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LIABILITY OF ARCHITECTS AND ENGINEERS FOR CONSTRUCTION SITE ACCIDENTS IN MARYLAND — *KRIEGER V. J.E. GREINER CO.*: BACKGROUND AND UNANSWERED QUESTIONS

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INTRODUCTION

For the past two decades, courts throughout the nation have been defining and redefining the legal responsibilities of design professionals — architects and engineers — during the construction process.¹ Injured workmen seeking “deep pockets” have been successful in suits against design professionals, the courts in some jurisdictions having departed from the traditional tort and contract principles of duty and privity to impose liability on design professionals for construction site accidents.² Architects and engineers have become prime targets for such suits because federal and state workmen’s compensation laws prohibit workers from bringing tort claims against their actual employers or their “statutory employers,”³ the parties most often directly responsible for workmen’s injuries, and because the compensation provided by such laws is generally inadequate to make the worker whole.⁴

This trend has been based upon the perceived role of the architect or engineer as representative of the owner, with authority to act as an

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1. See, e.g., *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958); *Conklin v. Cohen*, 287 So. 2d 56 (Fla. 1973); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *Holt v. A.L. Salzman & Sons*, 88 Ill. App. 2d 306, 232 N.E.2d 537 (1967); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966); *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

2. E.g., *Broyles v. Brown Eng’r Co.*, 275 Aia. 35, 151 So. 2d 767 (1963); *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

3. Article 101, § 62, of the Annotated Code of Maryland provides that a general contractor is, for workmen’s compensation purposes, the “employer” of the employees of subcontractors performing work on the contract. MD. ANN. CODE art. 101, § 62 (1979). If workmen’s compensation claims are filed by a subcontractor’s employee, the principal contractor may join the subcontractor as a party to the action; and if he is liable to pay compensation, he may seek indemnity from the subcontractor. *Id.* Such provisions are common. See 2A A. LARSON, WORKMEN’S COMPENSATION LAW § 72.31, at 14–47 n.46 (1976); text accompanying notes 69 to 76 *infra*.

4. See 2A A. LARSON, *supra* note 3, §§ 65.10, 65.20, 65.30 (1976 & Supp. 1978).

inspector or supervisor,⁵ but this trend ignores the modification of that role during the past twenty years.⁶ During that time, the influence of design professionals has been drastically reduced by, among other things, the need for professional construction management often necessitated by the sheer size and complexity of many construction projects and by increasing specialization in the design professions due to technological advances.⁷

The declining importance of design professionals on the construction site and the imposition of liability upon architects and engineers has resulted in the addition to their contracts of provisions denying any right or duty upon which liability might be premised.⁸ Accordingly, many courts may be obliged to reformulate the rules of liability of design professionals with the likely result of a return to the immunity from suit that architects and engineers once enjoyed under privity rules. Although this return will almost certainly be contract-based, as was the original immunity and the departure therefrom, there are important policy issues that courts and legislatures should consider in deciding whether design professionals should bear any responsibility for construction accidents. Paramount among these issues are: (1) the inadequacy of workmen's compensation laws; (2) the significance of an architect or engineer's having exercised the power to stop work in a phase of the construction either related or unrelated to that which was a cause of the accident; and (3) the assignment of responsibility for safety.

In *Krieger v. J.E. Greiner Co.*⁹ the Court of Appeals of Maryland purportedly resolved the issue of architects' and engineers' liability in Maryland, deciding against the imposition of liability. Although the decision was undoubtedly correct, given the facts before the court, it was

5. See *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir.), cert. denied, 359 U.S. 912 (1956); *Morris v. Marin County*, 18 Cal. 3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977); *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958); *Macomber v. Cox*, 249 Or. 61, 435 P.2d 462 (1967). See generally AMERICAN INSTITUTE OF ARCHITECTS, HANDBOOK OF ARCHITECTURAL PRACTICE §§ 1.01-9.12 (8th ed. 1958) [hereinafter cited as HANDBOOK]; J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 699-700 (2d ed. 1977).

6. See Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075, 1076-83 (1979).

7. *Id.* at 1078-80.

8. The duties of inspection and supervision and the right to stop work are those usually addressed by these provisions. Indeed, the American Institute of Architects has published standardized contract forms that specifically negate such duties. See AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE (1978); text accompanying notes 54 to 57 *infra*.

9. 282 Md. 50, 382 A.2d 1069 (1978).

based solely on the judges' interpretation of the specific contracts involved.¹⁰ The court did not discuss, much less resolve, any of the underlying policy issues, leaving lower courts and litigants, who may be faced with similar policy considerations but slightly different contracts, without guidance.¹¹ Nevertheless, the *Krieger* decision may play a significant role in reversing the trend in other jurisdictions to require design professionals to bear not only the economic burden attributable to their own fault or neglect, but also the costs attributable to the negligence of persons over whom they have no control.

This Article will first discuss industry customs, knowledge of which is necessary to an understanding of the issues involved. It will then examine the holding in *Krieger* and consider the policy issues mentioned above. Lastly, it will suggest legislative and judicial changes appropriate to a resolution of the question of design professionals' liability in Maryland.

BACKGROUND

Construction Industry Practice

The prospective owner of a building, bridge, or any other improvement to real property calls upon two separate groups of individuals — a

10. *Id.* at 67–70, 382 A.2d at 1078–80. The court did suggest the possibility that on remand plaintiffs might be able to state a cause of action against the engineers but apparently viewed it as also contract-based. *Id.* at 70, 382 A.2d at 1080. *But see id.* at 70–73, 382 A.2d at 1080–81 (Levine, J., concurring).

11. See Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance — Part II: Craftsmanship and Decision-Making*, 38 Md. L. Rev. 148, 167–69 (1978).

Differences in contract language are more likely to be a function of the sophistication of the contract drafter than the intention of the design professional in entering into a particular contract. Rarely does a design professional intend to assume a responsibility to supervise construction, although his intention does not necessarily preclude liability to workmen. Accordingly, unless the design professional has consciously intended to assume such duties, the precise wording used in the contract is not intended to evidence an intention to provide other than "customary construction phase." When the architect prepares the contract documents, he will generally use the AIA form or other standard forms adopting the customary language of the AIA contract. When, however, the owner's representative prepares the contract documents, there may be less care taken in the provisions relating to the designer's activities during construction. Thus, on occasion the word "supervision" creeps into the designer's contract, although the designer neither intended to assume such additional responsibility nor was he paid to do so.

