Spearin in Alaska: Whose end is Sharpest?

By Kenneth Wasche

To many lawyers and judges, interest in construction litigation falls somewhere between remembering to take out the trash and fixing that chip in the windshield. Construction lawyers are often frustrated by the glazed eyes and seemingly closed ears of judges and others uninterested in the legal issues surrounding such things as the slump test of the concrete used in the footing between grids A-3 and A-7 on plan sheet S-16.

What is the Spearin Doctrine?

In 1918 the Unites States Supreme Court succinctly delineated what has become the backdrop for the way construction is done in the United States. In *United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59 (1918),* the Court set out, and added to, the rights and responsibilities of the parties to a construction contract. The Court first reiterated a basic contract principal that one who undertakes to do, for a fixed sum, a thing which is possible to perform will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered. However, the Court then added an important caveat when it said that if a contractor is bound to build according to plans and specifications prepared by an owner, the contractor is not responsible for the consequences of defects in those same plans and specifications. The responsibility of the owner is not overcome by the standard clauses requiring builders to visit a site, check plans, and inform themselves of the details and scope of the work. This added proviso, which has become known as an implied warranty, is generally referred to as the *Spearin* doctrine.

Spearin arose after a contractor agreed to build a dry dock at the Brooklyn Navy Yard

Spearin was a federal case that arose after a contractor agreed to build a dry dock at the Brooklyn Navy Yard. Part of the contractor's work required the relocation of a sewer. The contractor completed the sewer relocation in accordance with the government's plans and specifications. About a year after the sewer relocation, a heavy rain and high tide caused the relocated sewer to fail before work on the dry dock was done. The contractor refused to resume its work in the dry dock area until the problems with the sewer were resolved. The government cancelled the contract, found out that the problem was related to a dam in a completely separate section of sewer, and repaired the sewer with better materials and specifications. Spearin sued for its costs and lost profits, and won.

The *Spearin* Doctrine in Alaska.

Most jurisdictions have adopted the *Spearin* doctrine explicitly or at least adopted the theories outlined in the opinion. The Alaska Supreme Court cited *Spearin* with approval in 1970. In the case of *Hopkins Const. Co. v. Reliance Ins. Co, 475 P2d 223 (Alaska 1970),* the Court reversed a lower court ruling and ordered that judgment be entered in favor of a contractor that had simply followed plans and specifications. The contractor's customer had accused the contractor of faulty work because the floors in the Kodiak Inn squeaked. The customer had multiple suppositions for the cause of the squeaking floors, such as not putting the sub-floor nails at the proper angle when nailing. While citing to *Spearin*, the Court required that an owner in this case must specifically prove what part of the contract the contractor failed to do. The owner foolishly tried to rely on the simple fact that the floors squeaked, therefore the contractor did it wrong. The contractor won because it simply followed the plans and specifications. Even though the end product was faulty, the contractor was not at fault.

The Alaska Supreme Court expanded *Spearin* (kind of) in 1974 in *Northern Corporation v. Chugach Electric Association, 523 P.2d 1243 (1974).* Northern and Chugach got into a dispute about the costs relating to hauling rock. The Court acknowledged that the method of hauling rock was not addressed in the owner's original plans and specifications. However, subsequent to entering into the contract, the owner directed the contractor to complete the work in a specific manner by hauling rock across a frozen lake. The Court held that the implied warranty of fitness of an owner's plans and specifications applied to this subsequently given instruction by an owner. The Court did limit this extension such that it required a contractor to stop the work once it became apparent, or should have been apparent, that the owner's instruction would not work. When a contractor should have such knowledge is ripe for a classic battle of the experts.

The Spearin Doctrine Evolves.

Over the years, the *Spearin* doctrine has evolved into a discussion of whether the construction contract is a "plans and specifications" (a/k/a "performance") contract or an "end result" (a/k/a "design") contract. If a contract is a performance contract, then a contractor is safe if it just follows the plans and specifications (and timely notifies its customer of problems it does or should discover). A performance contract gives an owner the advantage of greater control over the end product, but the owner (or more likely its architects and engineers) must be competent to properly create plans and specify the intended construction. With a design contract, the owner losses some control over the end product, but can rest assured that the contractor will be responsible for problems in the finished product caused by the contractor's choice of materials and methods. This evolution of terms is merely a shorthand version of the *Spearin* doctrine.

The _Spearin_ Doctrine appears a wonderful weapon for a contractor

The Alaska Supreme Court recognized this performance contract vs. design contract distinction in *A.R.C. Industries, Inc. v. State, 551, p.2d, 951 (1976).* The contractor in this case tried to recover additional compensation from the state for the construction of a weir. The contractor encountered additional costs when it was required to install rip rap along one shore of the river which had become much deeper than was specified on the State's plans and specifications. The Court noted that it was the contractor's choice of the method to construct the weir and its choice of when to begin the project that made the riverbed deeper. Because the contractor "designed" these components of the project, the *Spearin* doctrine was not applied (although the Court reiterated that it would apply the *Spearin* doctrine if the facts were correct). The contractor should have informed the State of its intended logistics and tried to get the State to specify its logistics plan; it may then have been able to rely upon *Northern Corporation* to recover its additional costs.

The Court also recognized this performance contract vs. design contract distinction in *Lewis v. Anchorage Asphalt Paving Co., 535 P.2nd 1188 (1975).* Lewis hired the paving contractor to "prepare sub-grade" and pave streets. Shortly after completion, the streets became wavy, buckled, cracked and otherwise failed due to a sub-grade of peat and glacial till. In *Lewis,* the Court acknowledged the contractor's right to simply comply with the terms of the contract because it was a performance contract. All the contractor was required to do was grade and shape the existing soil material (this is what "prepare sub-grade" meant) and install the asphalt. Unfortunately for the contractor, the Court went on to note that while the contractor may simply follow the plans and specifications in a performance contract, the contractor still has a duty to point out to its customer when such plans and specifications are faulty. See also *Nordin Const. Co. v. City of Nome, 489 P.2nd 455 (Alaska 1971).*

Whose End is Sharpest?

At first blush, the *Spearin* Doctrine appears a wonderful weapon for a contractor. To keep the tip sharp, a contractor must do things right from the beginning. The multitude of *Spearin's* progeny have served to highlight some important and often skipped obligations of a contractor. Has the contractor examined and figured out obvious errors in plans and specifications? Has the contractor avoided entering into a "design" type of situation? Has the contractor timely notified its customer of problems with the contract plans and specifications? When contractors are careless, the trajectory the *Spearin* doctrine has taken since 1918 may hinder them rather than provide a weapon for getting paid.

If Alaska is in a boom, it is more likely that contractors, owners, architects or engineers may get sloppy. Keeping in mind the basic principals set out in the *Spearin* doctrine can keep all the parties involved in the construction process on the right track. If the boom causes some to mess up, then it will be the construction litigators who get to haggle over the concrete composition in the footings. We are happy to haggle, even before taking out the trash and fixing that cracked windshield.

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