# Comparative Contract Fault: Using the AIA Documents to Apportion Contract Damages

*David H. Fisk and R. Carson Fisk*

David H. Fisk

R. Carson Fisk

When a plaintiff's cause of action arises from breach of contract, the majority of courts today will not apply a comparative causation analysis, whereby the amount of recoverable damages is apportioned according to each party's percentage of fault.[1] Comparative causation, or comparative fault, generally equates with a tort principle of damages.[2] One of the main goals of apportioning damages under a comparative causation analysis is fairness.[3] In contract actions, the basic method for measuring damages is based on recovery of the expectancy or the benefit of the bargain, with the intention that the nonbreaching party will recover an amount that will put it in as good a position as it would have been in had the contract been performed.[4] Sometimes, especially when two or more parties may have contributed to the breach, the application of this rule can lead to harsh results. Some causes of action sound in both tort and contract, such as when the parties' relationship is initially formed by contract, but there is a claim that the contract was performed negligently.[5] In such a case, it may be appropriate to apply a comparative causation analysis, along with the doctrine of expectation.

In this article, the history of comparative causation will be discussed as it developed in the tort arena, and the doctrine will be examined to see how it may progress into the contract realm. The overarching issue is whether the time is right for courts to recognize the doctrine of "comparative contract fault."[6] The contract language utilized by the American Institute of Architects (AIA) demonstrates how a contractual comparative causation analysis can be employed to apportion damages between an architect and a general contractor in a suit for breach of contract brought by the owner of a construction project after a defect or deficiency is found in the finished project. The AIA language sets the stage for moving comparative causation into the contract arena through the application of a waiver/estoppel argument to claims made by an owner. An architect, when defending a breach of contract claim made by the owner, may assert that the latter has waived, and therefore is estopped from pursuing, any amount of damage attributable to the fault of the contractor, for which the architect is specifically relieved from liability by the AIA contract. Likewise, a contractor, when similarly situated, also may assert that the owner has waived and is estopped by the AIA contract provisions from pursuing damages attributable to the fault of the architect. This process will require a comparative causation analysis in which the architect's or the contractor's percentage of fault is determined by the trier of fact and then offset for purposes of determining the architect's or the contractor's liability for the owner's damages. In making this analysis, it will be necessary to explore the economics of the relationship among owners, architects, and general contractors.

*David H. Fisk is an associate in the Subrogation and Recovery Department at Cozen O'Connor in the Dallas, Texas, office. R. Carson Fisk is an associate at Ford Nassen & Baldwin P.C., in the Austin, Texas, office. The opinions expressed herein are those of the authors and do not necessarily reflect the opinions of their respective firms.*

## The History and Development of Comparative Causation

Comparative causation arose in tort law, specifically in negligence causes of action, beginning with the application of contributory negligence. Contributory negligence is often said to have first been applied in the 1809 British case *Butterfield v. Forrester*.[7] The concept first entered the United States several years later in the Massachusetts case *Smith v. Smith*.[8] As this theory first developed, a plaintiff not exercising reasonable and ordinary care could not maintain a cause of action for negligence on the part of a defendant.[9]

The doctrine of contributory negligence, as it was being applied by the courts in the nineteenth century, was considered by some to be the harshest doctrine known to the common law.[10] Because its rigid application led to drastic results, certain limitations started to appear. An early and important exception was the doctrine of last clear chance, which provides that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant by ordinary care could have avoided the harm to the plaintiff notwithstanding the plaintiff's negligence.[11] Other judicial restrictions included cases involving intentional torts and strict liability.[12] The doctrine of comparative negligence developed from these limitations on contributory negligence, especially from the last clear chance exception.[13]

Comparative negligence also has its roots in the defense of assumption of the risk, a principle that started at about the same time. It has always been closely related to contributory negligence and, in fact, overlaps it to some degree.[14] The defense of assumption of the risk provides that a plaintiff who voluntarily accepts the possibility of injury from a known danger cannot recover for a subsequent loss caused by that hazard.[15] Generally,

Published in *Construction Lawyer*, Volume 26, Number 2, Spring 2006 

it requires proof of three elements: subjective appreciation of the risk, voluntary confrontation of the danger, and manifestation of willingness to relieve the defendant of any duty to exercise care.[16]

From the defenses of contributory negligence and assumption of the risk came comparative negligence. Rather than completely barring a negligent plaintiff from recovery, as under a contributory negligence system, this doctrine permits the plaintiff to recover a reduced amount of damages according to the fact-finder's apportionment of fault between the parties.[17] Comparative negligence originated in admiralty law and was first codified in the United States by Congress in a 1908 statute covering injuries sustained by railroad employees.[18] The statute adopted a system of pure comparative negligence, whereby a plaintiff can recover from a negligent defendant regardless of the extent of his own negligence, but recovery will be reduced by the percentage of fault that the fact finder apportions to the plaintiff.[19] Shortly thereafter, many of the state legislatures enacted similar laws that eventually adapted to apply in all negligence actions.[20] Some states preferred and adopted the modified comparative negligence doctrine, also referred to as the 50 percent rule.[21] This principle holds that a plaintiff's recovery on a negligence action will be reduced by his or her own percentage of fault, but if the plaintiff's percentage equals 50 percent or more, he or she cannot recover anything.[22]

