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A BLUEPRINT FOR THE DUTIES AND LIABILITIES OF DESIGN PROFESSIONALS AFTER *MOORMAN*

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Few cases in Illinois have engendered as much controversy as *Moorman Mfg. Co. v. National Tank Co.*[1] and *Redarowicz v. Ohlendorf*,[2] decided by the Illinois Supreme Court in February and June, 1982 respectively. *Moorman* was a products liability case in which the Court held that a plaintiff cannot maintain an action in tort, either in negligence or in strict liability, to recover solely economic losses. *Redarowicz* applied the same principle to a claim against a contractor for negligent construction of a house.

These cases and their progeny have given rise to questions concerning established areas of tort law thought to be impregnable to doctrinal revision. Among the issues raised is whether the "*Moorman* Rule" is applicable to professional malpractice actions. The context in which this issue has been litigated has primarily been negligence claims against architects and engineers, and the Illinois Appellate Courts have taken sharply conflicting positions as to whether *Moorman* bars a claim in tort against an architect or engineer for solely economic losses. This article will analyze the Illinois Supreme Court's holding and reasoning in *Moorman* and subsequent cases, discuss the interpretations which the Illinois Appellate Courts have given these cases with regard to their applicability to malpractice claims against architects and engineers and suggest a resolution of this issue which both implements the philosophy embodied in the *Moorman* line of cases and balances the various interests of the parties engaged in the construction process.

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1. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).
2. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

I. CASE LAW PRIOR TO *MOORMAN*

Prior to *Moorman*,[3] it was unclear whether economic losses were recoverable in tort.[4] In *Alfred N. Koplin & Co. v. Chrysler Corp.*,[5] the Second District Appellate Court dismissed a negligence claim against a manufacturer of certain malfunctioning air conditioning units for the cost of their repair or replacement on the ground that these were economic losses, recoverable only in contract and not in tort. This case and several others[6] anticipated the holding and reasoning of *Moorman*. However, in *Bates & Rogers Construction Corp. v. North Shore Sanitary District*,[7] the Second District Appellate Court permitted a contractor to recover solely economic losses in tort from an engineer who had negligently designed certain switch gear. The court distinguished *Koplin* as being a products liability case, not applicable to design malpractice.[8] Although without having discussed the "economic loss" issue, other courts had concurred in this result.[9] On the other hand, in *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*,[10] the Third Circuit Court of Appeals interpreted Illinois law to bar a claim in tort for economic loss resulting from the defendant's negligent design of a roof which was subsequently incorporated into architectural plans. Although the design of roofs and other building components are tasks ordinarily performed by architects and engineers, the action was not described as one for professional malpractice, and the court did not

3. For an excellent synopsis of the law prior to *Moorman*, *see generally* O'Brien, *Products Liability: Should Illinois Allow Recovery for Property Damage Absent Personal Injury?*, 1 N. ILL L. REV. 57 (1980).

4. There was no unanimity among other jurisdictions either. The Supreme Court of New Jersey had stated in Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), that the purchaser of carpeting, which shortly after purchase developed unsightly lines, could sue the manufacturer in tort (dictum). It treated the manufacturer's obligation as an enterprise liability and permitted an action in tort because the manufacturer was in the best position to insure the cost of damages. 44 N.J. at 64-65; 207 A.2d at 311-12. However, only months after *Santor* was decided, the California Supreme Court, per Justice Traynor, took the opposite position in Seeley v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), denying recovery in strict tort liability for the purchase price of a defective truck and lost profits therefrom. The Illinois Supreme Court in *Moorman* found Justice Traynor's reasoning to be persuasive. Moorman, 91 Ill. 2d at 79, 435 N.E.2d at 448.

5. 49 Ill. App. 3d 194, 364 N.E.2d 100 (2d Dist. 1977).

6. *E.g.*, Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 408 N.E.2d 1041 (1st Dist. 1980); Herlihy v. Dunbar Builders Corp., 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1st Dist. 1980); Fireman's Fund American Insurance Companies v. Burns Electronic Security Services, Inc., 93 Ill. App. 3d 298, 417 N.E.2d 131 (1st Dist. 1981).

7. 92 Ill. App. 3d 90, 414 N.E.2d 1274 (2d Dist. 1980).

8. 92 Ill. App. 3d at 98, 414 N.E.2d at 1280-81.

9. *E.g.*, W. H. Lyman Construction Co. v. Village of Gurnee, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (2d Dist. 1980); Normoyle-Berg & Associates, Inc. v. Village of Deer Creek, 39 Ill. App. 3d 744, 350 N.E.2d 559 (3d Dist. 1976).

10. 626 F.2d 280 (3d Cir. 1980).

explicitly consider whether a tort claim for professional malpractice could be maintained where only economic losses are sought.

In those jurisdictions where courts have held that no claim may be maintained in tort for solely economic loss, there was no consensus as to whether this rule was applicable to a claim against an architect or engineer for professional malpractice.[11] In *Cooper v. Jevne*,[12] the California Appellate Court explicitly refused to apply the holding of *Seely*[13] to a negligence claim against a structural engineer and architects. The court limited the holding of *Seely* to products liability actions and held that the architect owed a duty of care not to cause economic loss to subsequent purchasers of condominiums which they had negligently designed.[14]

II. *MOORMAN* AND *REDAROWICZ*

In *Moorman*, the Illinois Supreme Court was asked to decide whether a plaintiff could recover damages for the cost of repairs and the loss of use of a steel grain storage tank under several tort theories. The plaintiff had alleged that the defendant had designed, manufactured and sold the storage tank, which after purchase had developed a crack, rendering it unusable. Count I of the complaint alleged that the tank was not reasonably safe due to design and manufacturing defects; Count II asserted that the defendant had made certain misrepresentations regarding the performance of the tank; Count III alleged that the defendant negligently designed the tank.[15]

The court declined to extend the reach of tort law to permit the recovery of damages where there was no personal injury or property damage other than to the item itself. Addressing the strict liability theory embodied in Count I, the court noted that the "essence of a product liability tort case, is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property."[16] In support of its view it cited Section 402A of the *Second Restatement of Torts*[17] which limits the applicability of strict liability to actions against a defendant "who sells any product in a defective condi-

11. *See also infra* n.118.
12. 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (3d Div. 1976).
13. *Supra* n.4.
14. 56 Cal. App. 3d at 867-69, 128 Cal. Rptr. at 727-29.
15. Moorman, 91 Ill. 2d at 73, 435 N.E.2d at 445. The plaintiff filed a fourth count based on an express warranty, but that count was held to be barred by applicable statute of limitations.
16. *Id.* at 81, 435 N.E.2d at 448.
17. The case in which Illinois had adopted the tort theory of strict liability, Suvada v. White

tion dangerous to the user or consumer or to his property" which actually causes "physical harm". This result, the court reasoned, reflected sound policy.[18]

According to the court, the policy mitigating against recovery of solely economic losses in strict liability arises from the distinction between contract law and tort law. Contract law is better suited to redressing purely economic loss since the law of sales is well developed, regulating the quality of products which suppliers promise and obviating the need for tort protection.[19] It further noted that the limitations implicit in the rules of warranty law permit a supplier reasonably to limit his liability for a defective product and to exclude liability for business losses with which only the purchaser, and not the supplier, is familiar.[20] Finally, the court believed contract law to be the vehicle for relief because it permits consumers and vendors to bargain for warranty protection from economic loss to be reflected in the price of the product, rather than imposing an enterprise liability in tort for economic losses, which would restrict consumer choice.[21]

The court did recognize that its position might yield the counterintuitive result that a plaintiff who has suffered physical injury may recover for all types of harm, including economic loss, whereas another plaintiff who fortuitously escaped personal injury would be prevented from recovering the identical items of economic loss.[22] However, it reasoned that such apparently anomalous results are justified since a manufacturer may properly be held responsible in tort for the failure of his product to reach a standard of safety, but not for its failure to reach a standard of quality.[23]

The court held that the "policy considerations against allowing recovery for solely economic loss in strict liability cases apply to negligence actions as well," so that defects of a qualitative nature which manifest no harm other than disappointed expectations, are compensable only in contract and not in tort.[24] The court noted two exceptions

Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), had adopted the definition of strict liability set forth in Restatement (Second) Torts § 402A (1965).

18. 91 Ill. 2d at 78, 435 N.E.2d at 447.

