The Spearin Doctrine: *100-Plus Years Old and Still Going Strong*

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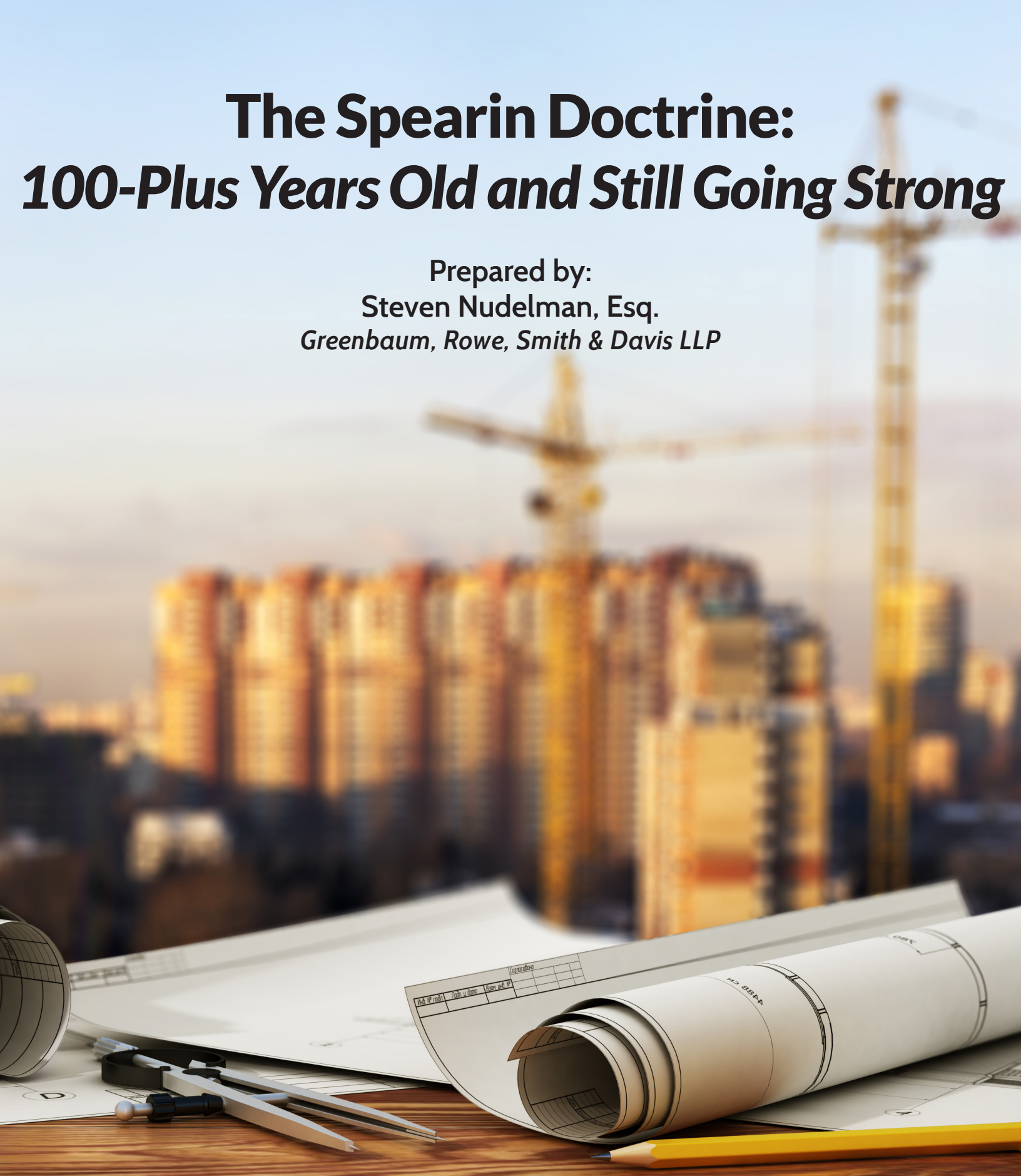

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Legal Pipeline

The Spearin Doctrine: 100-Plus Years Old and Still Going Strong

All parties to construction contracts must be aware of its limits and contours to understand properly their exposure to liability.

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No Comments

"Errors and omissions" is a phrase that keeps design professionals awake at night. Plans and specifications may contain mistakes or inaccuracies that are identified by

a contractor after construction on a project begins. If those inaccuracies cause delays, the question arises: Who is responsible for the associated costs? While the design professional may ultimately face liability from the owner, the initial tussle over responsibility is typically between the contractor and the owner.

In response to this "tussle," courts across the country have developed a doctrine known in some jurisdictions as the "implied warranty of design adequacy." This implied warranty is commonly known as the *Spearin* Doctrine, named after an infamous construction case dating back to 1918.

Under the *Spearin* Doctrine, "if a contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *United States v. Spearin*, 248 U.S. 132, 136 (1918). However, this general rule is subject to exceptions that contractors must familiarize themselves with to avoid unnecessary exposure to liability.

Background

The *Spearin* Doctrine originated in the U.S. Supreme Court at the turn of the 20th century. In 1905, George Spearin contracted with the federal government to build a dry dock at the Brooklyn Navy Yard for $757,800 (more than $19 million in present value). The government provided the plans and specifications. To complete the project, Spearin had to divert a nearby sewer.

Approximately one year after that diversion, heavy rainfall coinciding with a high tide broke the sewer and flooded the dock. Upon inspection, Spearin learned there was a dam within the sewer. The diversion of the sewer increased pressure on the dam substantially, causing it to break. All parties were unaware of the dam, which was not mentioned in the specifications provided by the United States.

