The Impact of *Moorman* and Its Progeny on Construction Litigation

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Written By:
Mark C. Friedlander
t 312.258.5546
mfriedlander@schiffhardin.com

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
t 312.258.5500
f 312.258.5600

www.schiffhardin.com
This article discusses the implications of the Moorman doctrine on a range of issues, including contribution and professional liability, and proposes solutions to some of the problems caused by the decision.

I. Introduction

In 1982, the Illinois Supreme Court decided the landmark case Moorman Mfg. Co. v. National Tank Co1. In Moorman, the court refused to allow a plaintiff to recover damages under various tort theories against the manufacturer for the cost of repairs to and lost use of a steel grain storage tank which had developed cracks. It held that the failure of a product to function as expected, absent a dangerous or threatening condition, did not violate tort interests and was compensable, if at all, only under a contract-related theory.

The holding in Moorman has commonly been known as the “Economic Loss Doctrine,”2 but this is a misnomer. The essence of Moorman is a distinction between tort interests, which protect the safety of persons and property, and contract interests, which protect expectations of quality and function.

Although the opinion in Moorman is couched in terms of economic loss and damages, the holding goes to the source of a party’s duties: i.e., whether they derive from tort or contract law. As Justice Simon noted in his concurring opinion,

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.3

The holding in Moorman (hereinafter the “Moorman Rule”), although a surprise to many litigators in Illinois, is not anomalous. The majority of jurisdictions which have considered the issue have held that no claim in tort lies for mere disappointed commercial expectations.4 However, some jurisdictions have rejected the contract/tort distinction and permitted actions in tort for mere disappointed commercial expectations.5

II. Moorman and Construction Litigation

Although Moorman is generally considered a products liability case,6 it is frequently applied in construction litigation involving claims of improper building design of construction or similar improvement to real estate. For example, in Redarowicz v Ohlendor7f the Illinois Supreme Court held that a homeowner did not have a claim in tort against a builder whose improper construction caused the chimney and an adjoining brick wall to pull slowly away from the main structure. In Foxcroft Townhome Owners Assoc. v Hoffman Rosner Corp.8, the court held that latent construction defects which posed no threat of injury or danger to other property could not be the basis of a tort claim.

The primary effect of the Moorman Rule in construction litigation has been to divide claims into two types: 1) personal injury or casualty claims and 2) claims of functional failure. Claims in the first category include worker injury claims, injuries to occupants or passersby, and calamitous damage to property other than the structure in question resulting from design or construction mistakes. Claims in the second category include those for water leakage, cracked concrete or masonry, mechanical heating and cooling system failures, and the like. The distinction between the categories conforms to the contract/tort distinction the supreme court established in Moorman.9

The Moorman Rule does not affect the first category of claims. These claims involve interests protected by tort law, and tort law affords a remedy against any party to the construction process whose negligent conduct proximately caused personal injuries or calamitous property damage.

However, the Moorman Rule has significantly changed the way claims falling into the second category are litigated. With one exception, discussed below, these claims can no longer be maintained in tort. The injured party must file a claim for breach of contract or warranty, and these claims are usually limited to parties in privity with the claimant.10 The typical claimant in such a case is the property owner. Where the claim concerns a construction defect, owners are generally limited in their choice of defendants to the general contractor,11 the only party with whom they are in privity,12 unless the construction was performed by several prime contractors hired by the owner.

After Moorman, an owner can no longer pursue a claim for functional failure directly against a subcontractor. By definition, the owner does not have a contract with the subcontractor, and the Moorman Rule bars a tort claim. Owners’ attempts to be declared an intended third party beneficiary of the contract between the subcontractor and general contractor have rarely succeeded.13

On occasion, the owner’s inability to sue a subcontractor directly may have harsh consequences. If the general
contractor is bankrupt or judgment proof, the owner may be
remediless. Alternatively, the architect or construction
manager may end up bearing the full loss for improperly
overseeing the contractor’s work, without being able to
pass the loss on to the judgment-proof contractor who was
actively responsible for the owner’s damages. Most of the
time, however, after the owner sues the general contractor,
third party complaints are filed against the various tiers of
subcontractors, paralleling the contractual relations, until
the actively culpable party is joined to the action. The
overall effect is similar to the series of up-the-line third
party complaints for indemnity which are often filed in
products liability lawsuits.