19. *Id.*

20. *Id.* at 79, 435 N.E.2d at 447.

21. *Id.* at 79-80, 435 N.E.2d at 447-48. The court's unarticulated assumption was that enterprise liability is less desirable for economic loss than for other types of damage, because economic welfare is an interest which a consumer ought to be able to compromise voluntarily.

22. *Id.* at 80, 435 N.E.2d at 448.

23. *Id.* at 80-81, 435 N.E.2d at 448.

24. *Id.* at 451. Throughout the remainder of this article, the court's holding in *Moorman* barring the recovery in tort of solely economic loss will be referred to as the "*Moorman* Rule".

to the rule barring recovery of economic losses in tort: where a defendant "intentionally makes false representations," or when a defendant "who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations."[25]

Having held solely economic loss unrecoverable in tort, the court then proceeded to determine whether the plaintiff's damages were mere economic loss. Economic loss, it noted, had been defined as:

> 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 . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.[26]

Consistent with the distinction which it drew between the purposes of tort and contract law, the court stated that the "demarcation between physical harm or property damage on the one hand and economic loss on the other usually depends on the nature of the defect and the manner in which the damage occurred."[27]

The *Moorman* court cited approvingly three cases for their interpretations of the concept of economic loss when the only damage was to the product itself. In *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*,[28] a manufacturer designed a roof to withstand unusually adverse weather, but it buckled and blew away over the course of time. The court found the roof's unsatisfactory performance to be the type of problem which warranty law is designed to address and barred a claim in tort for costs incurred to repair or replace the roof.[29] In *Cloud v. Kit Mfg. Co.*,[30] a plaintiff's trailer was damaged when a polyurethane pad which was an accessory to the trailer caught fire. The court held that the ignition of the pad had caused sudden and calamitous damage which it characterized as physical property damage recoverable in tort.[31] And in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor*

25. *Id.* at 452, *citing* Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969). The court did not articulate a reason for these exceptions. Presumably it believed that economic loss is among the interests which the torts of intentional and negligent misrepresentation are intended to protect.

26. *Id.* at 82, 435 N.E.2d at 449, *citing*, Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L. Rev. 917, 918 (1966); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. Pa. L. Rev. 539, 541 (1966).

27. *Id.* at 82, 435 N.E.2d at 449.

28. *Supra* n.10.

29. Moorman, 91 Ill. 2d at 83, 435 N.E. at 449.

30. 563 P.2d 248 (Alaska 1977).

31. Moorman, 91 Ill. 2d at 83, 435 N.E.2d at 449.

Co.,[32] a front end loader was damaged by a sudden and dangerous fire caused by a defect which might in other circumstances have injured people or other property,[33] and that court found that the circumstances warranted application of tort law.[34] The *Pennsylvania Sand Glass* court explained its demarcation between "contract losses" and "tort losses" in the following way:

> In drawing this distinction, the items for which damages are sought, such as repair costs, are not determinative. Rather, the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.[35]

Under the above analysis, the court found the damage claimed in *Moorman* to be economic loss. It observed that the crack in the storage tank developed over several months rather than suddenly and calamitously. The only harm resulted from a qualitative defect relating to the purchaser's expectation of the product's fitness to perform its intended function. Thus, the court denied recovery in tort, concluding that the plaintiff had "suffered a commercial loss of the type that the law of warranty is designed to protect."[36]

In *Redarowicz v. Ohlendorf*,[37] the Illinois Supreme Court applied the principle and reasoning of *Moorman* to a claim against a builder of a house whose negligent construction caused the chimney and an adjoining brick wall to pull slowly away from the rest of the structure, resulting in cracks and water leakage. There were no personal injuries or damage to other property, and the plaintiff only sought damages for the replacement or repair costs of the defective portions of the house. The court barred recovery in tort, holding the *Moorman* Rule to be applicable and stating that recovery in tort requires a showing of harm above and beyond disappointed expectations or the desire to enjoy the benefit of one's bargain.[38] It cited approvingly a case from Missouri[39]

32. 652 F.2d 1165 (3d Cir. 1981).

33. Actually, the *Moorman* court misread the case, because the Third Circuit Court of Appeals had explicitly stated, "There is no allegation that the defect caused the fire; rather, the theory . . . is that the faulty design enhanced the injuries stemming from the accidental fire." 652 F.2d at 1167.

34. 652 F.2d at 1165.

35. 652 F.2d at 1173.

36. 91 Ill. 2d at 86, 435 N.E.2d at 450.

37. *Supra* n.2.

38. 92 Ill. 2d at 175, 441 N.E.2d at 327. Although the court denied the plaintiff recovery in tort, it invented an implied warranty of habitability running from the builder to subsequent purchasers and remanded the case for further proceedings on this theory.

39. Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978).

which arose on virtually identical facts, quoting the following language:

> A duty to use ordinary care and skill is not imposed in the abstract. It results from a conclusion that an interest entitled to protection will be damaged if such care is not exercised. Traditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. Thus, where personal injury is threatened, a duty in negligence has been readily found. Property interests also have generally been found to merit protection from physical harm. However, where mere deterioration or loss of bargain is claimed, the concern is with a failure to meet some standard of *quality*. This standard of quality must be defined by reference to that which the parties have agreed upon.[40]

It is clear from *Redarowicz* that the Illinois Supreme Court did not intend to limit *Moorman* strictly to products liability actions.[41] It is well established that a house is not a product as the term is used in products liability actions.[42] Rather, as the court has articulated numerous times, the philosophical underpinning of the *Moorman* line of cases is the distinction between the interests which tort law and contract law are designed to protect; tort law protects the interests of safety and property, while contract law protects commercial expectations.[43]

The holding in both *Moorman* and *Redarowicz*, "that a plaintiff cannot recover solely economic losses in tort,"[44] approximates but does not precisely mirror the distinction between those interests protected by tort law and those protected only by contract law. Obviously, remedies

40. *Id.* at 882, *quoted in* Redarowicz, 92 Ill. 2d at 177-78, 441 N.E.2d at 327.

41. *See also* Foxcroft Townhome Owners Assoc. v. Hoffman Rosner Corp., 96 Ill. 2d 150, 449 N.E.2d 125 (1983) (no recovery in tort for latent construction defects causing solely economic loss).

42. *See, e.g.*, Walker v. Shell Chemical, Inc., 101 Ill. App. 3d 880, 428 N.E.2d 943 (1st Dist. 1981) (building structure and indivisible components not products); Heller v. Cadral Corp., 84 Ill. App. 3d 677, 406 N.E.2d 88 (1st Dist. 1980) (condominium unit not product); Immergluck v. Ridgeview House, Inc., 53 Ill. App. 3d 472, 368 N.E.2d 803 (1st Dist. 1977) (sheltered care facility not product); Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1st Dist. 1970) (open air parking garage not product).

43. Moorman, 91 Ill. 2d at 86, 435 N.E.2d at 450-51; Redarowicz, 92 Ill. 2d at 176-77, 441 N.E.2d at 327. This distinction provides the answer to Chief Justice Ryan's dissenting opinion in *Redarowicz*. In *Redarowicz*, the majority had created an implied warranty of habitability running from the builder of a home to a subsequent purchaser not in privity with the builder. Justice Ryan objected to the invention of this warranty as being equivalent to the imposition of strict liability in tort, which was itself a reaction to dissatisfaction with the principle of implied warranty actions for products liability. 92 Ill. 2d at 187, 441 N.E.2d at 332 (Ryan, C.J., dissenting). However, the situations are not analogous. Strict tort liability succeeded implied warranty theories as the basis for recovery in products liability actions because products liability actions involved personal injury or property damage, for which the appropriate remedy is in tort. But latent construction defects ordinarily do not involve personal injuries or damage to other property, so the contract theory of implied warranty is the appropriate one.

