THE SPEARIN DOCTRINE CONT'D: *SOME IMPORTANT NUANCES AND EXCEPTIONS*

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The Spearin Doctrine Cont'd: Some Important Nuances and Exceptions

Authored by: Scott Cahalan and Darren Rowles (for Georgia Utility Contractors Association's (GUCA) monthly publication "Underground Connection"). Permission to reprint from authors.

Last month, we discussed the *Spearin* doctrine, which establishes that a project owner impliedly warrants that plans and design specifications will be adequate if the owner issues and the contractor complies with the plans and specifications.[1] As a result, a contractor can use the *Spearin* doctrine defensively to avoid the consequences of defective plans and specifications or offensively to bring a claim if the defective plans and specifications cause its work to be more expensive, timely, or difficult. The *Spearin* doctrine's applicability and longevity have spawned a number of nuances and exceptions, some of which we discuss in this month's article.

Since the *Spearin* doctrine's birth in 1918, the scope of the doctrine has been the subject of many important legal decisions that continue to define its use. Under the modern rule, for example, the *Spearin* doctrine cannot be invoked by a contractor if (1) the construction contract contains an enforceable avoidance clause; (2) the contractor did not reasonably rely on the defective plans and specifications; or (3) the defects in the plans and specifications were small and not sufficiently fundamental to the completion of the project.[2]

Avoidance Clauses

Express contract terms trump implied contract duties. As a result, the law allows owners to both shift the consequences of an inadequate design to contractors and avoid liability for design defects under the *Spearin* doctrine through disclaimers, waivers, exculpatory, or other types of avoidance clauses. The effect is to expand the contractor's warranty beyond conformance to the plans and specifications to warranting that the work will be fit for its intended purpose, even if the plans and specifications contain defects.

In *Spearin*, the Supreme Court of the United States held that "[t]his implied warranty [of the adequacy of the plans and specifications] is not overcome by the *general clauses* requiring the contractor to examine the site, to check up the plans, and to assume the responsibility for the work until completion and acceptance." U.S. v Spearin, 248 U.S. at 137 (emphasis added). The court's reference to "general clauses" suggested that specific clauses could serve to shift the design responsibility to the contractor. Indeed, courts will enforce specific contract terms that shift the consequences and risk of design defects to contractors if the terms are clear and unambiguous.

Some avoidance clauses expressly disclaim the owner's responsibility for the accuracy of owner supplied information. For example, the court in McDevitt v. Marriott[3] upheld a contract provision expressing disclaiming "any responsibility [of the owner] for the data [in a soil report] as being representative of the conditions and materials which may be encountered."

Other types of avoidance clauses may be more subtle. For instance, a contract term that obligates the contractor to verify the specifications for accuracy and completeness may pass the risk of defects in the specifications to the contractor.

Clarity and lack of ambiguity are critical to enforcement of avoidance clauses. Common general clauses will not usually shift the consequences and risk of design defects to the contractor. For example, a clause stating that the actual conditions may be different than those shown on the plans and specifications will typically not overcome a *Spearin* claim. Yet courts will enforce an avoidance clause requiring the contractor to verify specific representations, such as the suitability of soil in soils reports or estimated quantities.

The line between a general and a specific clause also varies depending on whether federal or state law applies and, more specifically, which state law applies, as a contractor in Ohio recently discovered in the *Dugan & Meyers Construction Co. v. Ohio Dept. of Administrative Services*[4] case. In *Dugan & Meyers*, the Ohio Supreme Court denied the contractor's *Spearin* claim despite evidence of the inadequacy of the plans and specifications that included untimely owner responses to 700 RFIs, 250 field work orders, and 85 ASIs because the contract's "no-damages-for-delay" clause limited the contractor's damages to the remedy specified in the contract – an extension of time.

Practically every contractor association in the State of Ohio filed "friend of the court" briefs urging against the holding in *Dugan & Meyers*. In a strong dissenting opinion, Justice Pfeifer noted

"[t]he majority seems to suggest that an owner need not be concerned with preparing accurate plans, since any deficiencies must be corrected by the contractor. As it turns out, the State could have saved a lot of money on blueprints and just submitted some sketches on the backs of a few cocktail napkins." While Ohio's decision to severely limit the scope of *Spearin* does not appear to be a nationwide trend[5], it still provides a warning that the terms of the contract could make a difference to a contractor's right to invoke *Spearin*.