Beginning in 1969, a strong legislative and judicial movement applied comparative negligence in many states to all negligence causes of action.[23] Most jurisdictions judicially adopted the pure form of comparative negligence because most courts and scholars considered it to be the fairest and most equitable system.[24] However, the majority of jurisdictions that legislatively adopted comparative negligence used a modified form of comparative negligence, due in large part to the influence of the insurance industry.[25]

From comparative negligence came comparative fault, also referred to as comparative causation or comparative responsibility.[26] At common law, contributory negligence was only a defense to negligent conduct. It was not a defense to recklessness or to any other tort. Under comparative fault, however, any conduct, with the exception of intentional acts, on the part of the plaintiff is balanced against the misconduct on the part of the defendant in apportioning damages.[27]

Under the Uniform Comparative Fault Act, "fault" is defined as negligent or reckless conduct that gives rise to strict tort liability, breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product, and unreasonable failure to avoid an injury or to mitigate damages.[28] The Uniform Comparative Fault Act is limited in application to physical harms to person or property and does not include economic loss, although "failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application."[29] Actions that sound solely in contract, where the plaintiff seeks to recover what he or she contracted to receive, rather than an action for breach of warranty, which sounds in tort and in contract, are not intended to be covered by the Act.[30] Neither does the Act apply to intentional torts, although a court, in its discretion, can apply the general principle of the Act in a proper case.[31]

While most courts have been reluctant to apply comparative causation in breach of contract actions, principles of fairness and the continuing merger of tort and contract principles (e.g., in the areas of warranty and strict liability) justify this extension. Since the harsh theory of contributory negligence first appeared as a defense to negligence actions, the idea of apportioning damages between parties at fault has expanded to apply not only in negligence actions, but in other causes of action as well.[32]

### The Joint Wrongdoer Doctrine

A joint tortfeasor commits a tort along with one or more other tortfeasors who contributed to the claimant's injuries. All of them may be joined as defendants in the same lawsuit.[33] The joint wrongdoer doctrine encompasses these same principles, but it also can be based on the nonperformance of a contractual obligation.[34] Under the joint wrongdoer doctrine, the right of contribution arises from liability for a joint wrong committed by two or more parties against the claimant.[35]

At common law, even though one tortfeasor's act concurred or combined with that of another to produce the injury to the plaintiff, each joint tortfeasor was liable for the entire loss.[36] Since the adoption of comparative causation principles, most jurisdictions have either completely abolished or limited joint and several liability between joint tortfeasors.[37] However, comparative causation has not affected the common law doctrine of joint and several liability in two contexts: in purely vicarious liability and for an innocent product retailer.[38] Joint and several liability between joint tortfeasors also still exists by statute.[39] Consistent with limiting the application of joint and several liability in the joint tortfeasor context, joint wrongdoers should not be held jointly and severally liable. Instead, each joint wrongdoer should be liable only for his own proportion of fault in causing the injury to the claimant, except in the context of purely vicarious liability or when a statute dictates otherwise.

### Justifications for Apportioning Contract Damages

Today, under certain circumstances, courts should be willing to apply a comparative causation analysis in determining contract damages. Although comparative causation typically applies only in tort causes of action, when a plaintiff and a defendant are commercial parties of equal bargaining power and have provided for such an analysis in their contract, a court should apportion the plaintiff's damages according to each party's percentage of fault. If several parties each contribute to cause a breach and a single injury results, applying the current liability rules used in contract law would render a harsh result. Application of comparative fault principles would result in greater fairness to all of the parties involved.

Most jurisdictions in the United States have either legislation or case law allowing the defense of comparative fault in tort causes of action.[40] Some courts have refused to apply this defense to breach of contract claims,[41] while others have applied it when liability is concurrent in both tort and contract or when the contract liability relates to bodily injury or property damage resulting from the breach of an implied warranty.[42] As one commentator has noted, there are several justifications for refusing to recognize contributory negligence, and, in turn, comparative causation, as a

general defense in the field of contract law, including that it is superfluous because other defenses cause it to be redundant; it would introduce an alien and unknown element of culpability into contract law, making its application problematic; contract law requires adherence to clear and simple rules, which would be undermined by this defense; and it would conflict with the very essence of the contractual arrangement, which is to enable the parties to rely on the contract and plan for their future accordingly.[43] This final justification is the most significant argument and is referred to as the reliance and planning argument.[44] Another consideration against the use of comparative causation in contract actions is that it may result in holding a person liable for contract damages when that person was not a party to that agreement.[45]

On the other hand, several justifications favor adopting comparative causation in contract law. First, it prevents situations in which a loss brought by the aggrieved party upon itself befalls a party in breach. Second, applying comparative fault in contract claims would be consistent with the current trend to unify the remedies available in both contract and tort law, which is generally considered positive. Finally, a defense of comparative fault would encourage caution, cooperation, and solidarity between parties to a contract.[46] Rather than shifting the entire burden of the damages that could have been mitigated to one of the parties, a comparative causation analysis apportions the burden between the parties, none of which may be guiltless.[47] Additionally, there is justification for liability in contract actions for those not a party to the agreement because an award of damages should relate to the conduct of the responsible parties, whether signatories to the contract or not. There is further support for this position in that incorporated contractual general conditions may obligate other parties to perform certain duties even when they did not execute the actual agreement at issue.[48] Comparative fault promotes fundamental fairness through the apportionment of damages among the responsible parties. It prevents holding a party that is only partly responsible for a plaintiff's damages from being wholly liable for them.