44. 92 Ill. 2d at 176, 441 N.E.2d at 326 (concisely summarizing the holding in *Moorman*).

for personal injury and property damage can be set forth in a contract and thereby be recoverable on a contract theory, and in some instances property damage may be recoverable only in contract.[45] Somewhat less obviously, in certain situations solely economic loss may be recoverable in tort. For example, as Justice Simon observed in his concurring opinion in *Moorman*,[46] lost profits should be recoverable in tort where a plaintiff restaurant buys and serves the defendant's unfit packaged food, so that a patron jumps up and denounces the restaurant, injuring its reputation[47] or where a flooring material emits a penetrating obnoxious odor which renders a store's merchandise unsaleable although not physically damaged.[48] Under Justice Simon's approach, the economic or non-economic nature of the loss is a consideration only insofar as it approximates the distinction between contract and tort interests:

> The essential difference between economic loss and non-economic loss is the difference between contract and tort. The proper approach is to draw the line according to the policies that make some damages recoverable in tort and others not. The majority opinion goes a long way toward acknowledging this. In particular, it quotes and adopts *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, (3d Cir. 1981), 652 F.2d 1165, which held that, at least in the case of damage to the defective product itself, as opposed to other objects, the items for which damages are sought do not necessarily determine whether the loss is economic, but one must look to the policies behind the regimes of torts and contracts to see which is more appropriate. This logic should be carried further and applied more generally.[49]

Although the holdings of *Moorman* and *Redarowicz* are couched in terms of damages, the opinions are really about duties, not damages. The essence of both opinions is that tort law does not impose on a party the duty to refrain from disappointing another party's commercial expectations; that duty may be imposed only by contract or warranty.[50]

45. *See* Fireman's Fund American Insurance Companies v. Burns Electronic Security Services, Inc., *supra* n.4, in which a burglar alarm purchased from the defendant failed to function, permitting a burglary. Despite loss of other property, the court refused to allow recovery in tort, reasoning that the cause of the injury was the failure of the product to perform as expected.

46. 91 Ill. 2d at 89, 435 N.E.2d at 455 (Simon, J., concurring).

47. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

48. Walker v. Decora, Inc., 225 Tenn. 504, 471 S.W.2d 778 (1971).

49. Moorman, 91 Ill. 2d at 96, 435 N.E.2d at 445, (Simon, J., concurring).

50. *See* Bertschy, *The Economic Loss Doctrine i n Illinois After Moorman*, 71 Ill. B.J. 346, 351 (1983):

> While the *Moorman* court's opinion and concurrence state that economic loss as defined under such an analysis is not compensable in tort, it was not necessary for the court to go that far in reaching its decision. In examining the nature of the defect, the type of risk and the manner in which the injury arose, the court was performing a tortlike review of the facts. To the extent that such a review was done, the court only needed to state its conclusion in terms of the basic element it necessarily, though implicitly, determined in the case—that no "duty" in tort existed between *Moorman*'s plaintiff and defendant.

The term "economic loss" as used in *Moorman* and *Redarowicz* is shorthand or a code word for injuries suffered as a result of disappointed expectations or failure to realize the benefit of a bargain—interests protected only by contract law and not by tort law. This distinction, and the philosophy underlying it, ought to be fundamental to the remedial scheme for any injury for which the law allows redress, including professional malpractice.

III. Application of the *Moorman* Rule to Professional Malpractice in the Appellate Courts

As one commentator has noted, "*Moorman* and the other Illinois economic loss cases leave numerous and substantial questions of application unresolved."[51] Three districts of the Illinois Appellate Court were recently asked to determine whether the *Moorman* Rule applies to negligence actions against architects and engineers so as to bar tort claims for solely economic losses. In the first case to decide the issue, *Palatine National Bank v. Charles W. Greengard Associates, Inc.*,[52] the Second District Appellate Court held that *Moorman* barred a tort action for professional malpractice against an architectural firm where the only damages were economic loss. Shortly thereafter, in *Ferentchak v. Village of Frankfort*[53] and *Rosos Litho Supply Corp. v. Hansen*,[54] the Third and First District Appellate Courts respectively reached the opposite result, holding that *Moorman* did not bar negligence claims for solely economic loss against architects or engineers.

The remainder of this article will consist of an analysis of the holdings and rationale of these three cases as well as a recommendation of an approach which would both implement the philosophy of *Moorman* and balance the interests of the various parties to a construction project.

A. Greengard

Greengard arose from the dismissal of a tort claim by a developer against an architect who had negligently designed a storm and surface water drainage system. The system failed, resulting in flooding which delayed the development of the property and caused various banks to

51. *Id.* at 355.

52. 119 Ill. App. 3d 376, 456 N.E.2d 635 (2d Dist. 1983) (hereinafter referred to as "Greengard").

53. 121 Ill. App. 3d 599, 459 N.E.2d 1085 (3d Dist. 1984), *cert. accepted* by Illinois Supreme Court (hereinafter referred to as "Ferentchak").

54. 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984) (hereinafter referred to as "Rosos").

foreclose on the real estate, forcing the developer to convey all of its rights in the property to the mortgage holders.[55] Counts I and II of the complaint sought damages for expenses and lost profits for the negligent design of the drainage system and landscape grading; Count III sought punitive damages for the architect's reckless, willful and wanton conduct with respect to the first two counts.[56]

The lower court had dismissed all three counts as barred by *Moorman*. The appellate court affirmed the dismissal, holding that the design and construction of the storm and surface water removal system was a product not materially different from the grain storage tank in *Moorman*, the home in *Redarowicz* or the latent construction defects in *Foxcroft*.[57] The court stated that *Moorman* and its progeny stand for a philosophical distinction between tort and contract law in a large variety of factual settings,[58] and it did not find it necessary to consider the question of whether the architect defendant's professional status rendered the allegations of negligence against him outside the scope of the *Moorman* Rule.

B. Ferentchak

Ferentchak also involved the negligent design of a water drainage system by a professional civil engineer hired by a developer to design and supervise the construction of the system. The developer subsequently sold the property to a contractor who built a home on the property using the engineer's design for the surface water drainage system. The engineer[59] also gave certain advice about the drainage system to the building inspector for the Village of Frankfort, who conveyed the advice to the contractor. The contractor then sold the home to the plaintiffs who shortly thereafter noticed that there were water leaks in the house.[60] After trial, the jury found that the engineer had negligently designed the water drainage system and that the Village of Frankfort had negligently permitted the foundation grade of the house to have been set too low.[61] Both the engineer and the Village appealed

55. 119 Ill. App. 3d at 377-78, 456 N.E.2d at 637.

56. The court refused to consider arguments pertaining to a fourth count for breach of contract on the ground that the lower court's orders pertaining to this count were not properly appealable. *Id.* at 381, 456 N.E.2d at 639.

57. *Id.* at 379, 456 N.E.2d at 638.

58. *Id.* at 380, 456 N.E.2d at 638.

59. The engineer was also the Village Engineer.

60. 121 Ill. App. 3d at 601-03, 459 N.E.2d at 1087-88.

61. *Id.* at 604, 459 N.E.2d at 1089.

on the ground that the plaintiffs' tort action against them was barred by *Moorman* because the plaintiffs had suffered only economic loss.

The court agreed that the plaintiffs' damages were economic loss, not materially different than that suffered by the plaintiffs in *Redarowicz*;[62] however, the court held that *Moorman* did not bar the claims against the engineer or the Village. Although conceding that after *Redarowicz, Moorman* could not be restricted merely to products liability actions or situations with available Uniform Commercial Code remedies,[63] the court nonetheless interpreted the intention of the Illinois Supreme Court as being to bar tort recovery only where both "(1) the harm was to a plaintiff's reasonable commercial expectations,[64] and (2) *where the plaintiff's remedies against the party causing the harm are sufficient under contract or warranty theories of recovery*."[65] Although the court noted that the plaintiffs' only damages were to their commercial expectations, it held *Moorman* to be inapplicable because the plaintiffs had no contract or warranty remedy against the engineer or Village. The court noted, however, that its conclusion as to the engineer might have been different if there were available to the plaintiffs an "out of privity" system of warranties against the engineer.[66]

The court reached its conclusion by considering the facts of *Moorman, Redarowicz* and *Foxcroft* and noting that in all three cases there existed in theory a contract or warranty remedy which the plaintiff could have used against the defendant.[67] The court therefore read into those holdings an additional requirement before a tort action for solely economic losses is barred: that the plaintiff at least theoretically have a sufficient contract or warranty against the defendant.

Philosophically, there is a major problem with the *Ferentchak* opinion: in the court's remedial scheme, the existence of a cause of action in tort apparently turns upon the theoretical availability of a different cause of action, for breach of contract or warranty. Metaphysically, given a specific set of circumstances, an architect's actions either do or do not constitute a tort toward a present homeowner.

62. *Id.* at 606, 459 N.E.2d at 1090-91.