Reasonable Reliance

Another limitation on a contractor's right to invoke the *Spearin* doctrine is the requirement that a contractor demonstrate reasonable reliance on the plans and specifications. A contractor's reliance on the plans and specifications is not reasonable when it has prior knowledge of the defects or it fails to comply with the plans and specifications.

Similarly, a contractor's reliance upon the plans and specifications is not reasonable if the design defect was so "glaring or obvious" that an ordinary contractor would have found it during bid preparation or before performance. In fact, a contractor has an implied duty to seek clarification of any such patent ambiguity before submitting its bid or beginning performance.[6]

Nor is reliance reasonable if the contractor discovered or should have discovered a defect in the plans and specifications during

its site inspection. Failing to conduct a pre-bid site inspection will preclude a contractor from reasonably relying on defects in the plans and specifications that an ordinary contractor have discovered had it conducted the reasonable site inspection.[7]

Requirement for Fundamental Design Defect

Design defects must be fundamental to result in a breach of the implied warranty of the adequacy of the plans and specifications. The fact that drawings require repeated clarification is not necessarily an indication that the drawings are defective.[8] Rather, it has been said that "the [owner's] documents must be substantially deficient or unworkable in order to be considered a breach of the contract. If there are many errors or omissions in the specifications, the [owner] breached the contract if the cumulative effect or extent of these errors was either unreasonable or abnormal taking into account the scope and complexity of the project. . . . To prove that the plans [are] defective, it [must be shown] that the plans were unworkable."[9]

Whether plans and specifications contain fundamental defects is normally determined by the result. If a contractor carefully follows plans and specifications (with no patent ambiguities) and the contract item is deficient or fails to perform as required, then the owner will normally be held not to have met its duty under *Spearin*.[10]

In sum, while the *Spearin* doctrine protects contractors from the consequences of complying with defective plans and specifications, a prudent contractor should be aware of the limitations of the *Spearin* doctrine, or it may find itself assuming responsibility for a defective design.

[1] Similarly, a contractor impliedly warrants that plans and design specifications will be adequate if the contractor issues and a subcontractor reasonably relies upon the plans and specifications. Ironically, design professionals do not impliedly warrant the adequacy of their designs in most states.

[2] The modern *Spearin* doctrine includes another important nuance – it assigns responsibility for defective specifications to the owner or contractor according to whether the specification is deemed a "design specification" or "performance specification." The distinction between design specifications and performance specifications is an important issue that will be addressed in a future article.

[3] 713 F. Supp. 906 (E.D. Va. 1989), aff'd in part, rev'd in part on other grounds, 911 F.2d 723 (4th Cir. 1990).

[4] 113 Ohio St. 3d 226, 864 N.E.2d 68 (2007).

[5] Another example of Ohio's limited view of *Spearin* is that Ohio apparently limits the doctrine's applicability to public projects. *See Thomas & Marker v. Wal-Mart*, 2008 U.S. Dist. LEXIS 79072 (refusing to extend the *Spearin* doctrine to private projects). While the *Spearin* doctrine has been adopted by most jurisdictions, there remain some states, such as Pennsylvania, that have refused to apply it. *See Stabler Constr., Inc. v. Comm. Of Pennsylvania*, 692 A.2d 1150, 1153 (Pa. 1997).

[6] *See, e.g., Graham Constr. Co., Inc. v. Earl*, 362 Ark. 220 (2005).

[7] *See, e.g., Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576 (Fed. Cir. 1987); *Johnson Controls, Inc. v. United States*, 671 F.2d 1312 (Ct. Cl. 1982); *Allied Contractors, Inc. v. United States*, 381 F.2d 995 (Ct. Cl. 1967).

[8] *Caddell Constr. Co., Inc. v. United States*, 78 Fed. Cl. 406 (2007).

[9] *Id.* at 413-415.

[10] *See, e.g., John McShain, Inc. v. United States*, 412 F.2d 1281(Ct. Cl. 1969) (finding that "although plans need not be perfect, they must be adequate for the task or reasonably accurate").