It is appropriate to recognize a defense of contributory negligence when, even in the absence of an indication of breach, it is desirable to encourage the potentially aggrieved party to take precautionary measures, to refrain from absolute reliance on the fulfillment of the contract, and to seek protection from the consequences of a possible breach, taking into account such factors as the value of the interest likely to be impaired if the contract were breached, the probability of breach, and the cost of undertaking additional protective measures.[49] Recognizing a contributory negligence defense in these cases "would not significantly impair reliance and planning ability, would lead to just and fair results, and would encourage cooperation, solidarity and caution."[50] Furthermore, it would provide incentives to fulfill contracts and mitigate damages resulting from a breach.[51]

Under the current system of contract damages, the goal is to give the nonbreaching party the benefit of its bargain by entitling it to recover an amount that will put it in as good a position as it would have been in had the contract been performed.[52] As previously discussed, "[t]his system of damages is one of strict liability that operates without regard to fault—the breaching party bears the full brunt of damage assessment regardless of the nonbreaching party's contributions to the breach."[53] Similar to the all or nothing system of common law contributory negligence, this system of strict liability found in the doctrine of expectation damages can be considered too harsh because it is generally unfair and inequitable.[54] Even today, many states allow a comparative causation analysis to be applied to causes of action based on strict liability torts.[55]

Although some courts may reject a comparative causation analysis in a breach of contract action by relying on the theory that tort principles should not be applied in contract settings, principles of negligence can be found in many different aspects of contract law.[56] Under some circumstances, a party may suffer only one injury but be able to assert a cause of action for breach of contract as well as a cause of action in tort.[57] The distinction between contract law and tort law is not always clear.[58] As the law has developed, principles of fairness have replaced rules of law that have been considered too harsh. As succinctly stated: "Principles of law which serve one generation well may, by reason of changing conditions, disserve a later one. . . . Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better."[59]

## Apportioning Liability Using Standard AIA Contract Documents

### *Economic Analysis of the Relationship Among Owner, Architect, and General Contractor*

Construction projects often have large financial, social, and technical implications. A project may fail due to many different factors, involving several different parties. Typically, the owner will contract separately with the architect and with the general contractor. In such a case, no privity of contract exists between the designer and the builder. In addition, the general contractor typically will contract directly with the subcontractors, which means that it is the only party in privity with them.

The agreements between these different parties are often standard, and the AIA contract documents are widely used in the vertical construction industry.[60] One provision from the AIA owner-architect agreement gives the owner the option to have the architect observe the construction process and report both on the progress of the work and whether the architect, from its general observations, discovered any deficiencies.[61] If the architect performs this administrative or quality control function, the architect's fee should be higher than if the architect is not required to do so. The AIA contract language also provides that the architect is not responsible for the failure of the contractor to perform its work in accordance with the contract documents, but the architect should be held liable for the architect's own negligent acts or omissions.[62] This means that if there is a defect or deficiency in the construction that was not discovered by the architect, the architect should only be liable for its acts or omissions and not those of the contractor.

The AIA Document A201-1997: General Conditions of the Contract for Construction, the construction administration portions of which are incorporated in the standard AIA contracts between the owner and the architect and between the owner and the contractor, provides that the architect is not responsible for any damages arising from the failure of the contractor to perform

its contractual obligations.[63] Similarly, A201 also provides that the contractor is not responsible for the damages arising from the failure of the architect to perform its work as required.[64] No matter whether the owner sued the architect or whether the owner sued the contractor, in either situation and under certain facts, the provisions in A201 entail a comparative causation analysis whereby fault should be apportioned between the architect and the contractor, and the owner should be compensated by the architect or the contractor in accordance with each party's percentage of fault.

Typically, two rules are used to measure the amount of damages an owner may recover based on breach of a construction contract: either the cost of remedying the defect, or the difference in value between what the building would have been worth (if it had been properly designed and constructed) and the value of the building as actually designed and built.[65] If the resulting damages for remedying the defect are overly generous to an owner, the difference in valuation is generally used to measure the damages.[66] In a breach of contract action against an architect or contractor brought by the owner after a defect or deficiency is discovered in the finished project, under the doctrine of expectation, the architect or contractor could be held liable for the entire cost of remedying the defect. As stated by other commentators, "[t]he results reached with expectation damages are too harsh because the doctrine fails to consider potential wrongful acts of other parties in contributing to the breach."[67]

In one example discussed throughout this article and more thoroughly below, the breach of contract action is brought by the owner against the architect after a defect is discovered in the construction project. The owner has contracted separately with the architect and the contractor. Under its contract, the architect is obligated to inform the owner of known deviations from the contract documents and from the most recent construction schedule submitted by the contractor. The architect is not responsible for the contractor's failure to perform the work in accordance with the requirements of the contract documents. However, the architect is liable for its own negligent acts or omissions, not for those of the contractor. The architect is the party allegedly breaching the contract by failing to observe and catch the contractor's mistake, and the contractor is a third party contributing to the breach. Though the architect may be liable to the owner for failing to catch the mistake, the architect should not be liable for the entire amount of the damages.