63. *Id.* at 607, 459 N.E.2d at 1091.

64. This requirement was the court's restatement of the requirement that the plaintiff's damages be solely economic loss.

65. 121 Ill. App. 3d at 607, 459 N.E.2d at 1091.

66. *Id.* at 607, 459 N.E.2d at 1091, n.1.

67. The contract or warranty remedy was not equally available in all of those cases, however. In *Moorman*, the statute of limitations barred recovery under such a theory. In *Redarowicz*, the court invented an out of privity warranty of habitability to subsequent owners from the builder. And in *Foxcroft*, the court held that the plaintiff had waived its warranty claim by failing to include it in the amended complaint. *Id.* at 607-08, 459 N.E.2d at 1091-92.

There is no logical reason why the existence of a cause of action in tort should depend on whether or not a contract or warranty remedy also exists. Such a philosophy amounts ultimately to nothing more than a fashioning of remedies to fit the individual circumstances of each plaintiff—providing tort remedies only where there are inadequate contract remedies—and is inappropriate in a court system which relies upon rules applied uniformly in all situations.

The *Ferentchak* court's gratuitous addition of this prerequisite to the *Moorman* Rule is not justified by the *Moorman* line of cases. The discussion of Uniform Commercial Code warranty remedies in *Moorman* was not intended to demonstrate that a putative plaintiff would not be left remediless without a tort remedy, but rather to demonstrate that permitting an action in tort for economic loss would infringe upon and contravene the remedial scheme contemplated by the Uniform Commercial Code.[68] Similarily, the fact that the court in *Redarowicz* created an out of privity implied warranty of habitability from home builders does not logically imply that the Illinois Supreme Court intended to exclude all parties but home builders from the *Moorman* Rule.

A second reason offered by the *Ferentchak* court for refusing to apply the *Moorman* Rule to the engineer and the Village is that the plaintiffs' expectations as to these defendants were not commercial and were instead the traditional societal expectations imposed by tort law.[69] The court reasoned that the plaintiffs' commercial dealings were only with the contractor, so the contractor was the only party from whom the plaintiffs had commercial expectations. The relationship of the engineer and the Village to the plaintiffs was therefore something other than a source of commercial expectations; rather, the engineer and Village owed the plaintiffs the traditional duties which tort law imposed upon them.[70] The court cited *Rozny v. Marnul*[71] for the proposition that a surveyor out of privity with a property owner owed duties of care in tort to the property owner, and concluded that the engineer in *Ferentchak* owed the plaintiffs similar tort duties. There are two errors in this reasoning.

The first problem with the court's argument is that it has misinterpreted the *Rozny* case. *Rozny* did not involve an ordinary negligence tort claim; it was an action for negligent misrepresentation, which the

68. Moorman, 91 Ill. 2d at 88, 435 N.E.2d at 452.
69. 121 Ill. App. 3d at 609, 459 N.E.2d at 1092.
70. *Id.* at 607-08, 459 N.E.2d at 1091-92.
71. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

Illinois Supreme Court in *Moorman* explicity exempted from the economic loss rule.[72] *Rozny* involved an explicit guarantee of accuracy on a survey plat on which a large but indeterminate group of people could reasonably be expected to rely. The expectations surrounding a guarantee of certain information on a document intended to induce reliance may legitimately give rise to certain tort expectations which the design of a water drainage system for use on a particular lot may not.[73] Indeed, it is arguable that economic loss is the very danger which the tort of negligent misrepresentation is designed to compensate and deter.

The second and more important problem with the court's argument is that it draws the wrong conclusion from it. It is true that the plaintiffs had no commercial expectations regarding the engineer or Village, and derived all of their commercial expectations from the party with whom they dealt, the contractor. What the court failed to consider is that the only injury to the plaintiffs was to their commercial expectations. The source of the injury, therefore, was not the engineer or Village.[74] The situation is different from *Redarowicz*, in which an implied warranty of habitability was created by a party with whom the plaintiffs had not dealt; in that case, the plaintiff was given a remedy for disappointed commercial expectations against the builder, with which it had not dealt, because as a matter of public policy the court held that the builder is the only party in the chain of title with sufficient expertise in construction practices.[75] In *Ferentchak*, however, the engineer and the Village never owned the property and therefore never made warranties or representations to any purchaser concerning the condition of the property. Therefore, it is to the contractor that the plaintiffs should turn to compensate them for the disappointment of their commercial expectations, and there is no need to create a tort remedy against the engineer or Village for this injury.

There would be no inequity in such a remedial scheme, because the contractor would be able to maintain a third party action against

72. 91 Ill. 2d at 89, 435 N.E.2d at 452, *citing* Rozny v. Marnul, *supra* n.71. *See also supra* n.25.

73. The type of loss which the survey was intended to prevent is economic loss and the explicit guarantee of accuracy may be viewed as a voluntary extension of the surveyor's duties to include protecting reasonably foreseeable third parties from economic loss caused by an error in the survey.

74. Although the engineer and Village were responsible for the condition which caused the injury (the poor drainage system) they were not responsible for the injury itself, the disappointed expectations. There would have been no disappointed expectations if the contractor had explained the shortcomings of the drainage system to the plaintiffs before selling the property and the price had been adjusted accordingly.

75. 92 Ill. 2d at 183, 441 N.E.2d at 330.

the Village and the developer, who in turn would have a claim against the engineer for any construction defects for which the engineer's negligence was responsible. The *Ferentchak* court apparently considered but was unable to accept such a scheme. It wrote:

> To conclude that the harm was to the plaintiffs' consumer expectations as against the architect for the developer, but that they had no remedies as to him, would be to leave plaintiffs with no action, except as against the ultimate supplier, here the builder, who would then be left to possible third-party actions against those responsible in the chain of production. We find that result inadequate, however conceptually sound, and not intended by the court in *Moorman*.[76]

The court did not offer any reason for rejecting this remedial scheme, suggesting instead, "If the direction of the Illinois Supreme Court is to broadly apply the *Moorman* doctrine against tort recovery for economic loss to situations such as the instant case, then this case presents an opportunity for them to so state."[77]

In fact, the remedial scheme described above in *Ferentchak*, with the engineer liable only in a third party action by the developer, is a sensible and advantagous scheme. The party who contracted with the engineer ought to be the party to bring the claim against him, because there may have been specific or unwritten understandings between them which might have affected the work product of the engineer. For example, if the developer had required the engineer to use only certain materials in the design, the developer clearly could not maintain a claim against the engineer for negligent choice of materials. However, under the *Ferentchak* court's scheme, the present owner of the property, who was not a party to the contract between the developer and the engineer, might subsequently choose to bring such a claim against the engineer. The engineer's defense, that he was complying with the terms of his agreement with his client, would not be relevant to his duty to the present property owner. Under the remedial scheme described but rejected in *Ferentchak*, the loss would fall upon the developer, the party who in this example made the choice of materials.

C. Rosos

The First Appellate District in *Rosos Litho Supply Corp. v. Hansen*,[78] also refused to apply the *Moorman* Rule to bar negligence claims for solely economic loss against architects and engineers. The defend-

76. 121 Ill. App. 3d at 608, 459 N.E.2d at 1092.
77. *Id.*
78. *Supra* n.54.

ant, Hansen, was an architect who entered into a contract with Rosos to design and supervise construction of a storage building addition to an existing structure owned by Rosos. After the addition was built, numerous cracks developed in the concrete floor rendering it unusable, and Rosos brought an action against various contractors and against Hansen for negligent supervision.[79] A jury found in favor of Rosos and awarded him $115,000.00 on his negligence claim. Hansen then made an unsuccessful post-trial motion for judgment notwithstanding the verdict on the grounds that *Moorman* barred tort claims for solely economic loss.

The appellate court affirmed the trial court's refusal to grant Hansen's post-trial motion and articulated several reasons why the *Moorman* Rule should not apply to tort claims for professional malpractice. To rule otherwise, reasoned the court, would require rewriting much of the well established body of law regarding professional malpractice.[80] The court also stated that applying the *Moorman* Rule to professional design malpractice cases would require a change in the previously recognized measure of damages in such cases.[81] It distinguished the *Moorman* line of cases on grounds similar to those in *Ferentchak*: that unlike the defendants in the *Moorman* line of cases, there is no implied common law or statutory warranty applicable to an architect's services. The court likewise declined to follow *Greengard* on the grounds that the "authorities it cites in support of its conclusion are exclusively products liability cases."[82] The court further reasoned that the distinction between professional and non-professional services was justified because professionals hold themselves out and offer services to the public as experts in their lines of endeavor, and others rely on professionals to possess and use levels of skill and ability beyond that of laymen.[83]

The essence of the *Rosos* court's refusal to apply the *Moorman* Rule to the claim against Hansen is apparent in its observation that: "[T]he broad reading of *Moorman* urged by Hansen in the instant case would, simply by inference, effectively eliminate and stand squarely in conflict with the body of law defining the scope of an architect's liabil-

79. 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984).