The only practical significance of the actual language used involves the ability of innovative attorneys to create causes of action based upon the use of a particular word or words which might differentiate the contract from those previously reviewed by appellate courts in the relevant jurisdiction. If the courts in question have applied a consistent policy approach to the question of liability, the language used in any particular contract should make little difference.

design team and a construction team — to provide a complete structure. The design team includes architects, engineers, or both,¹² who provide services customarily divided into four phases: schematic design, design development, construction documents, and administration of the construction contract.¹³ In the schematic design phase the design concept is established, and determination is made of the overall project cost and the cost efficiency of the proposed design concept. The design development phase includes the preparation of preliminary design drawings, which establish the size and character of the project and include the designer's choice of materials and systems. The preliminary design drawings are then refined and incorporated into bid documents, which generally include a proposed contract between owner and contractor, and final design drawings (plans) and specifications, all of which become known as the contract documents. The owner, sometimes with the design professional's assistance if the project is particularly complex, then negotiates with bidders and awards a construction contract.

The construction contract obligates the prime, or general, contractor to erect the structure in accordance with the contract documents.¹⁴ The contractor is customarily given wide latitude in determining the methods and means of performing the work required by the contract documents and in choosing the particular employees or subcontractors to perform the work. For example, form contracts prepared by the American Institute of Architects provide: "The Contractor shall supervise and direct the Work, using his best skill and attention. He shall be *solely* responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract."¹⁵

Generally, the bidder proposing the most efficient and cost effective means of construction will be selected as the contractor on a particular construction project. After the contract has been awarded and work begun by the contractor, the design professional will enter into the administration of the construction contract phase, during which he will

12. In structures where design features predominate, for example, houses, stores, and other buildings, an architect is placed in overall charge of the project and may engage engineers to assist in the preparation of plans and specifications. In industrial projects, for example, bridges and highways, where engineering features are of paramount importance, the engineer takes the lead. C. DUNHAM & R. YOUNG, CONTRACTS, SPECIFICATIONS AND LAW FOR ENGINEERS 111 (2d ed. 1971).

13. AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT B551, STATEMENT OF THE ARCHITECT'S SERVICES (1972 ed.).

14. See, e.g., AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT A101, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR, art. 2 (1970 ed.) [hereinafter cited as OWNER-CONTRACTOR FORM].

15. AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION ¶ 4.31 (1970 ed.) [hereinafter cited as GENERAL CONDITIONS].

be required to be present either continuously or periodically, at the construction site to determine whether the contractor's work conforms to the requirements set forth in the contract documents.

This, then, is the basic division of labor between the design and construction teams — the design team designs the structure and the construction team constructs it, using its own means, techniques, and men, to conform to the design. In structuring a body of law governing the construction industry, courts have carefully drawn a distinction between the responsibilities of the two groups. The contractor is not liable for defects in the work attributable to faulty plans or specifications,¹⁶ and the design team is not responsible for defects in the finished product attributable to the construction team's failure to perform the work in a workmanlike manner.¹⁷

This distinction becomes blurred when the question before a court is the liability of an architect or engineer who provides construction administration services, arbitrating disputes between the owner and the contractor or judging the quality of workmanship and materials.¹⁸ Whether the design professional assumes a duty to workmen to inspect for safety hazards or to dictate alternative means of construction when he believes that those used constitute a hazard are questions made even more difficult if the design professional has, prior to the incident upon which suit is based, made such inspections or exercised the power to stop work.

Traditional Doctrine

In Maryland the question of the design professional's liability to injured workmen depends on the concept of legal duty. When a person is negligent in his own affairs but is found to have no legal duty to a person injured by his negligence, he is not liable in tort.¹⁹ Negligence alone does not create such a duty.²⁰

16. *Hammaker v. Schleigh*, 157 Md. 652, 665, 147 A. 790, 795 (1929). See generally Annot., 6 A.L.R.3d 1394 (1966).

17. See *Day v. National U. S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961) (architect not liable in negligence for personal injuries resulting from subcontractor's failure to comply with architect's instructions).

18. See, e.g., *Lynn v. Baltimore & O.R.R.*, 60 Md. 404 (1883); GENERAL CONDITIONS, *supra* note 15 (1976 ed.).

19. *Zamecki v. Hartford Accident & Indem. Co.*, 202 Md. 54, 60, 95 A.2d 302, 305 (1953) ("Where there is charged non-performance of an act, and yet no duty owed to the injured party, the law of this State seems to be that the defendant is not liable."); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53 (4th ed. 1971).

20. *Winfield, Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 43 (1934). See generally *Green, The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); *Morison, A Re-Examination of the Duty of Care*, 11 MOD. L. REV. 9 (1948); *Prosser, Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

By the same token, the creation of a contractual obligation will not give rise to a legal duty to one not a party to the contract unless the parties to the contract intend to create such a duty.²¹ Only when the breach of contract *also* violates an independent duty imposed by law does a cause of action accrue to an injured third person.²² Deciding whether there is an independent duty imposed by law may depend upon the ultimate policy sought to be furthered.

As Dean Prosser has observed, "'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."²³ Thus the answer to the question whether the design professional owes a duty to workmen may be reached in two separate ways: either by determining that the design professional and the owner intended by their contract that the design professional assume such an obligation, or by deciding that public policy requires the creation of a legal duty irrespective of the language of the owner-architect or owner-engineer contract.

Architects and engineers have traditionally been held to have no duty to supervise methods of construction or to inspect for safety hazards. This rule was based upon the doctrine of privity and on the traditional role played by design professionals.²⁴ The presence of architects or engineers at a job site was regarded as being solely for the benefit of the owner, to insure that the structure was being built in accordance with the contract documents.²⁵ Their supervisory power was usually governed by provision in the owner-contractor contract.²⁶ Failure to perform the duty of supervision could result in tort or contract liability, but an action generally could be brought only by the owner, with whom there was privity of contract.²⁷

In 1952 the American Institute of Architects sought to give contractual recognition to the established legal rule denying liability of design professionals to parties outside the contracting group. The

21. *Marlboro Shirt Co. v. American Dist. Tel. Co.*, 196 Md. 565, 570, 77 A.2d 776, 777 (1951); *McClare v. Massachusetts Bonding & Ins. Co.*, 266 N.Y. 371, 195 N.E. 15 (1933); *Lawrence v. Fox*, 20 N.Y. 268 (1859).

22. *Heckrotte v. Riddle*, 224 Md. 591, 595, 168 A.2d 879, 882 (1961).

23. W. PROSSER, *supra* note 19, § 53, at 325-26.

24. *See, e.g., Garden City Floral Co. v. Hunt*, 126 Mont. 537, 255 P.2d 352 (1953); *GENERAL CONDITIONS*, *supra* note 15, art. 38 (1963 ed.).

25. *See Hubert v. Aiken*, 15 Daly 237, 5 N.Y.S. 839 (Sup. Ct. 1889); *C. DUNHAM & R. YOUNG*, *supra* note 12, at 4; *J. SWEET*, *supra* note 5, at 92-94.

26. *See Sweet, Owner-Architect-Contractor: Another Eternal Triangle*, 47 CALIF. L. REV. 645, 646 (1959).

27. *See J. SWEET*, *supra* note 5, at 838-39; *Note*, *supra* note 6, at 1077-78.