In the other example, the owner brings a breach of contract action against the contractor after a deficiency has been discovered in the project. As with the first example, the owner has a separate agreement with both the designer and the builder. Pursuant to the provisions of A201 incorporated into its contract, the contractor must inform the owner of known design errors or omissions. However, the builder is not liable for damages resulting from such errors or omissions. The contractor is the party allegedly breaching the contract by, in part, failing to observe and catch the architect's mistake. As in the previous example, the architect is a third party contributing to the breach, and while the contractor may be liable to the owner for failing to catch the mistake, it should not be held liable for the entire amount of the damages.

In each example, both the architect and the contractor have contributed to the owner's injury. Each acted independently in failing to catch the mistakes, and each acted independently in causing the defects. They are both joint wrongdoers. They could each be sued for their own acts in breaching their respective contracts with the owner. A more efficient and equitable determination of damages would involve apportioning liability based on the percentage of fault that each party, the architect and the contractor, contributed to the breach—the implementation of a comparative causation analysis.

### *Contracting for Comparative Fault: Application of the 1997 Editions of the AIA Contract Documents*

Regarding the architect, the newest versions of the standard AIA agreements include slightly different language than the provisions involved in most earlier published cases. AIA Document B141 is the Standard Form of Agreement Between Owner and Architect. It allows the architect to offer a broad range of services to the owner spanning the life of a project, from conception to completion and beyond.[68] It contains initial information, terms and conditions, and compensation details, as well as definitions of the architect's scope of services.[69] Specifically, B141 provides:

> The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the contractor. However, *the Architect shall not be responsible for the Contractor's failure to perform the work in accordance with the requirements of the Contract Documents*. *The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the contractor, subcontractors, or their agents or employees*, or any other persons or entities performing portions of the work.[70]

This language can and should be interpreted as a limitation of the architect's liability. If defects and deficiencies appear in the construction, the architect is not responsible for the contractor's breach. However, the architect is responsible for its own negligent acts or omissions, such as failing to discover the defects or deficiencies. The issue of damages should be put before the trier of fact, who can then determine what percentage of fault should be attributed to each of the parties.[71]

A201 also plays an important role in the contract for construction and in the analysis of responsibility. It sets forth the rights, responsibilities, and relationships of the owner, the general contractor, and the architect.[72] Even though the architect is not in privity with the general contractor because the architect is not a party to the contract for construction between the owner and the general contractor, the architect usually plays an integral role in preparing contract documents, and the architect may have specific duties and responsibilities during the construction phase of the project.[73] Typically, A201 is adopted by reference in other AIA documents, such as B141, AIA Document A101-1997: Standard Form of Agreement Between Owner and Contractor, and AIA Document A401-1997: Standard Form of Agreement Between the Contractor and the Subcontractor.[74] A201 provides:

> The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters . . . .[75]
>
> The *Contractor warrants* to the Owner and Architect that materials and equipment furnished under the contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the work will be free from defects not inherent in the quality required or permitted, and *that the work will conform to the requirements of the Contract Documents* . . . .[76]

A201 seeks to further delineate the differences between the responsibilities of the contractor and the duties of the architect and recognizes that "[a] clear allocation of responsibility is in the interests of all participants in the construction project," although care must be taken not to alter this delineation through conduct.[77]

> The Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Subparagraph 3.3.1.[78]
>
> The Architect will not be responsible for the Contractor's failure to perform the work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the contractor, subcontractors, or their agents and employees, or any other persons or entities performing portions of the work. . .[79]

The above language strikes a balance between the architect's duty to protect an owner through site observation and the architect's standard of care. Generally, the architect should not be held to the same standard of care as an on-site construction supervisor. However, the architect must still perform site observations and seek to guard the owner against defects in a reasonable and prudent manner, consistent with the governing standard of care. In interpreting the 1976 edition of A201, which includes language similar to the above provisions, at least one court has found that the architect is not an insurer or guarantor of the contractor's work.[80]

In regards to the contractor, A201 contains language that can and should be interpreted as a limitation of the contractor's liability. The contractor is responsible for its own negligent acts or omissions, which may include the failure to inform the owner of known errors or omissions in the contract documents. B141 places the following responsibilities on the architect:

> The Architect's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project. The Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services which initially shall be consistent with the time periods established in Section 1.1.2.6 and which shall be adjusted, if necessary, as the Project proceeds. This schedule shall include allowances for periods of time required for the Owner's review, for the performance of the Owner's consultants, and for approval of submissions by authorities having jurisdiction over the Project. Time limits established by this schedule approved by the Owner shall not, except for reasonable cause, be exceeded by the Architect or Owner.[81]
>
> The Architect's design services shall include normal structural, mechanical and electrical engineering services.[82]

The A201 specifically addresses the limitation of liability for the contractor and sets the stage for a comparative causation analysis:

> Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.[83]
>
> Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws,

> statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.[84]
>
> If the Contractor fails to perform the obligations of Sections 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.[85]
>
> The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. . . . The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.[86]

Despite the requirements of notification, the contractor is not expected or required "to engage in a professional review of the architect's design."[87] Again, this contractual language seeks to reach a balance between a contractor's duty to protect an owner through notification of errors and omissions detected in the contract documents while simultaneously providing that the contractor is not to be held to the same standard of care as a design professional. When studying and comparing the contract documents, the contractor must perform these duties in accordance with the applicable standard of care of a contractor, and to the extent the contractor fails to do so, it is liable for all damages incurred as a result.