80. *Id.* at 295, 462 N.E.2d at 569.

81. *Id.* at 295-96, 462 N.E.2d at 569.

82. *Id.* at 297, 462 N.E.2d at 570. The court's observation was not correct. The court in *Greengard* also relied upon *Redarowicz* and *Foxcroft*, which involved the sale of a home and latent construction defects respectively, not products liability actions. *See supra* n.42, 57. However, the *Rosos* court correctly noted that no attempt was made in *Greengard* to distinguish between professional services and other services or products.

83. *Id.* at 123 Ill. App. 3d at 295, 462 N.E.2d at 566.

ity for professional negligence."[84]

This pronouncement appears to rest upon the assumption that application of the *Moorman* Rule to claims for professional negligence would either restrict a plaintiff's ability to seek compensation from professionals or would increase the ability of the professional to avoid liability for his negligence. This assumption in turn is apparently premised upon the court's observation that there are no implied warranties in a contract for architectural or other professional services.[85] But this observation, although frequently repeated in the case law, is not truly accurate, and the action in contract which the client of a professional may maintain against the professional, in most cases obviates the need for the tort action which *Moorman* would bar.

It is well established in Illinois, in the very cases cited by the court in *Rosos* as establishing the body of law defining the scope of an architect's liability for professional negligence, that a contract for architectural services contains an implied term by which the architect promises to exercise the ordinary and reasonable skill usually exercised by architects at the same place and time.[86] An architect therefore does include an implied warranty in every contract for his professional services; the warranty is not as to result or ultimate outcome, but rather as to the degree of skill and diligence with which the architect will perform his work. Whenever the skill with which an architect performs his services does not measure up to the appropriate standard of care, his client will always have the option, in addition to whatever tort claim may exist, of bringing suit against the architect for breach of an implied term of the contract for his services.[87]

The court's refusal in *Rosos* to apply the *Moorman* Rule to claims

84. *Id.*

85. *Id.* at 296, 462 N.E.2d at 569.

86. Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 299 N.E.2d 359, 361 (3d Dist. 1973) ("The duty of an architect depends upon the particular agreement he has entered with the person who employs him and in the absence of a special agreement . . . he is only liable if he fails to exercise reasonable care and skill"); Miller v. DeWitt, 59 Ill. App. 2d 38, 208 N.E.2d 249, 284 (4th Dist. 1965), *aff'd in part, rev'd in part on other grounds*, 37 Ill. 2d 273 (1967) ("The architects in contracting for their services implied . . . that they would exercise and apply in the case their skill, ability and judgment reasonably and without neglect.") *See* Lurie and Stein, *Injured Workmen: Loss Allocation Among the Direct Participants in the Construction Process*, 23 ST. LOUIS L.J. 292 (1979).

87. *See also* Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, 838-39 (2d ed. 1977):

> Essentially the professional standard is one of reasonableness. Reasonable conduct being the principal tort standard of conduct, the client's claim can sometimes be based upon contract breach or upon tort. Also, breach can cause harm to person or property, a type of loss traditionally compensated by tort law.
>
> Breach of contract and commission of a tort do not always involve identical conduct

for negligently performed professional services is based on reasoning similar to that of Timothy L. Bertschy in his article entitled "The Economic Loss Doctrine In Illinois After Moorman."[88] Bertschy argues that the underlying principle of *Moorman* "cannot be extended to the purchase of services and 'services' liability without coming into conflict with a substantial body of opposing law."[89] Bertschy offers the example of a company who hires an accountant to prepare financial data for a statement to accompany a construction bid. The accountant negligently prepares the financial statements which results in the company losing the bid, and the company wants to sue for the profits which it lost thereby against the accountant.[90] Bertschy correctly concludes that the company should be able to recover its lost profits from the accountant. Despite noting that the heart of the company-accountant relationship is a contract, Bertschy is concerned by the fact that *Moorman* implies that there is only a contractual cause of action and no claim in tort for the economic loss.[91]

It is difficult to understand that concern. Clearly the company has a cause of action against the accountant for breach of an implied term of the contract to perform his services with a reasonable degree of skill (i.e. non-negligently). The damages which occurred were clearly a foreseeable consequence of the accountant's negligence and are therefore recoverable as consequential damages.[92] Thus, no advantage is given to the accountant or disadvantage to the company from application of the *Moorman* Rule which would bar a tort suit for the com-

nor are they proved in exactly the same way. But often the same conduct can be classified as a contract breach or a tort. . . .

Without a contract there can be no claim. In that sense the client's claim is based upon the design professional's breach of contract. Yet increasingly the client can treat a contract breach as a tort. One justifiable reason may be that the conduct is so wrongful that it goes beyond simply breaching a contract. But more often this magic conversion of an ordinary contract breach into tortious conduct is either a thoughtless transfer because of the similarities to tort or a desire to substitute more desirable tort rules for those involving breach of contract.

Whether the client can elect tort or contract is not clear. Much depends upon the effect of making the classification. But it is likely that tort can be used, if desired, where there is personal harm or damage to property but less likely where the conduct has caused economic loss.

88. *Supra* n. 50.

89. *Id.* at 352.

90. *Id.* at 352-53.

91. *Id.* at 353.

92. *See* F.E. Holmes & Son Construction Company, Inc. v. Gualdoni Electric Service, Inc., 105 Ill. App. 3d 1135, 435 N.E.2d 724 (5th Dist. 1982); Student Transit Corp. v. Board of Education of City of Chicago, 76 Ill. App. 3d 366, 395 N.E.2d 69 (1st Dist. 1979) (lost profits will be awarded as compensation for breach of contract where wrongful acts of defendant caused the loss, the profits were reasonably within the contemplation of the parties when the contract was entered into, and the lost profits are proved with a reasonable degree of certainty).

pany's economic loss. The rules and standards surrounding accountants' malpractice would remain substantially the same.

The appellate court in *Rosos* cited *Bates & Rogers Construction Corp. v. Northshore Sanitary District*[93] and the cases on which it relies,[94] in support of its position that applying the *Moorman* Rule to architectural malpractice would entail substantial changes in that area; changes which the *Moorman* court did not intend.[95] In *Bates & Rogers*, the court recognized a cause of action for economic loss in tort. The action was brought by a contractor, against an architect. The contractor had a contract with the owner to act as its agent for the project but it did not have a contract with the contractor. The *Rosos* court refused to apply the *Moorman* Rule to architectural malpractice in light of the apparently inconsistent results obtained in *Bates & Rogers*.

However, there are two other ways in which the appellate court could have reconciled the *Bates & Rogers* line of cases with the intentions of the Illinois Supreme Court as evidenced by the *Moorman* line of cases. First, the court could simply have held that *Moorman* implicitly overruled the *Bates & Rogers* line of cases, particularly because none of the *Bates & Rogers* line of cases had ever been reviewed by the Illinois Supreme Court, and all of the *Bates & Rogers* cases were decided before *Moorman*.[96] Another way to harmonize the two lines of cases would have been to hold that the factual circumstances present in the *Bates & Rogers* line of cases represent a specific and narrow exception to the *Moorman* Rule because the owner, contractor and architect are all parties to an interlocking set of contracts which contain explicit cross-referenced provisions regarding the architect's duties to administer the contract between the owner and the contractor impartially and for the benefit of both parties and to provide timely directions and interpretations to the contractor.[97] The *Bates & Rogers* exception could

93. *Supra* n.7.

94. *Supra* n.9.

95. 123 Ill. App. 3d at 297-98, 462 N.E.2d at 566 .

96. A persuasive case is made for overruling the *Bates & Rogers* line of cases in Bernard Johnson, Inc. v. Continental Constructors, Inc., 630 S.W.2d 365, 371, n.6 (Tex. Civ. App. 1982), explicitly criticizing Normoyle-Berg & Assoc. v. Village of Deer Creek, *supra* n.9.