Institute published form construction industry contracts,²⁸ including owner-architect agreements,²⁹ owner-contractor agreements,³⁰ and form General Conditions of the construction contract.³¹

The General Conditions provided in its article 38:

The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract.³²

Although the language of article 38 was intended to *limit* the liability of architects, it was that language that eventually was used to establish a contractually based duty to inspect for safety hazards.

Liability for Design Professionals

Following the New York Court of Appeals' rejection of the doctrine of privity as a ground for denying recovery,³³ the Arkansas Supreme Court found in *Erhart v. Hummonds*³⁴ a contract-based duty of an architect to protect workmen at a construction site. Instead of directly attacking the established rule that discouraged the imposition of

28. In 1888 the American Institute of Architects, in conjunction with the National Association of Builders, published the Uniform Contract, which became the accepted standard building construction contract for over 25 years. During the next 90 years, the Institute, with organizations of builders, engineers, and subcontractors, published many other construction form documents. See generally W. PARKER & F. ADAMS, *THE AIA STANDARD CONTRACT FORMS AND THE LAW* (1954).

29. AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (1952 ed.) [hereinafter cited as OWNER-ARCHITECT FORM]. Publication of this form began in 1917.

30. OWNER-CONTRACTOR FORM, *supra* note 14.

31. GENERAL CONDITIONS, *supra* note 15 (1952 ed.).

32. *Id.* art. 38.

33. *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). The court concluded that architects could be held liable in negligence for injuries to third parties not in privity with them. In extending the doctrine of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), the court reasoned that "there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure." 3 N.Y.2d at 140, 143 N.E.2d at 898, 164 N.Y.S.2d at 702 (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 517 (2d ed. 1955)). The court, however, affirmed the dismissal of all the plaintiff's claims, because the plaintiff failed to allege facts sufficient to constitute a cause of action under the *McPherson* rule.

34. 232 Ark. 133, 334 S.W.2d 869 (1960).

liability as a matter of policy, plaintiffs theorized that language closely resembling that of article 38 in their contract was intended to create a duty to inspect for and warn of safety hazards. Suit was brought after a poorly shored excavation wall collapsed, killing three workmen. The architects had detected the hazard before the accident and had threatened to stop work unless the problem was corrected but took no such action.³⁵ Plaintiffs alleged that the architects had a duty under the contract to exercise their power to stop work in order to protect workmen from possible injury.³⁶ The court held that the architects' duty of supervision included enforcing the contractor's obligation to provide a safe working environment.³⁷

Six years later, in *Walker v. Wittenberg, Delony & Davidson, Inc.*,³⁸ the Arkansas Supreme Court reaffirmed *Erhart*,³⁹ and imposed liability on a design professional for an accident caused by the negligence of a construction team. For reasons not evident from the record, the court reconsidered its decision in *Walker* three months later, and, in a complete turnabout, held that the language of article 38 could *not* be interpreted to create a duty on the part of an architect to inspect for safety, thereby rejecting its own earlier decision in *Erhart*.⁴⁰ The Arkansas court in the second *Walker* opinion adopted the rationale of a Louisiana decision, *Day v. National U.S. Radiator Corp.*⁴¹

35. *Id.* at 135, 334 S.W.2d at 871.

36. *Id.*

37. *Id.* at 138, 334 S.W.2d at 872. The court noted that the architect had been paid an additional sum by the owner to supervise the construction. Moreover, the agreement between the owner and the contractor provided for the maintenance of certain safety conditions at the job site. The court concluded that the injuries to the construction workers which resulted from a violation of the safety provisions were the responsibility of the supervising architect. *Id.* The dissent pointed out, however, that it was the contractor who was responsible for safety under the contract documents. *Id.* at 142, 334 S.W.2d at 874-75 (Ward, J., dissenting).

38. 241 Ark. 525, 412 S.W.2d 621 (1966), *rev'd on rehearing*, 242 Ark. 976, 412 S.W.2d 626 (1967). In *Walker* a workman on a construction site was seriously injured when an exterior wall on which he was standing collapsed after the wall's supports had been prematurely removed.

39. The court observed: "The contention that the sole duty of the architects was to supervise to the end that the building would conform to plans and specifications when completed, was likewise the principal defense in *Erhart v. Hummonds* . . . , but we upheld a judgment against the appellant architects in that case." *Id.* at 527, 412 S.W.2d at 624 (citation omitted).

40. 242 Ark. 976, 979, 412 S.W.2d 626, 630 (1967). Although the court did not specifically overrule its prior opinion, it limited *Erhart* narrowly to its own facts.

41. 241 La. 288, 128 So. 2d 660 (1961).

In *Day* a wrongful death action was brought after a boiler exploded while being improperly installed by a subcontractor on a construction site. Plaintiffs contended that the architects had assumed a contractual obligation to make "frequent visits to the work site" to insure strict conformity of the work with contract requirements.⁴² Determining that such a contractual provision did not require the architects to control the methods by which contractors performed their work, the Louisiana Supreme Court stated:

As we view the matter, the primary object of this provision was to impose the duty or obligation on the architects to insure to the owner that before final acceptance of the work the building would be completed in accordance with the plans and specifications; and to insure this result the architects were to make "frequent visits to the work site" during the progress of the work. Under the contract they as architects had no duty to supervise the contractor's method of doing the work. In fact, as architects they had no power or control over the contractor's method of performing his contract, unless such power was provided for in the specifications. Their duty to the owner was to see that before final acceptance of the work the plans and specifications had been complied with, that proper materials had been used, and generally that the owner secured the building it had contracted for.⁴³

In January 1967, one month after the Arkansas Supreme Court reaffirmed *Erhart* in *Walker* and two months before it reconsidered and tacitly overruled *Erhart*, the Supreme Court of Illinois decided *Miller v. DeWitt*,⁴⁴ which was to become a leading case supporting the extension of the design professional's liability.⁴⁵ In *Miller*, several workmen, who were injured in the collapse of a gymnasium roof on which they were working, brought suit against the project architects. Liability was asserted on two grounds — common law negligence and violation of the

42. The *Day* court was faced with the question whether the architect had a duty to inspect a boiler before and during installation. The duty was alleged to arise from the contract with the owner, which bound the architect to exercise "adequate supervision of the execution of the work to reasonably insure strict conformity with the working drawings, specifications, and other contract documents." *Id.* at 295, 128 So. 2d at 666 (quoting the owner-architect contract).

43. *Id.*

44. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

45. See, e.g., *McInerney v. Hasbrook Constr. Co.*, 62 Ill. 2d 93, 338 N.E.2d 868 (1975); *Voss v. Kingdon & Naven, Inc.*, 60 Ill. 2d 520, 328 N.E.2d 297 (1975).