These provisions further evidence the intention of the parties to employ a comparative causation analysis in determining contract damages. Furthermore, neither the architect nor the contractor is attempting to disclaim liability for its own fault. With respect to the use of the AIA documents, total liability should be apportioned between the parties. One should be held responsible for the respective failure to detect the defect in construction or design, and the other should be held responsible for causing the defect to exist. Both a judge and a jury are fully capable of making such an apportionment.

Although considerations of judicial economy would go against the use of a comparative causation analysis in contracts, freedom of contract favors its enforcement. The AIA contract terms are commercially reasonable and an industry standard. The provisions do not bar the owner from seeking damages from the architect or contractor; rather, they should only prevent the owner from recovering the full amount of damages from the architect or contractor when a portion of the damages is attributable to the fault of another party. The architect or contractor will still be held liable for its own fault and failures. This fault can be apportioned among the parties.

## Conclusion

The language found in the 1997 editions of the AIA documents provides for an ideal context in which a court can utilize a comparative causation analysis in a breach of contract cause of action. The provisions of the documents are commercially reasonable and are typically entered into between parties of equal bargaining power. In a way, the provisions function as a limitation of liability clause. The architect or the contractor is liable only for its own acts or omissions, not in failing to detect the defects or deficiencies of each other. Thus, the liability of the architect and/or the contractor is limited to each party's own respective fault. Just as contributory negligence was considered too harsh and developed into comparative negligence, the doctrine of expectation in contract law can lead to harsh results, especially when a breach is attributable to more than one party. Allowing a system of comparative causation to apportion damages among the joint wrongdoers would provide a more equitable and just result.

## Endnotes

1. *See* Haysville U.S.D. No. 261 v. GAF Corp., 666 P.2d 192, 199 (Kan. 1983) (stating that "[t]he use of the comparative negligence theory is not proper in breach of contract actions"); Becker v. BancOhio Nat'l Bank, 478 N.E.2d 776, 781 (Ohio 1985) (concluding that comparative negligence is not a defense to a breach of contract claim); Bd. of Educ. of Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley, 517 N.E.2d 1360 (N.Y. 1987) (concluding that New York's contribution statute does not permit contribution between two parties whose potential liability to a third party is for economic loss resulting from a breach of contract); Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933 (Tex. App.–Dallas 1987), *writ denied* (holding that the doctrine of comparative causation does not apply to allocate liability between breaching parties in a breach of contract action); Parke State Bank v. Akers, 659 N.E.2d 1031, 1035 (Ind. 1995) (Indiana does not recognize comparative causation in breach of contract claims) (citing Fowler v. Campbell, 612 N.E.2d 596, 602 (Ind. Ct. App. 1993)); Allsup's Convenience Stores, Inc. v. N. River Ins. Co., 976 P.2d 1, 11 (N.M. 1998) (noting that the doctrine of comparative fault does not apply to contract actions); *but see* Gateway W. Ry. Co. v. Morrison Metalweld Process Corp., 46 F.3d 860, 862 (8th Cir. 1995) (holding that under Missouri law, the district court's limitation of the railroad's breach of contract damages by comparative fault instruction, which applied to both breach of contract claim and negligence claim, would be upheld); Moundsview Indep. Sch. Dist. No. 621 v. Buetow & Assocs., 253 N.W.2d 836 (Minn. 1977) (holding that when the contract provision stating that the architect "shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents" is read in conjunction with the section that provides that "[t]he Architect shall not be responsible for the acts or omissions of the Contractor, or any Subcontractors, or any of the Contractor's or Subcontractors' agents or employees or any other persons performing any of the Work," it is apparent that, by the plain language of the contract, an architect is exculpated from any liability occasioned by the acts or omissions of a contractor); Pathman Constr. Co. v. Hi-way Elec. Co., 382 N.E.2d 453 (Ill. App. Ct. 1978) (holding that where a contractor elected to seek recovery against a subcontractor for damages caused by the subcontractor's delay in performance of the contract, apportioning damages to arrive at a share attributable to the subcontractor's delayed performance was not error); Calumet Constr. Corp. v. Metro. Sanitary Dist. of Greater Chicago, 533 N.E.2d 453 (Ill. App. Ct. 1988) (allowing apportionment of fault under a liquidated damages clause); Gray v. Johnson Mobile Homes of Tenn., Inc., No. W2001-01982-COA-R3-CV, 2003 WL 1618084, at *3 (Tenn. App. Ct. Mar. 26, 2003) (concluding that where the plaintiff in a breach of contract action sued two parties,

the trial court did not err in apportioning the damages between the two defendants).

2. *See* UNIF. COMPARATIVE FAULT ACT § 1 (1977) (the Act generally applies in an action based on fault, including acts or omissions that are negligent or reckless or that subject a person to strict tort liability and further including breach of warranty when sounding in tort, unreasonable assumption of risk, misuse of a product, and unreasonable failure to avoid an injury or to mitigate damages); s*ee also* Jennifer L. Eugster, *Allocating Fault to Stipulated Non-Parties at Fault*, 43 ARIZ. L. REV. 737, 737 (2001) ("Comparative fault is a relatively new concept in tort law and is replacing joint and several liability in most states.").