97. The American Institute of Architect's Document A201, "General Conditions of the Contract for Construction" (1976), is frequently incorporated into contracts between owners and contractors to define the roles of the various parties, including the architect. Many of the provisions of this document appear to imply that the architect is to perform certain functions for the benefit of the contractor:

> 2.2.8 The Architect will render interpretations necessary for the proper execution or progress of the Work, with reasonable promptness and in accordance with any time limit agreed upon. Either party to the contract may make written request to the Architect for such interpretations.
>
> 2.2.10 All interpretations and decisions of the Architect shall be consistent with the

then be premised upon a theory of "common enterprise" among the three parties to the construction project,[98] or upon the theory that the contractor is a third party beneficiary of the contract between the owner and architect.[99] Even if *Moorman* were interpreted to bar the cause of action recognized in *Bates & Rogers*, the contractor would not be without a remedy for the architectural negligence which caused it economic loss; the contractor could bring an action against the owner, for whom the architect is the agent, and the owner could maintain a classic principal versus agent third party claim for indemnity against

> intent of and reasonably inferable from the contract Documents Architects and will be in writing or in the form of drawings. In his capacities as interpreter and judge, he will endeavor to secure faithful performance by both the Owner and the Contractor, will not show partiality to either, and will not be liable for the result of any interpretation or decision rendered in good faith in such capacity.
>
> 2.2.14 The Architect will review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for conformance with the design concept of the Work and with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay. . . .

98. *See* Zaremski and Cottrell, *Risk Shifting Devices and Third-Party Practice: The Impact of Skinner and Alvis*, 14 LOY. U. CHI. L.J., 467, 480 (1983), in which the authors suggest that a "common enterprise" be recognized as the basis for the pre-tort relationship necessary to maintain a third-party action for implied indemnity. The authors consider the relationships on a construction project to be an archetypical example:

> Currently in commercial settings where multiple parties are involved in a common enterprise, there is a mutual understanding that certain obligations will be performed only by certain of the parties. Not only are these parties not strangers to one another, but they have clear expectations as to the role each is to play in the common enterprise. Legal adoption of the "common enterprise" test would merely acknowledge these commonly understood roles and would greatly alleviate the present confusion in indemnity tort law. To illustrate, the common enterprise test for pre-tort relationship could be used in the field of construction law or Structural Work Act liability. In any given construction project, there are a myriad of contractual relationships. Although not all of the parties involved will be in privity with each other there are well-defined roles and expectations which all of the parties recognize.

See also Quail Hollow East Condominium Assoc. v. Donald J. Schulz Co., 47 N.C. App. 518, 268 S.E.2d 12 (1980) (rejecting *Moorman*-like distinction between property damage and economic loss but noting that the mutual reliance inherent in the modern construction process gives rise to implied duties among the participants); Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075, 1084 (1979).

99. Traditionally under Illinois law, a cause of action is recognized on behalf of a third party beneficiary to a contract only when the intention of the parties as evidenced by the contract evinces such a right. People ex rel. Resnick v. Curtis & Davis, Architects & Planners, Inc., 78 Ill. 2d 381, 400 N.E.2d 918 (1980). Recently, the Illinois Supreme Court has recognized that particular relationships may imply third party beneficiary status to a party even in the absence of an explicit provision of such rights in the underlying contract. Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982) (intended beneficiary of insurance policy was implicit third party beneficiary to oral contract between client and attorney retained in divorce action where professional services included having intended beneficiary be named as beneficiary on the insurance policy). *See also* Zostautas v. St. Anthony DePadua Hospital, 23 Ill. 2d 326, 178 N.E.2d 303 (1961) (minor patient who survives damage attributable to physician's breach of contract may sue as third party beneficiary to the contract). *But see* Bryon Chamber of Commerce, Inc. v. Long, 92 Ill. App. 3d 864, 415 N.E.2d 1361 (2d Dist. 1981) (contract for professional services between lawyer and client does not create a professional obligation between lawyer and an unknown third party).

the architect.[100]

It is difficult to understand the appellate court's contention in *Rosos*, that applying the *Moorman* Rule to architectural malpractice would "cast aside" the previously recognized measure of damages in architectural malpractice cases.[101] The court correctly points out that the proper and traditional measure of damages in an action for architectural malpractice is the cost of repairing the defective structure, unless the defect is so fundamental or widespread that the repairs would have to be unduly extensive, in which case the diminution in value of the building is the proper measure of damages.[102] This measure of damages would not change if the client's claim of architectural malpractice were brought in contract rather than in tort. The traditional remedy for breach of contract is to place the innocent party in the position which it would have occupied but for the breach.[103] In the context of architectural malpractice, the measure of damages is the cost of repair or replacement, or the difference in value between a properly designed and constructed structure and the actual structure. The measure of damages would therefore be the same in an action in contract as in an action in tort.[104]

The court in *Rosos* also reasoned that a negligence claim against

100. *See, e.g.*, Stawasz v. Aetna Insurance Company, 99 Ill. 2d 131, 240 N.E.2d 702 (1968); Embree v. Gormley, 49 Ill. App. 2d 85, 199 N.E.2d 250 (2d Dist. 1964). *See also* American Institute of Architect Document A201, *supra* n.97:

> 2.2.2—The Architect will be the Owner's representative during construction and until final payment is due. The Architect will advise and consult with the Owner. The Owner's instructions to the Contractor shall be forwarded through the Architect. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with subparagraph 2.2.18.

101. 123 Ill. App. 3d at 295, 462 N.E.2d at 566.

102. *Id.*

103. *See, e.g.*, Crum v. Krol, 99 Ill. App. 3d 651, 425 N.E.2d 1081 (1st Dist. 1981); Bank v. Schlinder, 72 Ill. App. 3d 147, 390 N.E.2d 447 (1st Dist. 1979).

104. Of course, the theoretical measures of damages in tort and contract are not precisely the same. In a tort action a plaintiff may recover all damages proximately caused by the tortious conduct. *See, e.g.*, Horan v. Klein's-Sheridan, Inc., 62 Ill. App. 2d 455, 211 N.E.2d 116 (3d Dist. 1965). In a contract action, a plaintiff may recover all consequential damages which were reasonably foreseeable and within the contemplation of the parties when the contract was formed. *See, e.g.*, Sitnick v.Glazer, 11 Ill. App. 2d 462, 138 N.E.2d 84 (1st Dist. 1956).

This difference in the formulation of the measures of damages may have some impact on a plaintiff who is forced by the *Moorman* Rule to sue an architect in contract rather than tort. For example, if an architect negligently designs windows for a client's garage which permit a burglar to break in, and the client subsequently converts the garage into a jewelry store, it is likely that the architect would be liable for jewels stolen by the burglar if a tort action could be maintained, but not under a contract theory. The architect's negligence was a proximate cause of the stolen jewels, but it was not reasonably forseeable that the jewels might be stolen.

This result is laudable. The architect might very well have used a different design or added a premium to his fee if he had known that the garage would be converted into a jewelry store. To permit the client to maintain a tort action for the stolen jewels would be similar to implying a

an architect, because of his professional status, was substantively different than a negligence claim against a non-professional. It stated:

> Among the reasons architects have been answerable in malpractice actions is because they hold themselves out and offer services to the public as experts in their line of endeavor. Those who employ them perceive their skills and abilities to rise above the levels possessed by ordinary laymen. Such persons have the right to expect that architects, as other professionals, possess a standard minimum of special knowledge and ability, will exercise that degree of care and skill as may be reasonable under the circumstances and, when they fail to do so, that they will be subject to damage actions for professional negligence, as are other professionals. . . . The broad reading of *Moorman* urged by Hansen in the instant case would, simply by inference, effectively eliminate and stand squarely in conflict with the body of law defining the scope of an architect's liability for professional negligence.[105]

Lying behind the court's description of the unique status of architects and other professionals are two assumptions: that there exists a distinct body of tort law for professional malpractice which has different rules and underlying policies from ordinary negligence law, and that this separate treatment of professionals is justified by the public's reliance on their superior skills. Neither of these assumptions, however, withstands deeper analysis.