Spearin refused to continue work unless the government paid for repairs. The government refused to compensate him further and elected to use other contractors to complete the project. Spearin sued the federal government, arguing that the faulty design specifications it created caused damage and delay to the project.

The government argued that because Spearin's contract obligated him to inspect independently the actual conditions of the site, the government was not liable for providing incomplete specifications. In what has become a landmark legal decision in the construction industry, the U.S. Supreme Court rejected this argument.

The court held that "[t]he obligation to examine the site did not impose upon [Spearin] the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer ... would prove adequate." *Spearin*, 248 U.S. at 137. In other words, a general requirement in a contract that a contractor inspect the site does not obligate the contractor to unearth unknown conditions that should be in the design specifications.

Since *Spearin*, nearly all 50 states adopted some form of the doctrine. See 3 Brunner & O'Connor, *Construction Law* § 9:81. The precise contours and limitations of the doctrine vary from state to state. While most states simply refer to the *Spearin* Doctrine, some jurisdictions use the phrase "implied warranty of design adequacy." See, e.g., *MidAmerica, Inc. v. Bierlein Cos.*, No. 4:19-cv-04096, 2020 WL 5995981 (W.D. Ark. Oct. 9, 2020); *Costello Constr. Co. v. Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015).

Despite the doctrine's wide acceptance, there are a number of landmines contractors must avoid to take advantage of it. For example:

• The *Spearin* doctrine will not apply if a plaintiff failed to adhere to other parts of the contract. See *Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 469-70 (Fed. Cir. 1988); *S. Comfort Builders, Inc. v. United States*, 67 Fed. Cl. 124, 134 (Fed. Cl. 2005); *Fid. & Deposit Co. of Md. v. Travelers Cas. & Surety Co. of Am.*, No. 2:13-cv-00380, 2018 WL 4550397, at *13 (D. Nev. Sept. 21, 2018).

• The *Spearin* doctrine does not apply if the supplier of the plans and specifications exculpates itself from responsibility for inaccurate descriptions from the site, as opposed to merely placing a general burden upon the contractor to check the site. See *Sasso Contracting Co. v. State*, 173 N.J. Super. 486, 489-91 (App. Div.), *certif. denied*, 85 N.J. 101 (1980).

• A contractor otherwise entitled to relief under the *Spearin* doctrine will not get it if the site specifications contained an obvious discrepancy. See *Metric Constr. Co. v. United States*, 80 Fed. Cl. 178, 186 (Fed. Cl. 2008).

• The *Spearin* doctrine will not apply when site specifications are incomplete, leading to numerous Requests for Information. See *Dugan & Meyers Constr. Co. v. Ohio Dep't Adm. Servs.*, 864 N.E.2d 68, 73 (Ohio 2007). At least in Ohio, the Ohio Supreme Court limited *Spearin* to a very specific type of claim and it cannot be used as a free-wielding sword to recover for delays to a project.

Notably, the above restrictions to *Spearin* are only applicable to the referenced jurisdictions. Courts around the country differ in their interpretations of *Spearin* and its limitations.

Application of *Spearin*

While owners such as the federal government lost the battle in the Supreme Court in 1918, the war against contractors is ongoing. After *Spearin*, an owner cannot assign the contractor an independent duty to inspect the project site and expect a court to absolve the owner from liability for inadequate design. This scenario is illustrated in a recent case out of the Western District of Arkansas, *MidAmerica, Inc. v. Bierlein Cos.*

This case concerns a construction dispute related to the decommissioning of a retired power plant. Defendant Bierlein was the general contractor; plaintiff MidAmerica was its subcontractor charged with removing fuel oil. MidAmerica prepared a bid for its subcontract work based on specifications provided by Bierlein. After performing an on-site inspection, MidAmerica submitted what was ultimately a winning bid and was awarded the subcontract.

Upon commencing work, however, MidAmerica discovered that the site contained No. 6 fuel oil instead of No. 2 fuel oil. Types of fuel oil range from 1 through 6. The higher the number, the more difficult and expensive it becomes to remove. In litigation, MidAmerica claimed that Bierlein misrepresented the grade of fuel oil in the site documents.

As a preliminary matter, the court held that the *Spearin* Doctrine is not limited to public construction contracts; it extends to private projects as well.

Bierlein relevantly argued that the requirement that MidAmerica inspect the site absolved Bierlein of responsibility from a discrepancy in the site documents. The court, however, soundly rejected this argument. It held that under *Spearin*, "a warranty made by positive affirmation as to site conditions cannot be undone by language requiring a site inspection to determine the scope of work." *Id.*

Takeaways

The *Spearin* Doctrine should loom large in the minds of both owners and contractors. While the *Spearin* case itself focused on the owner, other courts, such as the *MidAmerica* court, have extended the doctrine to cover other parties who supply plans and specifications, such as the general contractor. See, e.g., *L.K. Comstock & Co. v. United Eng'g & Constructors, Inc.*, 880 F.2d 219, 226 (9th Cir. 1989).

The *Spearin* Doctrine can operate as both a sword and a shield. That is, a contractor may sue for relief if an owner fails to compensate the contractor properly for additional work not contemplated in the plans and specifications. Or, instead, the contractor may use it as a defense if an owner sues for damages to complete the contract if the contractor decides to stop performance due to differing site conditions.

In either situation, all parties to construction contracts must be aware of the limits and contours of the *Spearin* Doctrine, as it has been applied in their particular jurisdiction, to understand properly their exposure to liability.

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