Illinois Structural Work Act.⁴⁶ The Illinois Supreme Court found for the plaintiffs on both grounds,⁴⁷ and its holding on the negligence theory had a wide impact. Citing only *Erhart*, the court held: "From a careful examination of the record we conclude that if the architects knew or in the exercise of reasonable care should have known that the shoring was inadequate and unsafe, they had the right and corresponding duty to stop the work until the unsafe condition had been remedied."⁴⁸

Miller, unlike prior relevant cases, received widespread publicity and comment.⁴⁹ The controversy apparently centered on the meaning and effect of contractual provisions for "supervision." Courts following the *Miller* rationale took the position that "supervision" provisions created an implicit duty to supervise methods employed at the construction site.⁵⁰ Courts following the *Day* rationale held that use of the term "supervision" in a provision similar to article 38 was not to be construed to require design professionals to control the "method and manner of doing the details of the work."⁵¹ One court observed that the term "supervision" had been included in the architect's contract only to demonstrate the parties' intention that he would provide such "supervis-

46. Ch. 48, § 1, 1907 Ill. Laws 312 (present version at ILL. REV. STAT. ch. 48, § 60 (1969)). The Illinois Structural Work Act pertains to safety of construction scaffolds, hoists, cranes, and other structural components and imposes civil liability on certain categories of persons who willfully violate its provisions, e.g., persons "in charge of" the work. ILL. REV. STAT. CH. 48, § 48, 69.

47. The court observed that the architects "had charge" of the work because of their contractual right to stop work. 37 Ill. 2d at 280, 226 N.E.2d at 639. More recent Illinois decisions have confined the *Miller* holding to the structural work and thus abrogated its holding as to common law liability. See *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976); *Getz v. Del E. Webb Corp.*, 38 Ill. App. 3d 880, 349 N.E.2d 682 (1976).

48. 37 Ill. 2d at 279, 226 N.E.2d at 638 (citing *Erhart v. Hummonds*, 232 Ark. 133, 334 S.W.2d 869 (1960)).

49. See, e.g., Note, *Torts — Architect's Liability in His Capacity as a Supervisor*, 17 DEPAUL L. REV. 439 (1968); Note, *The Architect's Tort Liability for Personal Injury*, 17 DRAKE L. REV. 242 (1968); Note, *Liability of Design Professionals — The Necessity of Fault*, 58 IOWA L. REV. 1221, 1224 n.24 (1973); Comment, *The Supervising Architect: His Liabilities and His Remedies when a Worker is Injured*, 64 NW. L. REV. 535, 546-48 (1969) [hereinafter cited as *Supervising Architect*].

50. See, e.g., *Associated Eng'rs, Inc. v. Job*, 370 F.2d 633 (8th Cir.), cert. denied, 389 U.S. 823 (1967); *McGovern v. Standish*, 33 Ill. App. 3d 717, 341 N.E.2d 739 (1975), aff'd, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976); *Amant v. Pacific Power & Light Co.*, 10 Wash. App. 785, 520 P.2d 181 (1974), aff'd, 84 Wash. 2d 872, 529 P.2d 829 (1975) (per curiam).

51. *Reber v. Chandler High School Dist. No. 202*, 13 Ariz. App. 133, 136, 474 P.2d 852, 855 (1970). *Accord*, *Seeney v. Dover Country Club Apts.*, 318 A.2d 619 (Del. Super. Ct. 1974); *Jackson v. Sergeant, Hauskins & Beckwith Eng'rs, Inc.*, 20 Ariz. App. 330, 512 P.2d 862 (1973).

ory controls" as would be reasonably necessary to assure that the final structure would be constructed in accordance with applicable contract documents.⁵²

Reaction of the Design Profession

The conflict between the *Miller* and *Day* approaches provoked a two-pronged assault by the profession on design professional liability. The American Institute of Architects first attacked the problem at its source, by revising its form contract documents. The organization then lobbied Congress to broaden the exclusive remedy provisions of the proposed National Workers' Compensation Act of 1975,⁵³ in an effort to preclude, by law, actions by construction workers against all supervisory personnel.

The revision of the form contract documents, begun in 1967, focused on eliminating the troublesome words "supervision" and "inspection." A disclaimer of liability for construction methods and safety was added, and article 38 was deleted. The new provision, article 1.1.14, read:

*The Architect shall make periodic visits to the site to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of his on-site observations as an architect, he shall endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. The Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.*⁵⁴

52. *Reber v. Chandler High School Dist. No. 202*, 13 Ariz. App. 133, 136, 474 P.2d 852, 855, (1970). The court held:

In our opinion, provisions such as these are insufficient to support, and in fact negate, a finding that the parties intended that the architect have the obligation or duty to control the contractor and his employees in the method and manner of doing the details of the work. Such provisions are more consonant with an intention that the architect have such supervisory controls as are necessary to assure that the results of the contractor's work comply in technical detail with the plans and specifications prepared by the architect.

53. S. 2018, 94th Cong., 1st Sess., 121 CONG. REC. 61067 (1975).

54. OWNER-ARCHITECT FORM, *supra* note 29, art. 1.1.14 (1974 ed.) (emphasis added).

No longer would design professionals supervise construction or inspect the work. Instead, they would administer the construction contract by visiting the site and becoming generally familiar with work progress and quality; not only was the power to stop work eliminated, but the duty to protect zealously the owner's interests was reduced to making an "endeavor to guard the Owner against defects and deficiencies"⁵⁵ in the contractor's work.

Even this language did not seem to solve the problem completely, and article 1.1.14 was subsequently replaced by articles 1.5.4 and 1.5.5.⁵⁶ These articles further defined the architect's duties and limited his responsibilities:

1.5.4 The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Architect in writing to become generally familiar with the process and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of such on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.

1.5.5 *The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, Subcontractors or any other persons performing any of the Work in accordance with the Contract Documents.*⁵⁷

In some states the change in language appeared to achieve the desired effect. Appellate courts in Missouri⁵⁸ and Indiana⁵⁹ rejected attempts to impose liability on architects and engineers based upon the language of the revised A.I.A. documents. The Indiana court analyzed each provision of the owner-architect agreement and also the owner-contractor agreement in reaching its conclusion that the architect had

55. *Id.*

56. *Id.* arts. 1.5.4, 1.5.5 (1977 ed.).

57. *Id.* (emphasis added). While the 1974 and 1977 editions of the form contract documents differ in organization, the rearticulation of the architect's duties is the only major substantive change.

58. *Brown v. Gamble Constr. Co.*, 537 S.W.2d 685 (Mo. App. 1976).

