the extent to which a design professional may be liable in tort to project participants in the absence of privity of contract.\textsuperscript{72} The Arkansas caselaw is not sufficiently developed to provide definitive authority on whether the economic loss rule will stand as a defense in actions brought by project participants against design professionals under tort theories such as negligence, breach of the professional standard of care, or negligent misrepresentation. But the few cases on point seem to suggest that Arkansas law would not necessarily recognize the economic loss rule as a bar in such circumstances.\textsuperscript{73} One recent case, however, may indicate that the application of the economic loss rule to claims brought against design professionals by those other than


\textsuperscript{72} Id.

\textsuperscript{73} See, e.g., Carroll-Boone Water Dist., supra note 36; Bragg v. Fred Hunt Co., Inc., 272 Ark. 179, 612 S.W.2d 321 (1981).
the client remains an open question under Arkansas law.\textsuperscript{74}

14.11 Professional Liability Insurance

With the exception of certain public projects, Arkansas does not require professional liability insurance for architects and engineers. However, despite the absence of a requirement under the law, the majority of project owners will require the design professionals to have insurance. Likewise, there are no rules governing the events which are covered. As a result, the language of the policy will establish what events are covered as well as any exclusions.

Typical professional liability insurance only covers professional negligence of the architect or engineer and the specific acts which are covered can vary from policy to policy. Some insurers will include only the typical functions of the design professional and exclude other services. Others will provide a list of covered activities or incorporate into the agreement a list prepared by the professional of professional services to be covered.\textsuperscript{75} Given that a professional duty of care can arise out of contractual provisions, as discussed earlier in this chapter, extra care should be taken by all parties involved to ensure that the services to be rendered on a particular project are covered under the policy.

Further attention should be paid to the limitations of the policy at issue, the most obvious being the monetary policy limits. Further complicating this issue is whether

or not the cost of defense is included in the overall policy limit. Professional liability policies will typically include a duty to defend the insured against legal claims made by third parties, and some policies will count the cost of defending the claim in the policy limits; this is known as a defense within limits policy. Typically, defense within limits policies cannot be issued without a separate defense limit equal to the aggregate limit also offered.\textsuperscript{76} However, in the case of architects or engineers, such a policy can be issued if the insured is licensed as an architect or engineer and has executed a consent form that is made part of the policy.\textsuperscript{77} With such a policy, higher limits may be advisable due to the costly nature of defending design malpractice claims, which could reduce the amount that may be paid out. Closely related to the policy limits is the consent to settle clause. Some insurance policies allow the insurer full authority to settle with the claimant, but others will have a provision requiring the insured's consent to any settlement. Careful attention must be paid, as it is common for a consent to settle clause to provide that if the insured rejects an offer to settle, then the insurer's liability will be limited to the amount of that offer.

Another issue is whether a particular policy is an occurrence or claims made policy. Occurrence policies cover events that occurred during the effective life of the policy even if the claim is brought after the expiration of the policy. The primary benefit of an occurrence policy is that a negligent act could be covered even if it was not discovered until after the expiration of the policy. However, due to the uncertain nature of quantifying the risk on a year-to-year basis, occurrence policies are not

\textsuperscript{77} Ark. Ins. Dept. Order 94-253 (June 22, 1994).
common. To contrast, claims made policies only cover events if a claim is made during the life of the policy and can extend retroactively to acts or omissions which occurred prior to the enactment of the policy. However, most insurers will require a statement from the design professional that he or she is unaware of any past errors which could give rise to a claim.

Finally, in addition to covered acts, policy limits, and claim types covered, most policies will include a specific list of excluded acts. The most common exclusion is for intentional acts by the insured, but there may also be exclusions for things such as experimental work, soil testing, environmental issues, and cost estimates, among others. As with any other insurance policy it is important to be aware of the specific exclusions called out, as individual policies will vary.

14.12 Conclusion

Almost any act or omission by a design professional in connection with a construction project may lead to liability, either under contract law or tort law. Because there are relatively few Arkansas authorities on the topic, attorneys involved with potential claims against design professionals must often look to the law of other jurisdictions. It is, however, important to be aware of the Arkansas statutes of limitations and repose, which are discussed in section 14.4.

In analyzing the potential liability of a design professional in any circumstance, special consideration should be given to any contractual provisions that may

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78 John G. Cameron, Jr., supra note 75, 2-34.
79 Id. at 2-35.
80 Id. at 2-36.
expand the design professional’s duties beyond the professional standard of care, as well as to the coverage that may be afforded under a professional liability insurance policy or other applicable insurance. Attorneys negotiating or drafting design services agreements should pay particular attention to terms establishing the scope of services, those defining the standard of care, insurance requirements, and any indemnification provisions.