3. *See* Mark M. Hager, *What's (Not!) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 CONN. L. REV. 77, 97 (2000) (recognizing that the adoption of comparative fault is due largely to considerations of fairness); Mark Geistfeld, *Symposium: Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 624 (2003) ("[a]pportioning damages among the multiple injurers has evident fairness that explains the widespread adoption of comparative fault").

4. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 14.4 (4th ed. 1998); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8 (3d ed. 2004).

5. *See* Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1368–69 (N.Y. 1992) (stating that "[t]his case partakes of both categories, and thus falls in the borderland between tort and contract, an area which has long perplexed courts . . . [t]hese borderland situations most often arise where the parties' relationship initially is formed by contract, but there is a claim that the contract was performed negligently"); *see also* Lembke Plumbing & Heating v. Hayutin, 366 P.2d 673, 677 (Colo. 1961) (stating that "[a]n injured party in such a case as this may elect to proceed ex contractu for breach or ex delicto for negligence"); Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508, 510 (Tex. 1947) (stating that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract").

6. The phrase "comparative contract fault" can be found in the court's opinion in Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933 (Tex. App.–Dallas 1987), *writ denied*.

7. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

8. 19 Mass. 621 (Mass. 1824).

9. HENRY WOODS & BETH DEERE, COMPARATIVE FAULT § 1:3 (3d ed. 1996).

10. Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 46 (1944); Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 201 (1950).

11. WOODS & DEERE, *supra* note 9, § 1:7; J.P. Ludington, Annotation, *Applicability of Last Clear Chance Doctrine to Collisions Between Motor Vehicles Crossing at Intersections*, 20 A.L.R.3d 124 (1968).

12. WOODS & DEERE, *supra* note 9, § 1:6.

13. *Id.* § 1:7.

14. *Id.* § 1:8.

15. E. H. Schopler, Annotation, *Comment Note—Distinction Between Assumption of Risk and Contributory Negligence*, 82 A.L.R.2d 1218 (1962); *see also* RESTATEMENT (SECOND) OF TORTS § 496B ("[a] plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy").

16. VINCENT R. JOHNSON, MASTERING TORTS 182, 188 (1995).

17. *Id*. at 188.

18. WOODS & DEERE, *supra* note 9, §§ 1:10, 1:11; *see also* Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 36 (1996) ("[t]he development of modern comparative negligence laws is traced to eighteenth-century English admiralty law"); 60 Pub. L. No. 100, 60th Cong. Ch. 149, 35 Stat. 65 (1908) ("That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death; the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.").

19. WOODS & DEERE, *supra* note 9, § 1:11. Therefore, if a defendant is found to be 90 percent at fault and the plaintiff is found to be 10 percent at fault, the plaintiff will only be allowed to recover 90 percent of his or her damages. Furthermore, if the defendant is found to be only 10 percent at fault and the plaintiff is found to be 90 percent at fault, the plaintiff can still recover 10 percent of his or her damages.

20. *Id.*

21. *Id.*

22. *Id*. Therefore, if a defendant is found to be 90 percent at fault and the plaintiff is found to be 10 percent at fault, the plaintiff will only be allowed to recover 90 percent of his or her damages. However, if the defendant is found to be only 10 percent at fault and the plaintiff is found to be 90 percent at fault, the plaintiff cannot recover anything. Even if both parties are determined to be 50 percent at fault, the plaintiff cannot recover anything. But note that some jurisdictions hold that if both the plaintiff and the defendant are each determined to be 50 percent at fault, the plaintiff is allowed to recover 50 percent of his or her damages.

23. *Id*.

24. *Id*.

25. *Id*.

26. JOHNSON, *supra* note 16, at 182, 189.

27. *Id*. at 189.

28. UNIF. COMPARATIVE FAULT ACT § 1 (1977).

29. *Id.* § 1, cmt.

30. *See id*.

31. *See id*.

32. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, cmt. b (2000) (stating that "[t]his Restatement applies to all claims to recover compensation for death, personal injury, or physical damage to tangible property, including intentional torts, negligence, strict liability, nuisance, breach of warranty, misrepresentation, or any other theory of liability").

33. BLACK'S LAW DICTIONARY 1527 (8th ed. 1999); *see also* N.J. STAT. ANN. § 2A:53A-1 (West 2005) (defining "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."); ARK. CODE ANN. § 16-61-201 (Michie 2006) (defining "joint tortfeasors" as "two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them"); S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 3:6, at 390 (1983) ("joint tortfeasors" are "two or more persons [who] are the joint participants or joint actors, either by omission or commission, in the wrongful production of an injury to a third person").

34. *See* Grupo Condumex, S.A. de C.V. v. SPX Corp., 331 F. Supp. 2d 623, 626 (N.D. Ohio 2004) (citing DeJong v. B.F. Goodrich, Inc., 96 Mich. App. 36, 292 N.W.2d 157, 159–60 (1980) (stating that "'[w]rongdoer' status appears to depend on an antecedent nonperformance of a contractual obligation or commission of a tort"); *see also* Dubina v. Mesirow Realty Dev., Inc., 719 N.E.2d 1084, 1091 (1999); Int'l Proteins Corp. v. Ralston-Purina Corp., 744 S.W.2d 932, 934 (Tex. 1988)).

35. Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796, 801 (1990) (citing Estate of Bayliss v. Lee, 315 S.E.2d 406 (W. Va. 1984)) (stating that "[t]he doctrine of contribution has its roots in equitable principles [and] [t]he right to contribution aris-

es when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation" and observing that the right of contribution is not confined to cases of joint negligence, but is available under any theory of liability that results in a common obligation to the claimant).

36. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 47 (5th ed. 1984).

37. WOODS & DEERE, *supra* note 9, § 13:4; *see also* B & B Auto Supply v. Cent. Freight Lines, Inc., 603 S.W.2d 814, 816–17 (Tex. 1980) (explaining that the comparative negligence statute "has abolished the common law doctrine of indemnity between joint tortfeasors even though the statute does not expressly mention that doctrine").

38. Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc., 751 S.W.2d 179, 180 (Tex. 1988).

39. *See* Northwest Airlines v. Transp. Workers Union, 451 U.S. 77, 88 n.17 (1981) (stating that "[t]hirty-nine States and the District of Columbia recognize to some extent a right to contribution among joint tortfeasors"); *see, e.g.,* Joint Tortfeasors Contribution Law, N.J. STAT. ANN. §§ 2A:53A-1 to -5 (West 2005); N.C. GEN. STAT. § 1B-1 (2005); TEX. CIV. PRAC. & REM. CODE § 33.013(b) (Vernon 2006).

40. *Northwest Airlines*, 451 U.S. at 143; *see*, *e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); KAN. STAT. ANN. § 600-258a (1984); MINN. STAT. ANN. § 604.01 (West 2000); MISS. CODE ANN. § 11-7-15 (1999); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1999); TEX. CIV. PRAC. & REM. CODE §§ 33.001–.017 (Vernon Supp. 2004–05).

41. Ahluwalia/Shetty v. Kidder, Peabody & Co., Inc., No. 93 CIV. 1261 (TPG), 1998 WL 122592 (S.D.N.Y. Mar. 18, 1998) (stating that "[d]amages for breach of contract are not subject to apportionment under New York's comparative fault statute"); State v. Paxton, 674 N.W.2d 106, 109 (Iowa 2004) (stating that breach of contract actions are not encompassed in the scope of Iowa's comparative fault statute).

42. Ariel Porat, *Contributory Negligence in Contract Law: Toward a Principled Approach*, 28 U. BRIT. COLUM. L. REV. 141, 143 (1994).

43. *Id*. at 143–44; *see also* Field v. Boyer Co., L.C., 952 P.2d 1078, 1087 (Utah 1998) (stating that "[a]pplying comparative fault principles in breach of contract actions would create havoc of unprecedented proportions").

44. Porat, *supra* note 42, at 144.

45. *See* CTTI Priesmeyer Inc. v. K&O L.P., 164 S.W.3d 675, 685 (Tex. App.–Austin 2005), *pet. denied* ("[i]f we were to hold that, due to the indivisible nature of the resulting injury, breach of contract defendants and tort defendants are jointly and severally liable for all damages, we would be forced to hold a person not a party to a contract liable for the breach of that contract").

46. *See* Porat, *supra* note 42, at 144–45.

47. *Id*. at 167.

48. *See, e.g.*, AIA A201-1997.

49. Porat, *supra* note 42, at 163–66.

50. *Id*. at 169.

51. *Id*.

52. FARNSWORTH, *supra* note 4, § 12.8.

53. John B. Phillips, *Out with the Old: Abandoning the Traditional Measurement of Contract Damages for a System of Comparative Fault*, 50 ALA. L. REV. 911, 913 (1999); *see also* Paiz v. State Farm Fire & Cas. Co., 880 P.2d 300, 309 (N.M. 1994) (stating that "contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault") (quoting FARNSWORTH, *supra* note 4, § 12.8).

54. Phillips, *supra* note 53, at 914 (citing George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1349 (1994)).

55. *See* CBI NA-CON, Inc. v. UOP Inc., 961 S.W.2d 336 (Tex. App.–Houston, 1st Dist. 1997), *writ denied* (the court determined that for chapter 33 of the Texas Civil Practice and Remedies Code, the proportionate responsibility statute, to apply, the plaintiff would have to have a negligence claim, a breach of warranty claim under chapter 2 of the Business and Commerce Code, or a strict products liability claim against the defendant).

56. Phillips, *supra* note 53, at 918 (discussing several instances in which courts have infused principles of negligence into contract law: (1) the plaintiff's negligence, while it may not preclude recovery for a breach of contract, can be a material consideration in assessing the amount of recoverable damages; (2) a court may even exclude damages attributable to a plaintiff's negligence from a recovery for breach of contract; (3) a court may allow a claim for emotional distress in a contract action when the breach was particularly likely to result in serious emotional disturbance or if the nature of the breach is sufficiently egregious; and (4) a court may apply punitive damages in contract actions when fraudulent conduct accompanies the breach); *see also* A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 391 (Mo. Ct. App. 1998) (stating that "[a]lthough the affirmative defense of contributory negligence in a breach of contract action does not act as a complete bar to recovery, the defense is relevant when the mitigation of damages is at issue"); Lynch v. Scheininger, 744 A.2d 113, 125 (N.J. 2000) (maintaining that the doctrine of avoidable consequences, which limits a plaintiff's recovery by disallowing those items of damages that could reasonably have been averted, applies where a defendant has already committed an actionable wrong, whether tort or breach of contract).