59. *Walters v. Kellam & Foley*, 360 N.E.2d 199 (Ind. App. 1977).

not assumed a duty to workmen. The applicable clauses provided that (1) the architect would have approvals "only for conformance with the design concept"; (2) the architect would "make periodic visits to the site . . . to determine *in general* if the work [was] proceeding in accordance with the contract documents"; (3) the architect would not "guarantee the Contractor's performance" or take responsibility for the "construction means, methods, techniques, sequences or procedures or for safety precautions"; (4) the architect took no responsibility for "acts or omissions of the Contractor, any subcontractor or any of their agents or employees"; (5) the contractor would be responsible for the acts, omissions and safety of his employees and all other persons performing any of the work under a contract with the contractor; and (6) the contractor would indemnify the owner as a result of claims arising from the contractor's failure to comply with the requirements of the construction contract.⁶⁰ The court concluded that the provisions did not establish a duty of supervision or control over construction methods and procedures and declined to impose liability, adopting the reasoning of the Louisiana Supreme Court in *Day v. National U.S. Radiator Corp.*⁶¹

In 1975 the A.I.A. implemented the second prong of its attack on design professional liability by lobbying Congress for protective legislation.⁶² Relying on legal commentaries acknowledging the basic inequity of permitting the active tortfeasors (contractors or subcontractors) to escape liability while not granting a similar statutory immunity to design professionals,⁶³ the A.I.A. sought to include architects and engineers among those against whom suit was proscribed by law. The language of the applicable section of the proposed National Workers' Compensation Act of 1975 was as follows:

The benefits to which employees are entitled under section 5 of this Act, and such additional benefits as a State may provide, shall constitute the employee's exclusive remedy against the employer, any other person engaged, *directly or indirectly, with respect to the same location, (1) in the accomplishment of a connected or related objective or, (2) acting in furtherance of a common undertaking with the employee's employer,* and any collective bargaining agent of the employees of such employer for any occupational illness, injury, or death arising out of and in the course of employment.⁶⁴

60. *Id.* at 208 n.5.

61. *Id.* at 210; 241 La. 288, 128 So. 2d 660 (1961).

62. American Institute of Architects, Statement Submitted to the Subcommittee on Labor and Public Welfare, United States Senate (May 11, 1976).

63. *See, e.g., Supervising Architect, supra* note 49.

64. S. 2018, 94th Cong., 1st Sess., 121 CONG. REC. 61067 (1975) (emphasis added).

Although the proposed act did not become law,⁶⁵ the design professions will undoubtedly continue attempts to remedy, through both national and state legislation, what they perceive to be a basic inequity.

It was in this historical context that the Maryland Court of Appeals decided *Krieger v. J.E. Greiner Co.*⁶⁶ Although the court's adoption of the *Day* rationale may be regarded as establishing a rule of law in Maryland against design professional liability for construction site accidents, the decision may be narrowly limited to its interpretation of the specific contractual provisions involved. The court left for another day any decision on the issue of assumption of duty independent of contract.⁶⁷

THE *KRIEGER* OPINION

The Court's Decision

Krieger had its inception when Leroy E. Krieger, a construction worker employed by Bildot Steel Corporation (Bildot), a subcontractor on the Outer Harbor Bridge construction project, was injured by a falling steel bar, one of thirty-two that had been stood on end to be used as reinforcement for concrete columns. Six of the thirty-two had been welded into place, but the others, including the one that injured Krieger and killed a co-worker, were supported only by No. 9 guy wire.⁶⁸ The use of the particular guy wire and the choice of method by which the steel bars were to be raised constituted part of the "methods and means" employed by the contractor (in this case by a subcontractor). The contract documents required only that the contractor use steel reinforcing bars in the concrete columns.⁶⁹ The method of installation of the bars was not specified, and the choice of method could have had no adverse effect on whether the finished bridge complied with the construction contract.

65. The bill died in committee.

66. 282 Md. 50, 382 A.2d 1069 (1978).

67. See *id.* at 70, 382 A.2d at 1080. Judge Levine addressed the question in his concurring opinion. He maintained that, independent of any contractual obligations an architect may have, an architect's actions on the site may give rise to a duty to exercise reasonable care. Judge Levine reasoned that when an architect unilaterally halts work on the construction site in order to protect workmen, he assumes a duty of care and must thereafter act reasonably or be subject to liability for damages if injury results. *Id.* at 70-73, 382 A.2d at 1080-81 (Levine, J., concurring).

68. *Id.* at 56, 382 A.2d at 1072-73.

69. *Id.* at 54, 382 A.2d at 1071.

Krieger was obviously entitled to workmen's compensation benefits from his employer Bildot. The Maryland Workmen's Compensation Act, however, provides that the liability of an employer who procures the required compensation is limited to the payment of benefits under the Act.⁷⁰ This "exclusive benefit" rule bars a tort action against an employer even though the accident occurred as a result of his negligence.⁷¹ The theory underlying such provisions is that they are part of the "*quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts."⁷² In *Krieger* the contract documents placed certain affirmative duties regarding safety of workmen⁷³ on the general contractor, a joint venture comprised of three contracting firms, which, in the absence of workmen's compensation law, would have been liable to Krieger in tort. The general contractor group was immune to suit by Krieger because the workmen's compensation law protects a person retaining others to perform work "which is a part of his trade, business or occupation which he has contracted to perform."⁷⁴ Such a provision is not uncommon,⁷⁵ and the Maryland provision is premised upon the theory that because a general contractor is legally obligated to provide workmen's compensation benefits to employees of subcontractors it should be entitled to immunity from suit whether it or the subcontractor actually purchases the compensation insurance policy.⁷⁶

70. MD. ANN. CODE art. 101, § 15 (1979). Section 15 provides that "[t]he liability prescribed [herein] shall be exclusive"

71. *Wood v. Aetna Cas. & Sur. Co.*, 260 Md. 651, 273 A.2d 125 (1971); *Flood v. Merchants Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963); *Cox v. Sandler's, Inc.*, 209 Md. 193, 120 A.2d 674 (1956); *Hart v. Sealtest, Inc.*, 186 Md. 183, 46 A.2d 293 (1946); *Baltimore Transit Co. v. State*, 183 Md. 674, 39 A.2d 858 (1944).

72. 2A A. LARSON, *supra* note 3, § 65.10, at 12-3, 12-4. "[T]he statute has given to labor what it never had before, and has taken away from capital what it has always enjoyed, and has compensated the latter by limiting its liability" *Wood v. Aetna Cas. & Sur. Co.*, 260 Md. 651, 660, 273 A.2d 125, 131 (1971) (quoting *Victory Sparkler Co. v. Francks*, 147 Md. 368, 376, 128 A. 635, 638 (1925)).

73. These were to "'[o]bserve and comply with all Federal, State, and local laws or ordinances that affect those employed or engaged by him on the project . . . or the conduct of the work . . .'" and to "'be responsible for all damage to life and property due to its activities or those of its agents or employees in connection with the services required under the Contract.'" 282 Md. at 53, 382 A.2d at 1071 (quoting provisions of general contractor's agreement with state, quoted in plaintiffs' declaration).

74. MD. ANN. CODE art. 101, § 62 (1979).

75. Forty-three states have included similar provisions in their workmen's compensation statutes. See 2A A. LARSON, *supra* note 3, § 72.31, at 14-47 n.46.