The privity requirement is fully in accordance with the
philosophy underlying the Moorman Rule. Tort law decrees
that we can expect all persons, regardless of privity, to act
with due care to avoid causing reasonably foreseeable
personal injuries or calamitous property damage. But
commercial expectations are different. One creates
justifiable commercial expectations only by entering into a
contract with another to fulfill those expectations, or by
receiving an explicit warranty from an identifiable party.
The Moorman Rule requires that a claim for disappointed
commercial expectations be limited to parties with whom
one has contracted to fulfill those commercial expectations
or from whom one has received a warranty as to those
expectations.

From the potential defendant’s viewpoint, the privity
requirement is a valuable safeguard to prevent the
defendant from having to fulfill two parties’ conflicting
expectations. In the construction industry, a subcontract
defines a general contractor’s expectations about materials
and labor the subcontractor is expected to employ.
However, the owner’s expectations frequently are greater.
For example, a general contractor may hire a roofing
subcontractor to install a roof with an average life of five
years although the owner may expect a roof of greater
longevity. When the roof fails six years later, the Moorman
Rule decrees that the owner should not be able to sue
directly the subcontractor, who satisfied the requirements
of the subcontract. The owner’s commercial expectations
are defined by its contract with the general contractor, so
the owner’s remedy should be limited to the general
contractor and should depend on whether the general
construction contract called for a roof of greater
longevity.14

Overall, the impact of the Moorman Rule on construction
litigation has been limited and beneficial. Problems have
arisen, however, when the Moorman contract/tort
distinction has exposed weaknesses in well-established
aspects of tort law as applied to situations where
commercial expectations alone are at stake. In particular,
the Moorman Rule raises troubling questions about
professional malpractice law and the right to contribution in
actions seeking recovery for mere disappointed
commercial expectations.

III. Moorman and Professional
Malpractice

The Moorman Rule has generated controversy about
whether an architect or engineer can be sued in tort for
professional malpractice resulting solely in unfulfilled
commercial expectations. As a practical matter,
professionalists other than architects and engineers are
largely unaffected by the Moorman Rule. Malpractice
claims against doctors ordinarily involve personal injuries
and are brought in tort. Lawyers are sued almost
exclusively by their clients or intended third party
beneficiaries, who may sue for breach of an implied term of
the contract for professional services.15 When accountants
and real estate brokers are sued by nonclients, the
allegation is usually negligent misrepresentation, an explicit
exception to the Moorman Rule.16

Of course, the Moorman Rule does not affect all
malpractice claims against design professionals. Many
claims against architects and engineers are brought by
their clients for breach of an implied term of the
professional services contract. As for claims brought by
nonclients, many seek recovery for personal injuries or
calamitous property damage, and may be maintained in
tort. However, far more than other professionals, architects
and engineers are sued by nonclients for disappointed
commercial expectations resulting from design or
construction observation duties.

Since 1984, there has been a split among Illinois appellate
districts about whether the Moorman Rule permits a party
to sue an architect or engineer in tort for mere disappointed
commercial expectations.17

In Palatine National Bank v Charles W. Greengard
Associates, Inc.,18 the second appellate district court held
that Moorman barred a tort action for professional
malpractice against an architect for mere disappointed
commercial expectations. Subsequently, in Rosos Litho
Supply Corp v Hansen,19 the first district appellate court
carved out an exception to the Moorman Rule, allowing tort
malpractice claims against professionals even for mere
disappointed commercial expectations.
For a short time, the third district appellate court adopted a compromise position. In **Ferentchak v Village of Frankfort**, the court held that a tort claim for professional malpractice resulting in mere disappointed commercial expectations could be maintained against an engineer only if the plaintiff did not have a contract remedy available against the engineer. However, the Illinois Supreme Court subsequently rejected this reasoning in **Anderson Electric, Inc. v Ledbetter Erection Corp.**, stating that availability of a contract remedy had no bearing on any potential tort claim.