The first assumption overlooks the fact that the term "professional malpractice" is in fact just a convenient shorthand for describing the end of the spectrum of tort law in which a defendant is held to a higher than ordinary degree of skill and care. It is not a separate branch of tort law governed by separate rules; it is merely a specific application of the traditional common law rule that one who in fact possesses a higher than ordinary degree of skill and care is liable for actions which do not measure up to that greater standard, even if the same actions do measure up to ordinary standards of care.[106] Any greater than ordinary

warranty of fitness by the architect for whatever use the client should eventually choose to make of the building.

105. 123 Ill. App. 3d at 295, 462 N.E.2d at 566.

106. *See* Prosser, The Law of Torts, 161-62 (4th ed. 1971). Prosser notes that the standard of care for a professional derives from the same principles as that for a skilled non-professional. He states that if a person:

> has in fact knowledge, skill, or even intelligence superior to that of the ordinary man, the law will demand of him conduct consistent with it. The vendor of fur coats who has learned from experience that some few persons are especially susceptible to dermatitis caused by a particular dye must take precautions which might not be required if he had remained in ignorance. Upon the same basis, a physician who is possessed of unusual skill or knowledge must use care which is reasonable in the light of his special ability and information, and may be negligent where an ordinary doctor would not.
>
> Professional men in general, and those who undertake any work calling for special skill are required not only to exercise reasonable care in what they do, but also to possess

duty which a professional may owe to another person results solely from the greater than ordinary skills which he possesses, and not from any attribute which automatically attaches to the label "professional". A highly skilled person in a non-professional occupation is similarly under a duty to abide by a greater than ordinary standard of care. Professionals are merely experts who practice in a field which has been judicially recognized to be sufficiently complex, such that it is unreasonable to imply warranties of successful outcomes or results, and the only requirement which one can reasonably expect from such an expert is the proper exercise of his or her expertise.[107]

The *Rosos* court's second assumption, that the *Moorman* Rule ought not to be applied to professionals because of public reliance upon their expertise, also does not, upon deeper analysis, appear to be persuasive. The modern economy is increasingly specialized and it is increasingly common for ordinary people, both professionals and non-professionals, to develop special expertise in one or more facets of it. The public's reliance upon non-professional experts is as great as its reliance upon professionals. Mechanics, tradesmen, artisans, manufacturers of products and building contractors all possess expertise in their various fields, upon which the public relies as greatly as upon professionals. Although professionals are routinely licensed and subject to minimum competency tests and qualification, the same is true of various non-professional experts, including real estate salesmen, teachers, insurance agents, etc. Although the state's predominant purpose in licencing occupations is to prevent injury to the public by assuring that the occupation will be practiced competently and honestly,[108] the fact of licensing does not necessarily or logically bear any relation to the standards and rules for common law liability of the licensees.

The *Rosos* court's reliance analysis is also unpersuasive because it is circular. The public may justifiably rely upon the performance of a professional only to the extent that the law imposes a duty upon the professional. The Illinois Supreme Court in *Moorman* held that individuals owe a duty to all other foreseeable individuals not to act in a manner which might cause others personal injuries or property dam-

> a standard minimum of special knowledge and ability. Most of the decided cases have dealt with physicians and surgeons, but the same is undoubtedly true of dentists, pharmacists, psychiatrists, attorneys, architects and engineers, accountants, abstracters of title, and many other professions and even skilled trades . . . [A]llowing for the inevitable differences in the work done, the principles applied to all of these appear to be quite identical. . . .

107. *Id.*

108. *See* Stojanoff v. Department of Registration and Education, 72 Ill. App. 3d 585, 391 N.E.2d 10 (1st Dist. 1979), *aff'd*, 79 Ill. 2d 394, 403 N.E.2d 255 (1980).

age, but that absent a warranty or contractual obligation, they do not owe others the duty of refraining from acting in a manner which might disappoint their commercial expectations. The extent of the public's reliance upon architects and other professionals will depend upon whether the courts ascribe to professionals only those duties outlined in *Moorman*, or whether they ascribe the greater duty in tort to refrain from actions which may adversely affect the commercial expectations of third parties.[109] In either event, the public's expectations will be shaped by the court's pronouncement of the law, rather than the reverse.

The *Rosos* court found support for its position that the *Moorman* Rule does not apply to actions for professional malpractice in the California case of *Cooper v. Jevne*,[110] in which the California Appellate Court was asked to apply the *Moorman* Rule as stated in *Seeley v. White Motor Company*[111] to a claim against certain architects for solely economic loss. Relying upon a California case in which an attorney who negligently failed to fulfill his client's testamentary directions was held liable in tort for monetary loss for violating the duty of care owed directly to the intended beneficiaries,[112] the court distinguished an action for professional malpractice from the products liability action in *Seely*.[113] In addition to the fact that the court in *Cooper* did not provide any reasons for its special treatment of professional malpractice, that case is of questionable applicability because it involved allegations of dangerous conditions and other property damage in addition to economic loss. The court in *Cooper*, while deciding that an architect did owe certain duties in tort to subsequent purchasers of a building, therefore did not carefully distinguish whether the duty was merely to avoid conditions which might be dangerous to person or property or whether the duty extended to meeting commercial expectations.[114]

109. In many of the cases discussed in this article,the plaintiffs had no contractual or other relationship with the architect and may not have even been aware of his identity. All of the plaintiff's commercial expectations were derived from the previous owner or from the builder, the party with whom the plaintiffs had dealt. It is likely that the plaintiffs were not even aware of the fact or extent of the architect's involvement in design construction at the time of purchase. The reliance on the architect posited by the court in *Rosos* is really a fiction designed to permit the plaintiffs to maintain a direct action against the architect which would not be justified by an analysis of the plaintiffs' actual expectations and their sources.

110. *Supra* n.12.

111. *Supra* n.4.

112. Heyer v. Flaig, 70 Cal. 2d 223, 226, 74 Cal. Rptr. 225, 227 (1969).

113. Cooper, 56 Cal. App. 3d at 867-68, 128 Cal. Rptr. at 728-29.

114. The court's confusion of these duties is evident in its statement that:

> The architects must have known that the condominiums they designed and whose construction they supervised were built by East Sierra for sale to the public and that purchasers of these condominiums would be the ones who would suffer economically, if not

In contrast, in *Flintkote Co. v. Dravo Corp.*,[115] the Eleventh Circuit Court of Appeals held that under Georgia law, Georgia's equivalent of the *Moorman* Rule barred a tort claim for solely economic loss regardless of the professional status of the defendant. *Flintkote* was an action in tort for economic loss resulting from the repair of a negligently designed "traveling ship unloader".[116] The defendant was the company which both designed and assembled the unloader, and it was not disputed that the only damage was that the unloader failed to operate as designed. The Georgia courts, like those in Illinois, had applied the economic loss rule to bar claims against contractors,[117] but had never had the occasion to decide whether to apply the rule in an action against a professional. The court held:

> Georgia case law does not support the appellant's contention that application of the economic loss rule depends upon the nature of the defendant, applying only to distant manufacturers with no direct dealings with the plaintiff. . . . Moreover, the purpose of the rule, which is to distinguish between those actions cognizable in tort and those that may be brought only in contract, does not support appellant's contention. The distinction between these causes of action does not depend upon the nature of the party being sued, but rather upon the nature of the duty that has been breached, which in most instances can be ascertained from the harm suffered.[118]

The court noted that duties of care independent of contract may arise in certain professional relationships, but it held that such duties do "not create an exception to the economic loss rule, however; the harm protected against is injury to persons and damage to property other than the product contracted for, unless the damage resulted from an accident."[119] The court therefore did not find it necessary to reach the question of whether the defendant design and manufacturing company

> bodily, from any negligence by the architects in the performance of their professional services.

Id. at 867, 128 Cal. Rptr. at 729.

115. 678 F.2d 942 (11th Cir. 1982), cited but not followed in Rosos, 123 Ill. App. 3d at 298, 462 N.E.2d at 566 .

116. The traveling ship unloader was "a crane-like apparatus used to lift buckets of gypsum rock from the holds of cargo ships." 678 F.2d at 944.