76. See *State v. Benjamin F. Bennett Bldg. Co.*, 154 Md. 159, 164, 140 A.52, 54 (1928). There appears to be a split of authority in other jurisdictions as to whether the principal contractor is entitled to immunity if the claimant's direct employer procured the required

The two financially responsible entities directly at fault in *Krieger*, the contractor and subcontractor, were immune from liability under workmen's compensation laws.⁷⁷ The owner of the project, the State of Maryland, was not immune under the workmen's compensation laws,⁷⁸ but was entitled to sovereign immunity.⁷⁹ *Krieger* and his wife therefore filed suit only against the project engineers, J.E. Greiner Co., Inc. (Greiner) and Zollman Associates, Inc. (Zollman). Greiner had been employed by the State to perform the first three categories of engineering services⁸⁰ and to perform certain designated construction phase services, including coordination of Zollman's activities. Zollman's services were limited to providing on-site inspection services during the construction phase.

Krieger alleged that the engineers, who owed a duty of care to him by reason of their contracts with the State,⁸¹ knew, or in the exercise of reasonable care should have known, of the dangerous methods used by Bildot to erect the reinforcing bars; that they failed to stop work or to require corrective action as permitted under their contract with the State; and that they were thereby liable to the plaintiffs.⁸² *Krieger* further alleged that the engineers had assumed a duty to stop work whenever they observed improper construction practices because they

insurance. See 2A A. LARSON, *supra* note 3, § 72.31, at 14-49. The majority of new cases and Larson's view of the "sounder result" support the theory that the general contractor is entitled to immunity if the direct employer procured the necessary insurance. *Id.*

As applied to the construction field, these "exclusive remedy" provisions produce a somewhat anomalous result. Should a project engineer or architect enter into a contract with the owner not only to design the structure but also to build it using subcontractors, he would be immune from liability because he would be obligated to procure workmen's compensation insurance — the cost of which would be borne by the owner. This immunity would attach despite his responsibility for methods, means and techniques of construction, including the safety of workers. Yet if the design professional assumes no "build" obligation, as is usually the case, there attaches no immunity from liability even though he has no responsibility for methods and means of construction.

77. Indeed, the primary tortfeasors could not even be held liable for indemnity or contribution. See *Congressional Country Club, Inc. v. Baltimore & O.R.R.*, 194 Md. 533, 71 A.2d 696 (1950); note 93 *infra*.

78. See *Honaker v. W.C. & A.N. Miller Dev. Co.*, 278 Md. 453, 365 A.2d 287 (1976).

79. *Spriggs v. Levitt & Sons, Inc.*, 267 Md. 679, 298 A.2d 442 (1973). The state would probably not have been liable in any event, as the Maryland Court of Special Appeals has held that a construction contractor is an independent contractor and not an agent of the owner. *Cutlip v. Lucky Stores*, 22 Md. App. 673, 325 A.2d 432 (1974). Thus, unless the premises were in an unreasonably dangerous condition or there was a peculiar risk inherent in the work, the owner would not be liable for the torts of the contractor or subcontractor. See *id.* at 684-86, 325 A.2d at 438-40.

80. See text accompanying notes 12 to 14 *supra*.

81. 282 Md. at 55, 382 A.2d at 1072.

82. *Id.* at 56, 382 A.2d at 1072-73.

had done so on prior occasions when improper methods were being employed.⁸³ The engineers demurred on the ground that they owed no duty to the plaintiffs. They asserted that their contract with the State established as a matter of law that they were employed only to determine whether the completed structure conformed to the contract documents and that they had no contractual obligation to inspect for safety. The demurrer was sustained by the Superior Court of Baltimore City, the plaintiffs appealed, and certiorari was granted by the Court of Appeals prior to review by the Court of Special Appeals.⁸⁴

Although the court was faced with Maryland precedents espousing contrary views,⁸⁵ it held that the defendant engineers in *Krieger* had been under no contractual duty either to act as safety inspectors on the project or to direct the methods employed by the contractor.⁸⁶ The court based its decision primarily on its interpretation of the precise contractual language involved:

We find no provisions in these contracts imposing any duty on the engineers to supervise the *methods* of construction. . . .

We likewise find nothing in the contracts imposing any duty on the engineers to supervise safety in connection with construction.

The duty of the engineers under their contracts is to assure a certain end result, a completed bridge which complies with the plans and specifications previously prepared by Greiner. It will be observed that many of the cases which have held architects and engineers responsible for safety have done so upon the basis of the construction by the courts of the contracts existing between the engineer or architect and the owner. We hold that a fair interpretation of the contracts between the Commission and Greiner and Zollman is that the duties of those engineers do not include supervision of construction methods or supervision of work for compliance with safety laws and regulations.⁸⁷

83. *Id.*

84. See MD. CTS. & JUD. PROC. CODE ANN. §§ 12-201, -202 (1974).

85. *State v. City of Baltimore*, 199 Md. 287, 86 A.2d 618 (1952); *Otis Elevator Co. v. Embert*, 198 Md. 585, 84 A.2d 876 (1951); *Cutlip v. Lucky Stores*, 22 Md. App. 673, 325 A.2d 432 (1974).

86. 282 Md. at 69-70, 382 A.2d at 1079-80.

By implication, the Court of Appeals may also have settled the question whether a design professional owes a common law duty to workmen on the construction site. Had a common law duty on the part of the designer to workmen existed, there would have been no need for the court to examine the designer's contract with the owner to see whether any duty was created in that instrument or to explore the question of whether the designer voluntarily assumed such a duty. Thus, the court's analysis leads this author to conclude that in Maryland no common law duty exists.

87. *Id.* at 69, 382 A.2d at 1079.

Unanswered Policy Questions

The Court of Appeals has apparently settled the question whether a design professional supervising or inspecting work at a construction site owes, under his contract with the owner, any duty to injured workmen.⁸⁸ Because the decision will limit design professionals' liability for construction site accidents,⁸⁹ it would have been helpful to bench and bar alike if the highest court in the state had enunciated the policy goals it was attempting to implement by its decision. All the necessary contractual language was available in *Krieger* for the court to adopt the *Miller v. DeWitt* rationale: the word "supervision" was scattered throughout the engineers' contracts, and the plaintiffs alleged that Greiner and Zollman had actual knowledge of the ultra-hazardous construction practices employed by Bildot and that the engineers had the right to stop work under their respective contracts.⁹⁰ Nevertheless, the court chose not to impose liability, and gave no indication of having considered the policy arguments in favor of imposing liability.

The court could have considered whether the imposition of liability on an engineer in such cases might reduce the incidence of construction site accidents, and determined that design professionals should, because of their training and expertise, have a general obligation to insure safety as a matter of policy. It could have adopted a risk distribution approach, and concluded that design professionals are able to obtain insurance and pass on the cost in the form of higher prices, and are thus in a better position to spread the loss than are injured workers.⁹¹ Had the court considered these reasons for imposing liability it is likely it would have decided that neither was practicable, given the customs of the industry. Generally the contractor is selected on the basis of his bid, which, in turn, is based upon his choice of the most cost effective method

88. *Id.*

89. *Id.* at 56-57, 382 A.2d at 1073.

