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The "Spearin Gap"

No, it is not the mountain valley pass early settlers used to cross the Appalachian Mountains nor is it the space between the train and platform that the disembodied voice in the London underground warns you about. In the case of United States v. Spearin, 248 U.S.132, 137 (1918), the court held that upon taking its design professional's construction documents and offering them for contractor bids, the owner impliedly warrants that such design documents, if followed, will result in a buildable project. Or, as the court held:

"Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered … But if the contractor is bound to build according to plans and specifications provided by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications … This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, check up the plans, and to assume responsibility for the work until completion and acceptance."

The concept of there being an implied warranty of the design professional's plans and specifications provided by the owner to the contractor has been adopted widely by other courts such as Illinois, (Chicago College of Osteopathic Medicine v. George A. Fuller Company), Massachusetts (M. L. Shalloo, Inc. v. Ricciardi & Sons Constructors, Inc.) and California (Gagne v. Bertran).

The underlying rationale here is that the owner, in furnishing the design, has the ability directly or indirectly, through its design professional to control the quality of that design. When the plans and specifications prepared by the owner's design professional prove to be defective, the owner is potentially liable to the contractor for the contract sum and extra expenses caused by such defects or inadequacies. The so called "Spearin" or "Liability" gap then arises, however, when notwithstanding such defects in the design documents, when they were prepared within and according to a particular design professional's generally accepted standard of care, then the owner may have no recourse against its design professional. One could say that this gap exists because of the well-recognized, common law standard of care of design and consulting professionals. Let us look into this standard of care a bit further.

In the earlier case of Coombs v. Beede, 89 Maine 187, (1896), the court held:

"The undertaking of an architect implies that he possess skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result."

Having looked at the legal foundation for an owner's obligation to a contractor and the design or consulting professional's obligation, in turn, to the owner, what does all this mean? Surely, these concepts should be represented in the parties' business and contractual relationships and be fairly well settled. Regrettably, this is frequently not the case.

Many lawyers attempt to rectify this perceived imbalance as between owner and design consulting professionals by contractually shifting many risks to such professionals. This is done by inserting language seeking to warrant or guarantee an outcome or a result, obtaining certifications that are beyond the professional's reasonable knowledge or control, waiving reliance upon generally accepted professional standards in favor of open-ended and undefinable superlatives, and even specifically seeking redress for any perceived errors or omissions irrespective of negligence (creating an "insurer" of the project). This in disregard of the respective parties' ability to bear or control risks. The consequences of the professional agreeing to such shifting of risk may be that its professional liability insurance may not be able to respond and therefore its own firm's assets, and those of its individual members, may be in jeopardy.

Coming Next Quarter:
The design and consulting professionals' legal standard of care and how it applies.

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