Other courts, along with the first and second appellate districts, have addressed this issue. The fifth appellate district court very recently followed **Rosos**, although without considering the alternative position, in **People ex rel Skinner v FGM, Inc.** Shortly thereafter, in **People ex rel Skinner v Graham**, the fourth appellate district court elected to adopt the position taken by the second appellate district that there is no special exemption to the **Moorman Rule** for professional malpractice claims. In **City of East Moline v. Bracke, Hayes & Miller**, the third district held that an out of state architect was not amenable to service of process under the Long-Arm Statute for tortuous conduct in Illinois because under the Moorman Rule, the architect could not be sued in tort for disappointment of the plaintiff's commercial expectations.

There is nothing in **Moorman** or in any subsequent Illinois Supreme Court opinion which implies that actions for professional malpractice are exempt from the contract/tort distinction of the **Moorman Rule**. In **Palatine National Bank**, the court took the **Moorman Rule** at face value and held that it barred a tort claim against an architect for negligent design of a storm and surface water drainage system resulting in floods which delayed development of the property. This was the first appellate decision applying the **Moorman Rule** to a professional malpractice claim.

Subsequently, after the split in appellate opinions on this issue had become apparent, the second appellate district court reexamined the issue in **Bates & Rogers Construction Corp. v North Shore Sanitary District**, a claim by a general contractor against an architect with whom it was not in privity for negligent design and administration of the construction project, resulting in delays and extra costs. The court criticized the Rosos holding and held that the **Moorman Rule** barred the contractor's tort claim against the architect. The majority holding emphasized that the plaintiff had a contractual remedy against the owner for the delays and extra costs. However, Judge Reinhard, specially concurring, wrote that **Moorman and its progeny constitute an absolute bar on all tort claims for disappointed commercial expectations unless the Illinois Supreme Court explicitly recognizes an exception.**

In **Rosos**, the first appellate district court refused to apply the **Moorman Rule** to professional malpractice claims because doing so would "effectively eliminate and stand squarely in conflict with the body of law defining the scope of an architect's liability for professional negligence." The court based its position primarily on the contention that architects, as professionals, hold themselves out to the public as possessing special knowledge and ability and should be liable to the public when they fail to exercise appropriate skill or care.

The Rosos court's reasoning appears inconsistent with the philosophy underlying the **Moorman Rule**. It fails to divide the public's reliance on professionals into contract and tort interests. Clearly, the public at large relies on architects to design buildings which do not cause personal injuries or calamitous property damage, and the **Moorman Rule** would permit anyone to maintain a claim in tort against an architect for personal injury or calamitous property damage. However, the public cannot be said to rely on design professionals for their commercial expectations unless they have hired the architect or engineer themselves, in which case they have the right to bring a malpractice action for breach of an implied term of the contract for professional services.

The problem in the Rosos court's analysis becomes evident when one realizes that there are highly skilled nonprofessional experts upon whom the public relies as much as upon professionals. The distinction between a professional and nonprofessional is not in the degree of skill or care possessed; a highly skilled artisan or mechanic may possess as much skill and care as an architect or engineer. The difference is that professionals perform services which are not susceptible to a guarantee of results —hus they do not warrant the outcome of their services and are liable only for failure to exercise the appropriate level of skill and care. For example, a highly skilled mechanical contractor may have the same level of skill and care that a mechanical engineer would possess, and the owner may rely on them equally, but the Rosos court would treat them differently, permitting a tort claim against the engineer but not against the contractor.

The inequity of this different treatment becomes clearer when the architect is sued for negligent performance of a task which is frequently performed by nonprofessionals as well. For example, either an architect or a nonprofessional construction manage may be hired to oversee a contractor's work, and they utilize essentially identical skills.
in performing this task. If they carelessly overlook an obvious construction defect, the architect would be liable in tort whereas the construction manager would not, merely because of the architect’s professional status. To attempt such a distinction raises some troublesome questions: does the architect become a professional upon graduation from school, registration with the state, or some time in between; is an employee of an architectural firm who is hired to oversee construction, but who has no professional education or registration, a professional or not?