117. McClain v. Harveston, 152 Ga. App. 422, 263 S.E.2d 228 (1979).

118. Flintkote, 678 F.2d at 949. *See also* Local Joint Executive Board of Las Vegas v. Stern, 651 P.2d 637 (Nev. 1982). *But see* Conforti & Eisele, Inc. v. John C. Morris Assoc., 175 N.J. Super. 341, 418 A.2d 1290 (1980). *Cf.* San Francisco Real Estate Investors v. J.A. Jones Construction Co., 703 F.2d 976, 978 (6th Cir. 1983) (action by subsequent purchaser of building against architect and contractor for negligent design and construction resulting in economic loss): "The Ohio rule (regarding duties owed to third parties not in privity) . . . appears to apply not only to an action against the builder, but to one against the architect and any subcontractors as well. If privity is a requisite element of a cause of action against a builder, the same logic inescapably applies to these other parties."

119. 678 F.2d at 949.

in that action was a professional.[120]

Particularly in the field of architecture and construction, the *Rosos* court's distinction between professionals and non-professionals would yield counterintuitive results. For example, if a contractor negligently caused economic loss by deviating from the plans and specifications, and a supervising architect negligently failed to notice the deviation, *Moorman* would bar a tort claim against the contractor but would permit one against the architect, despite the fact that the contractor was the primary and active cause of the injury whereas the architect was a secondary and passive cause of the injury.[121] Similarly, if a construction manager caused economic loss for the owner by negligently supervising the construction, his liability in tort will turn upon whether or not he also happens to be licensed[122] as an architect. The liability for economic loss in tort of a design-build architect or company[123] (such as the defendant in *Flintkote*) could depend on which employee committed the negligent act. Liability could also depend on impossible metaphysical distinctions between professional activities (such as a design) and non-professional activities (such as construction or assembly).[124] Therefore the interpretation of *Moorman* articulated in *Rosos* neither is consistent with the rationale of *Moorman* nor establishes a workable framework for further application of the *Moorman* Rule.

IV. CONCLUSION

As the court noted in *Moorman*, "the vast majority of commentators and cases support the view against allowing recovery in negligence

120. *Id.* at 950. *Cf.* Jones & Laughlin, *supra* n.8, in which the court also avoided deciding the question of whether a company which designed and supervised the construction of a roof to a building was performing profesional services; instead, the court treated the roof as a product.

121. *See* Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 229 N.E.2d 769 (1st Dist. 1967) (the rationale behind the Illinois law permitting a secondarily negligent party to seek indemnity from the primarily negligent party is that it is more just for the tortfeasor who was chiefly at fault to assume the burden of the loss).

122. This assumes that a graduate architect legally becomes a professional only after being licensed. If the *Rosos* interpretation of *Moorman* were the law, a person's liability in tort could depend upon the precise point in the education/licensing process at which a non-professional becomes a professional. This could be particularly troublesome in the case of those professionals who have a series of educational or licensing requirements, such as actuaries.

123. *Moorman* itself involved a claim of negligent design, as well as negligent construction, of a grain storage tank, a structure which could be said to be more nearly a building than a product, although it was treated like a product by the court. The *Moorman* court did not find it necessary to determine whether the design work was performed by a professional in order to find that the tort claim for negligent design was barred.

124. For an historical review of the changing services performed by architects in the construction process, *see generally* Block, *As the Walls Come Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. MAR. L. REV. 1 (1984).

for economic losses."[125] It remains necessary only for the courts to devise a complete remedial scheme which both is consistent with the *Moorman* Rule and fairly balances the interests of the various litigants.

The appellate courts in *Greengard, Ferentchak* and *Rosos* have devised three different schemes for reconciling the law of professional malpractice with the distinction between contract and tort law established in the *Moorman* line of cases. Of the opinions rendered by these courts, the approach taken in *Greengard* is the most sensible and workable. An across-the-board application of the *Moorman* Rule to professionals and non-professionals alike would eliminate the need for courts to attempt to draw artificial distinctions among occupations and activities regarding whether or not they are to be considered "professional". There would be no need to justify carving out a professional malpractice area of tort law in which the *Moorman* distinction between contract and tort is not applicable.

Subjecting architectural and other professional malpractice claims to the *Moorman* Rule would not significantly change the manner in which malpractice actions are litigated. Any foreseeable plaintiff who is physically injured or suffers property damage as a result of the negligence of an architect or other professional would be able to maintain a tort action against the architect for any losses suffered thereby.[126] Any foreseeable plaintiff who suffers any damage from the collapse of a structure or some other sudden, calamitous event occasioned by an architect's negligence would also be able to maintain action in tort for all of his damages.[127] Any party who has a contract with an architect or other professional or is a third party beneficiary to such a contract, may maintain a malpractice action for breach of an implied term of the contract when the negligence of the architect results in any kind of damages, including solely economic loss.[128] Where a loss is solely to a

125. Moorman, 91 Ill. 2d at 87, 435 N.E.2d at 451, and cases cited therein.

126. Economic loss would also be recoverable in such a tort action, as long as it was incidental to the personal injuries or damage to other property. The *Moorman* Rule bars only tort claims for solely economic loss.

127. Under the *Moorman* Rule, a sudden and calamitous occurrence which poses a potential threat to body or property is actionable in tort even if no personal injuries or damages to other property actually result. Moorman, 91 Ill. 2d at 83-85, 435 N.E.2d at 449-50, citing Cloud v. Kit Manufacturing Company, *supra* n.30 and Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., *supra* n.32. *See also* Bi-Petro Refining Co., Inc. v. Hartness Painting, Inc., 120 Ill. App. 3d 556, 458 N.E.2d 209 (4th Dist. 1983) (tort action for sudden and violent rupture of oil tank which endangered safety of persons and property and caused damage to other property not barred by *Moorman*).

128. In most cases, a malpractice claim against an architect brought in contract for breach of an implied term will not be subject to the ten year statute of limitations ordinarily applicable to actions on written contracts (Ill. Rev. Stat. Ch. 110, ¶ 13-206) or the five year statute of limitations

plaintiff's commercial expectations, the plaintiff will be permitted to sue only those parties on whom he based his commercial expectations (i.e. parties with whom he has a contract or other contractual remedy).[129] Third party actions may then be pursued parallel to the contractual relationships so that the ultimate loss falls on the party or parties responsible for it.[130]

Although this article has discussed the application of the *Moorman* Rule to professionals primarily in the context of claims for architectural malpractice, similar acceptable and consistent results would occur if the *Moorman* Rule were applied to other professionals. Claims for medical and dental malpractice ordinarily will not be affected by the *Moorman* Rule because they tend to involve bodily or personal injury, which involve a tort rather than a contract interest. Claims for legal and accountant malpractice ordinarily tend to involve solely economic loss, and therefore a contract interest, but the party who brings the claim is generally the lawyer's or accountant's client, who will be able to maintain a claim in contract.[131]

Applying the *Moorman* Rule across-the-board to architects and other professionals as well as to non-professionals would greatly simplify Illinois tort law in general and malpractice actions in particular. It is important for businessmen to know and understand precisely what rights they have and what duties they owe, in order for them to function effectively. It is necessary for the Illinois Supreme Court to resolve the appellate courts' confusion by explicitly pronouncing the *Moorman* Rule to be applicable to actions for architectural and other professional malpractice.

ordinarily applicable to actions on oral contracts (Ill. Rev. Stat. Ch. 110, ¶ 13-205); rather, the applicable statute of limitations would be two years from the time the plaintiff knew of or should reasonably have discovered the malpractice, at least if the action relates to "an act or omission in the design, planning, supervision, observation or management of construction or construction of an improvement to real property." (Ill. Rev. Stat. Ch. 110, ¶ 13-214).

129. A direct contractual relationship is not a prerequisite to such a suit, since the plaintiff may be the third party beneficiary of a contract for construction or architectural services, or he may be a beneficiary of the implied warranty of habitability established by the Illinois Supreme Court in *Redarowicz*. *See supra* n.38.

130. For a review of third-party practice, *see generally* Zaremski & Cottrell, "*Risk Shifting Devices and Third-Party Practice: The Impact of Skinner and Alvis*", 14 LOY. U. CHI. L.J. 467 (1983).

131. In those instances in which a party other than the client seeks to bring a malpractice claim against a lawyer or accountant for solely economic loss, he will have to use a theory other than negligence in tort. For example, an investor who buys stock in a company in reliance upon the negligently prepared financial statements of the company's accountant may be able to bring a claim against the accountant for negligent misrepresentation similar to that in *Rozny supra* n.25, 72. It may also be possible for a non-client of the lawyer or accountant to be a third party beneficiary to the contract for professional services. *See Pelham v. Griesheimer, supra* n.99.