57. *See* KEETON ET AL., *supra* note 36, § 92 (stating that "[t]he distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make. It would not be possible to reconcile the results of all cases. The availability of both kinds of liability for precisely the same kind of harm has brought about confusion and unnecessary complexity. It is to be hoped that eventually the availability of both theories—tort and contract—for the same kind of loss with different requirements both for the claimant's *prima facie* case and the defendant's affirmative defenses will be reduced in order to simplify the law and reduce the costs of litigation.").

58. *See* Erlich v. Menezes, 981 P.2d 978, 982 (Cal. 1999) (stating that "Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy.'. . . While the purposes behind contract and tort law are distinct, the boundary line between them is not . . . and the distinction between the remedies for each are not 'found ready made.' These uncertain boundaries and the apparent breadth of the recovery available for tort actions creates pressure to obliterate the distinction between contracts and torts—an expansion of tort law at the expense of contract principles which Grant Gilmore aptly dubbed 'contorts.'").

59. Conn. Junior Republic v. Sharon Hosp., 448 A.2d 190, 198 (Conn. 1982).

60. *See* http://www.aia.org/docs_history. The AIA publishes over ninety contracts and administrative forms that are used throughout the design and construction industry for managing transactions and relationships involved in construction projects. The AIA contract documents are supported by 115 years of experience in creating and updating its documents. For example, the 1997 edition of AIA Document A201 is the fifteenth edition of the standardized general conditions for construction.

61. AIA Document B141-1997, Art. 2, ¶ 2.6.2.2.

62. *Id*.

63. AIA Document A201-1997, ¶ 4.2.3.

64. *Id.* ¶ 3.2.3.

65. CALAMARI & PERILLO, *supra* note 4, § 14.29; *see also* 5 AM. JUR. 2D *Architects* § 32 (1995).

66. CALAMARI & PERILLO, *supra* note 4, § 14.29.

67. Phillips, *supra* note 53, at 911.

68. *Available at* http://www.aia.org/docs_series.

69. *Id*.

70. AIA Document B141-1997, Art. 2, ¶ 2.6.2.2 (emphasis added).

71. *See, e.g.*, Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796 (W. Va. 1990) (the jury was able to apportion damages, finding that the architect was liable for 15 percent of the damages, the general contractor was liable for 75 percent, the subcontractor was liable for 0 percent, the owner was liable for 5 percent, and that 5 percent of the responsibility went to other parties); Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933 (Tex. App.–Dallas 1987), *writ denied* (The jury was able to determine that the defects in the construction reduced the value

of the project by $41,500.00. The jury further found that the general contractor was responsible for 95 percent of the damages and that the architect was liable for 5 percent of the damages; thus, the architect was only liable for $2,075, although this was reversed on appeal.). These cases show that the trier of fact is able to apportion damages among the responsible parties in a construction defect case.

72. *See* http://www.aia.org/docs_series.

73. *Id*.

74. *Id*.

75. AIA Document A201-1997, Art. 4, ¶ 3.3.1.

76. *Id.*, Art. 3, ¶ 3.5.1 (emphasis added).

77. AIA Commentary on AIA Document A201-1997.

78. AIA Document A201-1997, Art. 4, ¶ 4.2.2; *see also* AIA Commentary on AIA Document A201-1997 (stating that "[t]he eighth edition of A201 (1961) deleted the term *supervision*, which had been misinterpreted by certain courts, and clarified the architect's role by using the term *observation*").

79. AIA Document A201-1997, Art. 4, ¶ 4.2.3.

80. Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933 (Tex. App.–Dallas 1987), *writ denied* (The language at issue stated, in relevant part, "[t] he Architect . . . will not be responsible for the contractor's failure to carry out the Work in accordance with the Contract Documents." The architect argued that legal principles and the contract language allowed the jury "to compare the general contractor's breach of contract against the architect's breach of contract and thereby determine what percentage of the injury [was] attributable to each breach." The court disagreed, recognizing only that the architect was not the insurer or guarantor of the contractor's work and that the contract claims should not have been submitted to the jury on a comparative liability basis, and held that the architect was liable for the full amount of damages. However, the *Hunt* case dealt with an earlier version of the AIA contract provisions and is antiquated in light of the increasing acceptance of comparative causation analysis in the law, especially considering the new AIA contract language found in the 1997 revised documents. It is also important to note that the court in *Hunt* did not take into consideration the impact of the contractor's warranty to the architect.).

81. AIA Document B141-1997, Art. 1, ¶ 1.2.3.2.

82. *Id.*, Art. 2, ¶ 2.4.1.

83. AIA Document A201-1997, Art. 3, ¶ 3.2.1.

84. *Id*. ¶ 3.2.2.

85. *Id*. ¶ 3.2.3.

86. *Id*. ¶ 3.12.10.

87. AIA Commentary on AIA Document A201-1997.