In defense of the Rosos opinion, it was rendered at a time when the implications of Moorman for construction and other litigation were unclear. The appeal also arose from difficult facts. The jury had inexplicably found against the architect on a negligence theory but not on the virtually identical breach of contract theory. Perhaps instead of reversing the judgment because of inconsistent verdicts, the court strained to reach the right result, although for the wrong reason.

Thus, application of the Moorman Rule to claims against architects and engineers would not significantly disrupt professional malpractice law. However, the split in appellate opinions, combined with the supreme court’s failure to resolve the dispute, has seriously complicated construction litigation involving design professionals.

IV. The Moorman Rule and Contribution

At least in the realm of tort law, the legislature and the Illinois Supreme Court allocate liability for a loss based on the parties’ relative culpability. In Skinner v Reed-Prentice Division Package Mach. Co., the supreme court judicially adopted the doctrine of contribution among joint tortfeasors. The Contribution Among Joint Tortfeasors Act legislatively established the same right.

However, the right to contribution is generally restricted to joint tortfeasors. Contribution is generally not available among parties who are not joint tortfeasors and whose liability is founded on breach of contract. For example, in J.M. Krejci Co., Inc. v St. Francis Hospita a contractor sued an owner for failure to pay for work performed and the architect for negligent performance of its contractual duties. The court held that despite being liable in tort to the plaintiff, the architect could not seek contribution from the owner because the owner’s liability to the plaintiff was solely in contract.

The Moorman Rule interacts with the Contribution Act by taking claims for disappointed commercial expectations out of the purview of the Contribution Act. This has the effect of depriving defendants of the right of contribution from codefendants or third parties when the plaintiff’s claim is restricted to disappointed commercial expectations. Defendants are faced with the anomalous situation of preferring to be liable in tort so that they can pass a portion of the liability onto other parties whose mistakes or other malfeasance contributed to the plaintiff’s loss.

For example, plaintiffs may sue an architect whom they hired for improperly supervising the general contractor’s concrete pour by failing to notice missing reinforcing rods required by the specifications, resulting in cracks and diminished structural capacity. Although the contractor would be the primarily culpable party, the owner has a valid claim against the architect for breach of an implied duty of care in the contract for professional services. However, the architect has no cause of action, for contribution or otherwise, against the contractor, despite the contractor being the primary and active cause of the loss. Obviously, this is an unfair result.

This problem does not occur when the defendant has an independent cause of action against the other responsible party, such as when an owner sues a general contractor for a subcontractor’s error. The general contractor can then file a third party complaint against the subcontractor alleging breach of the subcontract.

Two important court decisions have attempted to circumvent this problem. The first was the difficult to understand Illinois Supreme Court opinion in Maxfield v Simmons, where the court held that the Moorman Rule did not apply to a third party complaint by a builder against a roofing supplier for supplying the defective material which resulted in the plaintiff’s loss. The court wrote as follows: “The implied contract of indemnity arose from the contractual relationship between the parties, but the liability, if any, imposed on [the builder] will be the result not of breach of contract but of tortious conduct.”

The court was compelled to reach this result to sustain the third party complaint because the statute of limitations had expired on a warranty claim against the roofing supplier. However, the Maxfield court’s recognition of an implied contract of indemnity applies only when the third party plaintiff is in privity with the third party defendant; there remains no right to contribution between, for example, an architect and general contractor who have no contractual relationship.

In the commercial, rather than construction, context, the first appellate district court has recognized the inequity of not allowing contribution among jointly liable defendants
whose liability is founded partially in contract rather than entirely in tort. In *Cirilo’s, Inc. v Gleeson, Sklar & Sawyers*, an accounting firm that was sued for negligent failure to discover a forgery scheme filed a third-party complaint for contribution against the bank that honored the forged checks. Although noting that the bank’s liability was founded on breach of the Uniform Commercial Code — Bank Deposits and Collections Act, the court allowed the contribution claim to stand since the accounting firm and bank were “subject to liability in tort arising out of the same injury,” even though their duties to the plaintiff “arose from their contracts with that party, not from tort law.”