90. *Id.* at 55-56, 382 A.2d at 1072.

91. For further discussion of this theory, see *Supervising Architect*, *supra* note 49:

It has been suggested that injuries which occur in an industrial-commercial setting should be regarded as costs of production and borne by those who benefit from the enterprise. It is argued that the purpose of tort law should be to compensate injuries with as little social loss as possible, and that enterprises, by obtaining insurance and passing on the cost in the form of higher prices, are in a better position to spread the loss than the injured workers. At first this would seem to militate against imposing liability on a third party outside the employer-employee relationship. But when the third party is also in a position to spread the risk of loss and is one of the principal beneficiaries of the enterprise (as the architect is), then there is no reason why he should escape liability.

Id. at 545 (footnote omitted).

of construction. If the project architect or engineer were given supervisory authority (including the right to stop work) regarding construction methods, the established bidding system used in the awarding of construction contracts would become exceedingly more complicated, and construction costs would undoubtedly increase. Judge House, dissenting in *Miller v. DeWitt*, aptly summarized the problem:

There would be utter chaos if the contractor or his superintendent were to give an order to use his most efficient equipment and personnel, and the architect attempted to countermand and order that the work be done by another method requiring different equipment and skills. When a contractor bids a job he expects to use his equipment and the special talents and experience of his organization. If the threat existed that the details of carrying out his contract be subject to outside interference, contractors naturally would take that into consideration in fixing their bids. If the duty of architects is expanded to require that they be on the job at all times and prescribe methods of construction or be held liable for the negligence of employees of the contractor, they will reflect that added burden in their supervision fees. All of this adds up to an additional and, I think, unnecessary and unwarranted financial burden upon the public without a commensurate benefit. Liability of architects as imposed here is economically unsound.⁹²

In addition to industry customs, existing statutes and the considerations for their enactment militate against a risk distribution approach placing sole liability on design professionals.⁹³ An approach that fails to take into account the employer ignores the accident cost distribution dictated by the Maryland workmen's compensation statute. Although it

92. 37 Ill. 2d 273, 281, 226 N.E.2d 630, 643 (1967). Judge House's comment regarding the lack of benefit to be gained from imposing liability on design professionals should not be interpreted as a disregard for safety considerations in favor of "practicality," but as a denial of any increase in job safety under such a scheme.

93. It should be noted that in evaluating the ability of the design professional to bear and distribute the costs of a workman's injuries for a construction site accident, the costs to be considered from the worker's point of view are those that exceed the amount of workmen's compensation available to him, those that the design professional must bear are the total costs of the accident. A worker will be able to obtain some compensation from his employer. If he is able to recover from the design professional, the amount of benefits received are to be repaid to his employer's compensation insurance carrier. MD. ANN. CODE art. 101, § 58 (1979). Recovery from the design professional thus does not merely supplement what the worker receives as compensation, with a portion of the total cost paid by the professional and a portion by the employer, which seems reasonable, it relieves the employer of the payment of any cost at all. Although the result seems fair in a case in which the employer is not at fault, for example, an automobile accident that occurs when an employee is making deliveries, it seems rather harsh to impose the costs of construction site accidents due to the use of improper methods or practices by the employer on the design professional alone.

may be argued that the primary purpose of workmen's compensation legislation was to shift the burden of paying for industrial accidents from the employee to the employer, such legislation may indicate a conviction on the part of legislators that employers not only can pay for such accidents better than their employees, but that if they must pay for them, they can and will do much to prevent them. In addition to this indirect sanction of additional costs, recent federal and state legislation provides direct sanctions to promote job safety for workers.

The enactment by Congress of the Occupational Safety and Health Act of 1970⁹⁴ was to "assure so far as possible every working man and woman in the nation safe and healthful working conditions,"⁹⁵ and the Act decreed that the employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards."⁹⁶ The Act further provided for the promulgation of regulations designed to implement and enforce its stated intention.⁹⁷ In 1973 the Maryland legislature enacted the Maryland Occupational Safety and Health Act.⁹⁸ The Act created an Occupational Safety and Health Advisory Board,⁹⁹ which proposes regulations and standards to the Commissioner of Labor, who decides whether to promulgate them.¹⁰⁰ It gave the Commissioner both inside investigative powers and the means by which to enforce regulations and standards.¹⁰¹

94. Pub. L. No. 91-596, § 3, 84 Stat. 1591 (1970) (codified at 29 U.S.C. §§ 651-678 (1976)). The Act applies to all construction industry activity which affects interstate commerce. 29 U.S.C. § 651(b)(3).

95. 29 U.S.C. § 651(b).

96. *Id.* § 654(a)(1).

97. *Id.* § 657(g)(2).

98. Ch. 59, 1973 Md. Laws 89 (now codified at MD. ANN. CODE art. 89, §§ 28-49 (1979 & Cum. Supp. 1979)).

99. MD. ANN. CODE art. 89, § 31 (1979). The Occupational Safety and Health Advisory Board is composed of 11 members appointed by the Commissioner of Labor and Industry. The Board consults with the Commissioner, making recommendations and proposing rules and regulations. *Id.* § 31(b). The Board's regulatory purview includes standards for toxic materials and dangerous physical agents, warning labels for employees, etc. *Id.* § 31(d)-(e). They may appoint special committees to deal with specific problems. *Id.* § 31(f).

100. *Id.* § 31(i).

101. *Id.* §§ 35-37, 40, 41 (1979 & Cum. Supp. 1979). The Commissioner is vested with the authority to make inspections of employers' premises. *Id.* § 35 (1979). He is to issue citations to violating employers and order correction within a specified period. *Id.* § 36 (Cum. Supp. 1979).

A civil penalty no greater than \$1,000 must be issued for each serious violation, unless the employer could not with reasonable diligence have known of the violation, *id.* § 40(b), and may be issued for non-serious violations, *id.* § 40(c). A penalty of \$1,000 per day may be assessed for failure to correct a cited violation, *id.* § 40(d), and a penalty of \$10,000 may be issued for willful or repeated violations, *id.* § 40(a).

Criminal penalties of \$10,000 or six months' imprisonment or both or, for a second offense, \$20,000 or one year's imprisonment or both may follow a willful violation

Society is thus already incurring the financial burden of two layers of governmental job safety administration, neither of which places the responsibility for job safety on persons other than employers. As regards the construction industry, both owners (in the contract documents) and workmen's compensation carriers (who are anxious to reduce the number of claims filed against them) also place the responsibility for a safe working environment upon the construction team — contractors and subcontractors.

