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Project owners can effectively combat contractors' efforts to use the Spearin Doctrine as a sword with strategic planning beforehand

Contractors across the country can use the over 100-year-old *Spearin* Doctrine—which places liability for construction defects on the party who either mandates specifications or is given discretion—as an offensive weapon to recoup damages. Recent case law has been handed down that clarifies and sets forth scenarios when a contractor can use the *Spearin* Doctrine as a sword. Through careful planning, project owners and developers can draft construction contract terms and conditions that can effectively negate contractors' ability to utilize the *Spearin* Doctrine offensively in lawsuits.

Background

Defendant contractors or subcontractors have traditionally used the *Spearin* Doctrine as a shield to liability for the failure of a project's design. See *United States v. Spearin*, 248 U.S. 132, 136 (1918). The *Spearin* Doctrine provides that, when an owner provides mandatory design plans and associated specifications, an implied warranty attaches as a matter of law, and the contractor cannot be at fault when the design fails. *Spearin* also states that an owner cannot prevent a contractor from using the *Spearin* shield by including *general* contract clauses, such as broadly requiring the contractor to examine the site or check the plans pre-construction.

A majority of states have adopted the *Spearin* Doctrine, including Missouri. See *Penzel Constr. Co., Inc. v. Jackson R-2 Sch. Dist.*, 544 S.W.3d 214, 226 (Mo. Ct. App. 2017). *Penzel* recognized that the *Spearin* Doctrine is not limited to its original use as a shield; it can also be used as a sword by contractors against owners. In *Penzel*, the contractor's use of the *Spearin* Doctrine in its breach of contract claim resulted in a \$800,000 jury verdict award to the plaintiff contractor. The Missouri Court of Appeals affirmed this judgment. *Penzel Constr. Co., Inc. v. Jackson R-2 Sch. Dist.*, No. ED 108821, 2021 WL 3040984, at *27 (Mo. Ct. App. July 20, 2021), *reh'g and/or transfer denied* (Aug. 23, 2021). For additional discussion of *Penzel*, see [Missouri appellate court opens the door to Spearin claims by contractors against public entities \(thompsoncoburn.com\)](https://www.thompsoncoburn.com/blog/missouri-appellate-court-opens-the-door-to-spearin-claims-by-contractors-against-public-entities).

Drafting construction contracts to avoid the *Spearin* sword

Owners can avoid the *Spearin* sword by giving contractors contractual discretion or responsibility for the design. A recent federal court decision highlights how important it is for owners to carefully draft their contractual documents. In *BAE Sys. Ordnance Sys., Inc. v. Fluor Fed. Sols.*, LLC, No. 7:20-CV-587, 2022 WL 969773, at *16 (W.D. Va. Mar. 30, 2022), a defendant subcontractor brought a *Spearin*-based counterclaim against the plaintiff contractor. The *Spearin* counterclaim has so far survived, because the court found the contract terms were "ambiguous" as to who had responsibility for the design. For example, one contract term stated (emphasis added):

It is incumbent upon the Subcontractor to review the documents submitted and to perform their own analysis, including Hazard and Operability Studies and Life Safety Code Analysis. The Subcontractor shall be solely responsible for the design and all safety reviews and safety submittals with all required state and federal agencies.

The plaintiff attempted to isolate the single underlined phrase from the above provision to argue that the subcontractor had design responsibility; therefore, the subcontractor's *Spearin* claim should be dismissed. But, the court chose to view the underlined phrase in light of the *entire* provision and held that it was ambiguous as to whether the referenced responsibility related to design as a whole or only to safety-related design. The court also discussed seemingly contradictory terms throughout the contract. Owners cannot escape the *Spearin* sword simply by placing one sentence in a provision or an entire contract; their contract *as a whole* must consistently give the contractor at least some discretion or control over the design.

When owners leave no room for contractor discretion in constructing a project, they leave the door open to contractor-initiated *Spearin* claims. For example, if an owner's design specifications state that a certain named material or device is to be used as "the only approved" option or to be used "exclusively," the owner cannot avoid liability if that material or device causes a delay or failure. See *Christopher Glass & Aluminum, Inc. v. Tishman Constr. Corp. of Illinois*, 2020 IL App (1st) 191972-U, 70.

On the other hand, if a specification allows the contractor some amount—even minimal—discretion, it may be deemed a "performance specification" (as opposed to a "design specification") and the owner can avoid liability for a failure stemming from that specification. See *A.G. Cullen Const., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1157 (Pa. Commw. Ct. 2006). In *A.G. Cullen*, the owner successfully avoided the *Spearin* sword. The contract offered the names of two approved window manufacturers, but also expressly permitted the use of other manufacturers so long as they could provide windows "with equal performance characteristics." The contractor first attempted to purchase windows from one of the two "approved" manufacturers, but the manufacturer could not provide conforming windows. This resulted in a costly delay to the project. The court analyzed the language of the specification and concluded that the contractor was not bound to that one window manufacturer. Because the contractor *could* have chosen a different window system, the specification was a "performance specification," and, therefore, the owner could not be held liable for delay-related damages due to the contractor's choice of window manufacturer. Similarly, in *Ames Constr., Inc. v. Clark Cty.*, No. 218CV299JCMGWF, 2020 WL 3488736, at *5 (D. Nev. June 26, 2020), a contractor filed breach of contract claims against the owner after higher-than-expected water flow caused delays and resulting repairs to the project. The specifications provided an *estimated* water flow and it described the *result* it wished to achieve ("a dry construction site"), but it permitted the contractor to decide *how* best to achieve that result. Accordingly, the court granted summary judgment in favor of the owner. The key to owners avoiding liability under *Spearin*, therefore, is to expressly provide the contractor with discretion in the contract's design specifications.

Looking ahead

Recent decisions anticipate future discussion on the allowable reach of the *Spearin* sword. In *Tolliver Group, Inc. v. United States*, the Federal Circuit Court of Appeals deferred on an opportunity to limit the use of the *Spearin* sword. The contractor—as plaintiff—sought recovery for the legal fees it incurred in litigation that was based on technical manuals that it created for the government. The contractor made a *Spearin*-based argument that it should be allowed to recover costs from the government because it followed the government's design specifications. The trial court agreed and cited *Spearin*. However, the Court of Appeals ruled that the trial court should not have relied on *Spearin* because the contractor did not put the defendant on notice of its *Spearin* implied warranty claim. This decision highlights the importance of citing *Spearin* and relying on design specifications, not other specifications, if a party wishes to rely upon and utilize the doctrine.

The Federal Circuit explicitly noted that it was not ruling on whether the *Spearin* Doctrine could be used by a contractor seeking reimbursement for attorney's fees; rather, it was remanding the decision based solely on the trial court's lack of jurisdiction. The Federal Circuit left the door open to future discussion on this topic by noting, "the United States has raised significant questions about whether the *Spearin* doctrine applies here." *Tolliver Grp., Inc. v. United States*, 20 F.4th 771, 775 (Fed. Cir. 2021).

Recent and current litigation highlights the importance of carefully drafting clear construction contract terms and conditions on the issue of responsibility for design specifications by and between owners and contractors. Thompson Coburn's Construction Litigation practice group works closely with the firm's transactional attorneys to advise clients on drafting contracts that can avoid unnecessary exposure. Thompson Coburn will continue to follow the evolving case law on the *Spearin* Doctrine and analyze implications for its clients' contracts.

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