Stretching the scope of the Contribution Act to include a situation clearly beyond its literal language, the court reasoned:

> The Contribution Act focuses, as it was intended to do, on the culpability of the parties rather than on precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss.

As the *Cirilo’s* case demonstrates, the problem of the unavailability of contribution between jointly liable defendants who are not joint tortfeasors results from the narrowness of the Contribution Act. The application of the *Moorman* Rule to construction litigation has simply made this deficiency more apparent by increasing the number and frequency of situations in which two or more parties are jointly liable for the plaintiff’s loss but are not tortfeasors, so that they lack any mechanism to apportion fault among themselves.

The solution to this problem is deceptively easy: the Contribution Act could be amended to eliminate the requirement that the parties’ liability be “in tort,” so that any defendant whose wrongful conduct was a contributing cause of the plaintiff’s injury may maintain or be subject to an action for contribution against or by other similarly situated defendants or third parties. Perhaps the *Cirilo’s* decision should be read as amending the Contribution Act by judicial interpretation.

The problem of comparing and evaluating one defendant’s liability for breach of contract against another defendant’s liability for negligence or for breach of a different contract is not insurmountable. The courts have already recognized that one tortfeasor’s liability for negligence can be compared to a joint tortfeasor’s culpability in strict products liability for the same injury. The process involves comparison of relative causation regardless of the technical basis of the defendant’s liability to the plaintiff.

Theoretically, there is no reason why this doctrine could not be extended to include breach of a contract or warranty as a source of liability capable of being compared to various forms of tort liability.

**V. Conclusion**

The impact of *Moorman* and its progeny on construction litigation has been quite positive. In addition to restoring an important philosophical distinction between contract and tort interests, it has highlighted and emphasized the imprecise and inconsistent application of the rules governing the related doctrines of professional malpractice and contribution. Once the legal profession clarifies its thinking on these issues, the rules of construction and other litigation should become fairer and more equitable for all parties.
About the Author

Mark C. Friedlander is a partner in the Construction Law Group at the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. He is currently an adjunct professor at the University of Illinois at Chicago School of Architecture and a lecturer at Northwestern University’s Engineering School, and had lectured at the Illinois Institute of Technology School of Civil Engineering from 1987-89, at the Engineering School of the University of Wisconsin in 1988 and 1990, and the Architecture School of the Georgia Institute of Technology in 1997-98. Mr. Friedlander concentrates his practice in construction law and litigation with particular emphasis on design-build methods of project delivery.

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Endnotes

1 91 Ill 2d 69, 435 NE2d 443 (1982).

2 For example, see Timothy L. Bertschy, *The Economic Loss Doctrine in Illinois after Moorman*, 71 Ill Bar J 346 (1983) ("Bertschy").


A federal court has suggested that although Justice Simon’s position philosophically mirrors the *Moorman* court’s rationale, the majority’s reference to “economic loss” may be an attempt to establish a bright line test which closely approximates the contract/tort distinction. *Kishwaukee Community Health Services Center v. Hospital Building and Equipment Co.*, 638 F Supp 1492 (ND Ill 1986). Another federal court reads *Vaughn v. General Motors Corp.*, 102 Ill 2d 431, 466 NE2d 195 (1984), in which the Illinois Supreme Court upheld a tort claim for defective truck brakes which failed, resulting in an accident in which only the truck was damaged and there were no injuries, as signaling that the court may have adopted Justice Simon’s position that the nature of the interest violated, rather than the type of damages, determines whether a claim is cognizable in tort. See *Dixie-Portland Flour Mills, Inc. v. Nation Enterprises, Inc.*, 613 F Supp 985, 988 (ND Ill 1985).

