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Negligent Misrepresentation Exception to the  
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Recent court decisions evidence a positive trend to limit the negligent misrepresentation exception to the economic loss doctrine and the so-called Spearin implied warranty doctrine. Both doctrines, while conceptually distinct, have served to allow the assertion and recovery of substantial construction contractor claims that directly, or indirectly, impact the professional liability exposure of design professionals. These decisions—and the trend that they potentially represent—are important and should be understood by design professionals.

A. Third-Party Negligence Claims Against Design Professionals for Economic Loss

Whether third parties who have no privity or contractual relationship with a design professional may assert, and recover, on negligence claims for economic loss (not bodily injury or property damage) against the design professional has been a controversial issue over the last fifty years for the courts to address and resolve. Underlying this issue are a number of competing and conflicting policies and considerations regarding the legal duties owed by design professionals, and the parties to whom those duties are owed in the design and construction process and context. The ability of a claimant to assert a viable negligence claim depends upon—and presumes the existence and breach of a legal duty of—care owed to the claimant. Unquestionably, design professionals owe to their client (typically, the Project Owner) a duty to act with reasonable care and diligence in the performance of those services for which the client has engaged the design professional and subject to the terms of that engagement. The scope of services and other relevant terms and standards of

performance are defined in the contract between the client and the design professional.<sup>1</sup> The Owner-Design Professional contract typically includes provisions that the design professional perform its services as a representative—and for the benefit—of its client, and negates the implication of any duty, or third-party beneficiary obligations, owed to third parties.

It is generally recognized that the design professional performs its services in the context of a network of interrelated contractual and transactional relationships between the Project Owner and others, such as the general contractor, construction manager at risk, or their subcontractors (collectively the “Contractor”), in which rights, duties, obligations, risks, and remedies are respectively defined between the Project Owner and those other parties. These contractual terms are the product of negotiation between the Project Owner and the Contractor, and are intended to evidence their various agreements, including limitations on risks, rights, and remedies. Moreover, contracts between the Project Owner and those other parties explicitly allocate risks and responsibilities, sometimes on an exclusive basis (construction means and methods, and safety), and sometimes on a shared basis (differing or concealed site conditions).<sup>2</sup>

Given the foregoing background and the centrality of contracts in defining risk, rights, obligations and remedies among the various project participants in the design and construction process, courts have struggled with whether or not the law should impose a duty upon the design professional to act with due and reasonable care for the benefit of third parties, notably contractors.<sup>3</sup> In this area, courts grapple with a number of challenging conceptual and policy issues.

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<sup>1</sup> If the owner-design professional contract does not explicitly define the applicable standard of performance, the law implies that the design professional will be obligated to perform its services in accordance with the professional standard of care. Klein v. Catalano, 386 Mass. 701, 718-19 (1982). The common law functions, in the absence of a more specific contractual performance standard, as a “default” standard that may be stated as follows:

As a general rule, “[a]n architect’s efficiency in preparing plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one of that professional... . [I]n the absence of a special agreement he does not imply or guaranty a perfect plan or satisfactory result... ‘Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. ... Because of inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Klein v. Catalano, 386 Mass. 701, 718 (1982).

<sup>2</sup> For a discussion as to how these risk allocation provisions may impact professional liability exposure of design professionals, see, David J. Hatem, The Relevance and Potential Impact of Risk Allocation Provisions in Owner-Contractor Agreements on Professional Liability Experience of Design Professionals, Design and Construction Management Reporter (Donovan Hatem LLP, October 2003)

<sup>3</sup> The difficulty that the courts have in addressing and resolving this issue generically extends to third-parties claims against other professionals, such as accountants and lawyers. While many of the underlying legal concepts and policies are similar in dealing with the issue of third-party negligence claims against all such professionals, what is characteristically different about the design and construction process context is the predominance and centrality of a network of contractual relationships that typically and explicitly define and allocate (and/or negate or limit) risks, rights, obligations and remedies among the various parties (including the design professional and those third-parties, respectively) involved in the design and construction process.

- While a professional may owe a primary duty to its client (with whom it has a contractual relationship), a breach of that duty may cause economic damage to a foreseeable class of third parties. Should those third parties be able to pursue a negligence claim against the professional?
- How should that foreseeable class of third parties be limited to avoid exposing the professional to the risk of indeterminate liability exposure?
- Should third parties be allowed to pursue negligence claims against design professionals without regard for limitations of liability or other risk allocation provisions negotiated and contained within the Owner-Design Professional Contract? Would recognizing such a duty owed to, and right of action by, third parties impose upon the design professional obligations that exceed and potentially conflict with the roles, responsibilities, and primary duties and allegiances owed by the design professional to its client?
- In determining whether any such duties and claim rights should be established in favor of third parties, should the respective provisions contained in (i) the design professional's agreement with its client, and (ii) the third party's contract with any other party, be determinative, consultative, or otherwise relevant?

All of these issues are critically important in the context of third-party negligence claims against design professionals seeking recovery of economic damage.