As an alternative argument to that based upon the contracts, the plaintiffs in *Krieger* alleged that the defendant engineers had, on several occasions prior to the accident, assumed a duty to supervise the work, and that such voluntary acts created a duty to workmen to continue to do so.¹⁰² It was not alleged that the prior incidents were causally related to the incident in which Krieger was injured, nor that Bildot, Krieger's employer, relied on the prior activities of the engineers in performing the work that led to the accident in question. Lacking those allegations, plaintiffs' argument can only be that any voluntary assumption of duty during the course of a construction project establishes such a duty for the remainder of the project. Such a rule of law, given the lack of reliance or causality and given the length of many modern construction projects,¹⁰³ would violate the principle of tort law upon which it is based.¹⁰⁴ Nor would such a rule promote job safety, as it would discourage architects and engineers from ever suggesting or requiring safety improvements in order to avoid an unwanted, and often

resulting in an employee's death. *Id.* § 41(a). A fine of \$5,000 or six months' imprisonment or both may be imposed for an employer's making knowingly false statements in reports and records required under the Act. *Id.* § 41(c).

102. 282 Md. at 55, 382 A.2d at 1072. It was further specifically alleged that the "engineers had exercised their [contractual] right to stop the work on numerous other occasions when said work either did not conform to the plans and specifications or was being performed in a negligent and dangerous manner which was unsafe for the workmen employed on the project." *Id.* (quoting plaintiffs' declaration). There was disagreement among the judges regarding the sufficiency of the complaint as to such allegations, compare *id.* at 70, 382 A.2d at 1080, with *id.* at 70-73, 382 A.2d at 1080-81 (Levine, J., concurring), but the majority granted plaintiffs leave to amend their declaration on remand, *id.* at 70, 382 A.2d at 1080.

103. For example, the Outer Harbor Bridge project on which Krieger was employed took several years to complete.

104. See *Hoover v. Williamson*, 236 Md. 250, 253-54, 203 A.2d 861, 863 (1964); *Pennsylvania R.R. v. Yingling*, 148 Md. 169, 176-77, 129 A. 36, 39 (1925); W. PROSSER, *supra* note 19, § 56.

unwarranted,¹⁰⁵ burden to inspect for safety for the remainder of the project.¹⁰⁶

It is thus apparent that the public policy objective of promoting job safety is not furthered by imposing liability for construction site accidents on the design professional. Suit brought by workers against architects and engineers may be seen, then, to be motivated solely by "a

105. It should be noted that the expertise that the architect or engineer brings to the construction site does not necessarily make him the best qualified person to supervise for unsafe practices and conditions. The professional is the expert in design but may have little or no practical knowledge regarding methods and means of construction. On the other hand, the contractor may not be a licensed professional but may be far more knowledgeable in dealing with the details of construction, such as the best way to shore a trench or raise a steel bar, than is a designer. The court alluded to this consideration in *Krieger*:

Some mathematics instructors have been heard to observe that there is more than one solution to a given problem and thus they are unable to say that any given method of solving a problem is the only correct solution, being able only to determine that the correct answer is produced. The same reasoning would apply to methods of construction. One skilled contractor may prefer one method for performing a given task while another such contractor may choose what seems to him a simpler, less expensive way of reaching the same end result, either of which procedures would be a proper method. It could well be, however, that one method might not have occurred to an engineer or another contractor.

282 Md. at 60, 382 A.2d at 1079. *Accord*, Allen, *Liability of Architects and Engineers to Third Parties*, 22 ARK. L. REV. 454, 462 (1968):

Courts have revealed a tendency to hold the architect liable for all injuries during construction. What is often overlooked is that the contractor and the architect have different expertise and that their liabilities should be considered in light of their respective fields of knowledge. Although they work together toward a common goal, their responsibilities are not inextricably bound together. The architect should not be made a safety engineer over the entire job, charged with the responsibility of seeing that all who are lawfully present are protected from harm.

106. The legal problems encountered by architects and engineers at the construction site are not limited to personal injury claims. Increasingly, contractors and subcontractors are filing actions against design professionals claiming economic losses due to delays, extra costs, or interference in contractual relations during construction. In 1960 the annual claim frequency against design professionals was 12.5 claims per 100 firms. By 1976 the frequency had more than doubled, to 29.6 claims per 100 firms. VICTOR O. SCHINNERER & CO., OFFICE FOR PROFESSIONAL LIABILITY RESEARCH, 7 DESIGN PROFESSIONAL LIABILITY CLAIMS, no. 6 (1976). Although some courts have refused to permit such actions because of lack of privity, *see, e.g.*, *Blecick v. School Dist.*, 2 Ariz. App. 115, 406 P.2d 750 (1965), a growing number have found design professionals liable. *See Annot.*, 65 A.L.R.3d 249 (1975).

The possibility of claims such as this, plus liability for worker safety, can create a dilemma for architects and engineers. Should the design professional require the contractor to use an alternative method because of concern regarding job safety, he runs the risk of interfering with the contractor's means and techniques, thereby exposing both himself and the owner to claims for extra costs of delay. If the design professional does not require alternative methods and an accident occurs, he may be liable to construction workers for injuries sustained.

desire for 'deeper pockets' to supply compensation for the injuries sustained."¹⁰⁷ Although injured construction workers cannot be blamed for seeking any possible legal remedy that may make them whole, no remedy should lie with individuals not at fault and not responsible for worker safety. Still, the refusal to impose liability on design professionals leaves the worker in much the same position as he was prior to *Erhart v. Hummonds*:¹⁰⁸ undercompensated by workmen's compensation and unable to bring suit against entities directly responsible for his injuries.

CONCLUSION

Krieger and similar cases¹⁰⁹ signal a return to a realistic appraisal of the design professional's function and legal responsibility during the construction project. Like Maryland, other jurisdictions have refused to impose liability upon the designer¹¹⁰ by judicial fiat. The duty to conduct safety inspections has returned to the construction team — where it belongs.

The return swing of the pendulum regarding the liability of design professionals may, however, eventually operate to mitigate the problems of injured construction workers. Certainly the argument for revision of workmen's compensation legislation, and in particular the benefits paid under those laws, is strengthened by the current trend to deny the liability of architects and engineers for construction site accidents. Since the deficiencies in such relief are what prompted suits against design professionals in the first place,¹¹¹ legislative action is imperative.

107. 282 Md. at 52, 382 A.2d at 1070 (quoting *Cutlip v. Lucky Stores*, 22 Md. App. 673, 675, 325 A.2d 432, 434 (1974)).

108. 232 Ark. 133, 334 S.W.2d 869 (1960). See text accompanying notes 24 to 37 *supra*.

109. *Moundsview Ind. School Dist. No. 621 v. Buetow & Assoc.*, 253 N.W.2d 836, 839 (Minn. 1977); *Brown v. Gamble Constr. Co.*, 537 S.W.2d 685, 687 (Mo. App. 1976).

110. See, e.g., *Wheeler & Lewis v. Slifer*, 577 P.2d 1092 (Colo. 1978); *Luterbach v. Mochon, Schutte, Hackworthy & Juerisson, Inc.*, 84 Wis. 2d 1, 267 N.W.2d 13 (1978).

111. See Note, *supra* note 6, at 1095-96.