4 For example, see *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 US 858, 106 S Ct 2295 (1986); *Seely v White Motor Co.*, 63 Cal 2d 9, 403 P2d 145, 45 Cal Rptr 17 (1965); *State v. Tyonek Timber, Inc.*, 680 P2d 1148 (Alaska 1984); Superwood Corp. v. Siempelkamp Corp., 311 NW2d 159 (Minn 1981); *Hawkins Constr. Co. v. Mathews Co.*, 190 Neb 546, 209 NW2d 643 (1973); See also Restatement (2d) of Torts, §§ 323, 395, 402(a), 402(b) (1965).


6 Actually, however, the plaintiff in *Moorman* alleged negligent design and construction of a large steel grain storage tank which is a fixture to the real estate, more nearly akin to a building than to a product.

7 92 Ill 2d 171, 441 NE2d 324 (1982).

8 96 Ill 2d 150, 449 NE2d 125 (1983).

9 Most other types of construction litigation have traditionally been litigated under contract theories. For example, contractors’ claims for extra work; owners’ or contractors’ claims for delay damages; actions for payment or to enforce mechanic’s liens. Litigation of this type is largely unaffected by *Moorman*.

10 An important exception to the privity requirement is a claim by a subsequent owner of a residence against the builder/vendor for breach of an implied warranty of habitability. For example, see *Peterson v Hubschman*, 76 Ill 2d 31, 389 NE2d 1154 (1979), applied in *Redarowicz v Ohlendorf* (cited in note 7) to subsequent owners.

11 Of course, owners may also have a cause of action against the architect, construction manager or any other party whom they may have hired to manage or oversee the construction.

12 However, the owner may be able to file a breach of warranty action directly against material suppliers who have warranted their products with warranties assignable to the owner.

13 For example, see *Midwest Concrete Products Co. v LaSalle National Bank*, 94 Ill App 3d 394, 418 NE2d 988 (1st D 1981).

14 Of course, the privity requirement of the *Moorman* Rule is not the only means of ensuring a just result. In *Ferentchak v Village of Frankfort*, 105 Ill 2d 474, 475 NE2d 822 (1985), the Illinois Supreme Court held that homeowners could not sue an engineer.
with whom they were not in privity for failing to set proper grade levels because the engineer’s duties were derived from the contract which did not call for setting grade levels.

15 But see *Pelham v Griesheimer*, 92 Ill 2d 13, 440 NE2d 96, in which the Illinois Supreme Court indicated in dictum that it might permit an intended third party beneficiary to bring a tort action for malpractice against a lawyer who negligently prepared a will. The court did not discuss why it might recognize a tort, rather than breach of contract, claim in favor of the third party beneficiary, whose only injury was disappointed commercial expectations.

16 *Moorman*, 91 Ill 2d at 88-89, 435 NE2d at 452.

17 There is a similar split of authority in other jurisdictions which have established a rule similar to the *Moorman* Rule. Compare *Cooper v Jevne*, 56 Cal App 3d 860, 128 Cal Rptr 724 (3d Div 1976) (subsequent purchasers may maintain tort action against architect for negligent design of condominiums and supervision of construction resulting in functional failure), and *Flintkote Co. v Dravo Corp.*, 678 F2d 942 (11th Cir 1982) (claim against engineer for negligently designed traveling ship unloader not actionable in tort).

18 119 Ill App 3d 376, 456 NE2d 635 (2d D 1983) (claim against engineer for negligent design of storm and surface water drainage system causing flooding which delayed development of property and resulted in lender’s foreclosure).

19 123 Ill App 3d 290, 462 NE2d 566 (1st D 1984) (claim against architect for negligent supervision of construction of concrete warehouse floor, resulting in cracks rendering it unusable).


21 115 Ill 2d 146, 503 NE2d 246 (1987).


23 166 Ill App 3d 802, 520 NE2d 1024 (5th D 1988) (claim against architect for negligent design and supervision of construction of roof, resulting in leaks).

24 170 Ill App 3d 417, 524 NE2d 642 (4th D 1988) (claim for structural design and construction defects to the Capitol Area Vocation Center necessitating closing of building).

25 Previously, in *Anderson Electric, Inc. v Ledbetter Erection Corp.*, 133 Ill App 3d 844, 847, 479 NE2d 476, 479 (4th D 1985), aff’d on other grounds, 15 Ill 2d 146, 503 NE2d 246 (1987) (claim against construction supervisor and manufacturer of electrical equipment for negligently increasing subcontractor’s construction costs), the court had also declined to create an exception to the *Moorman* Rule for claims involving arguably professional services.


27 However, in *Ferentchak v Village of Frankfort*, 105 Ill 2d 474, 475 NE2d 822 (1985), the supreme court noted the conflicting appellate decision on this issue but explicitly declined to address it, reversing the appellate court on other grounds.

28 128 Ill App 3d 962, 471 NE2d 915 (2d D 1984), aff’d on other ground, 109 Ill 2d 225, 486 NE2d 902 (1985).

29 This decision is particularly significant because it implicitly overruled a line of cases decided prior to *Moorman* which held that a contractor could bring a claim in tort against an architect for professional malpractice which resulted in commercial losses to the contractor. For example, see *W.H. Lyman Construction Co. v Village of Gurnee*, 84 Ill App 3d 28, 403 NE2d 1325 (2d D 1980); *Normoyle-Berg & Associates, Inc. v Village of Deer Creek*, 39 Ill App 3d 744, 350 NE2d 559 (3d D 1976). In fact, the court had affirmed precisely such a cause of action in an earlier appeal in the same case, *Bates & Rogers Construction Corp. v North Shore Sanitary District*, 92 Ill App 3d 90, 414 NE2d 1274 (2d D 1980), decided prior to *Moorman*.

30 128 Ill App 3d at 977; 471 NE2d at 925.
31 123 Ill App 3d at 295, 462 NE2d at 571. See also Bertschy (cited in note 2), who argues that the Moorman Rule “cannot be extended to the purchase of services and ‘services liability’ without coming into conflict with a substantial body of opposing law.” 71 Ill Bar J at 352.

32 123 Ill App 3d at 295, 462 NE2d at 571. The court also rested its opinion on its belief that following Moorman would require a change in the previously recognized measure of damages for malpractice cases. 123 Ill App 3d at 295-6; 462 NE2d at 571. Some commentators have questioned this reasoning. See Friedlander at 182 (cited in note 3).

33 70 Ill 2d 1, 374 NE2d 437 (1978).

34 Ill Rev Stat ch 70, § 301 et seq (1987).

35 148 Ill App 3d 396, 499 NE2d 622 (1st D 1986).

36 The court also dismissed the architect's claim against the owner for implied indemnity on the grounds that the doctrine of “active/passive” indemnity is no longer viable in Illinois. However, apparently neither the parties nor the court addressed the issue of whether the architect could file a counterclaim against the owner on the grounds that the owner’s breach of contract for architectural services resulted in the plaintiff’s loss.

37 For example, see McInerny v Hasbrook Construction Co., 62 Ill 2d 93, 338 NE2d 868 (1975). Although indemnity for “active/passive” negligence is no longer available in Illinois, the philosophy underlying it is no less valid: that all or most of the loss should be assigned to an active, not a passive, cause of the loss.

38 96 Ill 2d 81, 449 NE2d 110 (1983).

39 96 Ill 2d at 87; 449 NE2d at 112.

40 However, the court did not discuss why the builder did not bring a third party claim against the roofer for breach of contract.

41 154 Ill App 3d 494, 507 NE2d 81 (1st D 1987).

42 Ill Rev Stat ch 26, 4-101 et seq (1987).

43 154 Ill App 3d at 497; 507 NE2d at 83. The court explicitly found Moorman to be inapplicable on the grounds that it does not purport to define “liability in tort” for Contribution Act purposes, speaking only to the initial plaintiff-defendant relationship. Id.

44 154 Ill App 3d at 496; 507 NE2d at 83.

45 Skinner v Reed-Prentice, 70 Ill 2d 1, 374 NE2d 437 (1978).