In some claim scenarios, a third party alleges that it was economically damaged as a result of its reasonable reliance upon information negligently prepared or furnished by the professional pursuant to a contract between the latter and its client. In the design and construction context, for example, a contractor may allege that it sustained economic damage due to its reasonable reliance upon subsurface data negligently prepared or furnished by a geotechnical engineer pursuant to the latter's agreement with its client (typically, the Project Owner or another prime design professional).<sup>4</sup>

#### A.1 The Economic Loss Doctrine

As a general matter, the economic loss doctrine precludes recovery by a third party based on the negligence of a professional in the performance or discharge of duties owed by the latter to its client. In various forms, and to varying degrees and extents, the economic loss doctrine has been adopted in many jurisdictions in the United States. As has been noted by an authority in this area, "Courts divide on the application of the [economic loss doctrine], but it has been applied in several jurisdictions to limit actions by participants in the construction process against architects and engineers, typically, for negligent design or supervision." J. Feinman, Professional Liability to Third Parties (American Bar Association, Second Ed. 2007), page 26. ("Feinman").

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<sup>4</sup> See e.g., M. Miller Co. v. Central Contra Costa Sanitary Dist., 18 Cal. Rptr. 13 (Ct. App. 1962); Texas Tunneling Co. v. City of Chattanooga, 204 F. Supp. 821 (E.D. Tenn. 1962), rev'd in part, 329 F. 2d 402 (6th Cir. 1964); Nota Construction Corp. v. Keyes Associates, 45 Mass. App. 15 (1998).

Especially in the design and construction context, the rationale for the economic loss doctrine is predicated upon the sound proposition that rights, responsibilities, obligations, risks, and remedies by and between project participants primarily and predominantly should be defined and enforced according to the terms and limitations set forth in their respective contracts, and those terms and limitations should not be circumvented or subverted by the general judicial application of the law of negligence in the third-party liability context .<sup>5</sup> As Feinman has stated:

“The construction process presents one of the most complex settings in which third-party professional liability cases arise. ...

Every construction project in which a claim against a third party may arise is characterized by an extensive set of intertwined relationships. These relationships originate in the parties’ contracts; the owner contracts with the design professional and the general contractor, the general contractor engages subcontractors, and the subcontractors contract with suppliers, for example. Each contract is likely to contain complex terms about performance obligations that contemplate the performance of other participants in the project. The Owner’s agreement with the Architect, for example, may specify the extent of the Architect’s duty to coordinate or supervise the work of Contractors and Subcontractors, and the agreements of the Contractors and Subcontractors in turn may specify the duty to cooperate and to submit to the Architect’s control. These contracts may also contain risk allocation terms, defining the scope of liability to contracting parties and other participants, either in detail or by a general provision or limitation. ...

The law’s role in this process is to support the parties private ordering by using contract law to interpret and enforce their contracts. In defining obligations and allocating risks and benefits, the parties create expectations. The function of the law is to fulfill those expectations by enforcing the contracts as the parties have made them. It is inappropriate for the courts to impose liability outside the contracts, as through tort [i.e. negligence] law. Tort law is better suited to the redress of accidental physical harm than to the regulation of the kind of consensual economic relationships present in the construction process. If the courts were to impose liability, you would upset the parties’ own allocation of rights and duties, diminish their ability to regulate their own affairs, and introduce inefficiencies into the process. A particular concern is the threat of indeterminate liability; when the parties cannot accurately predict to whom and for what they will be liable, it is impossible for them to plan appropriate for performance and risk in the course of construction. ...

Among all the areas of professional liability, the contractual approach to third-party liability is particularly well suited to construction industry cases. Participants in the construction process typically do use extensive contracts to form their relationships. Both at the level of the trade groups which promulgate form contracts and the individual transaction for which the parties negotiate a unique contract, serious allocation of the costs and benefits of the construction process, including the costs and benefits of contracting with respect to risk, characterize the contracting process.” Feinman, supra, pp. 276, 278.

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<sup>5</sup> See e.g., Blake Construction Co. v. Alley, 353 S.E. 2d 724, 727 (Va. 1987); Berschauer/Phillips Const. Co. v. Seattle School District No. 1, 881 P. 2d 1986 (Wash. 1984).

## A.2 Negligent Misrepresentation Exception to Economic Loss Doctrine

The Miller and Texas Tunneling cases were two of the earliest cases charting the course for the so-called negligent misrepresentation exception to the economic loss doctrine, under which third-party claims predicated upon allegations that a design professional negligently prepared or furnished information (subsurface data, site condition, survey results) could provide the foundation of an actionable negligence claim for economic damage against the design professional.

In Miller, the Court allowed an action by a contractor on a sewer project against the engineer who conducted the soil tests, and provided a report, on which the contractor relied, for bidders on the project. During construction, it was determined that the material underlying the construction site was unstable in a manner not indicated in or anticipated by the subsurface report, resulting in the contractor's performance costs being greater than it had projected at the time of bid. The Court held that the contractor stated a viable negligence claim against the soil engineer because the engineer was determined to know that its report would be relied upon by prospective bidders.

In Texas Tunneling, a subcontractor was allowed to assert a claim against an engineer on a sewer project based on allegations that the bid documents failed to include certain information about test bore drillings, and that the subcontractor therefore underestimated its performance costs. The Court held that an action for negligent misrepresentation was available to the subcontractor.

Currently, in applying this negligent misrepresentation exception to the economic loss doctrine, most courts apply the formulation set forth in the Restatement (Second) of Torts, Section 552, which states:

“§ 552. Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information...”

Contractors and other third parties (not in privity with the design professional) have sought to expand the negligent misrepresentation exception on the theory that not simply negligently-furnished information, but also negligently-furnished designs, reports, or other communications expressing or evidencing exercise of professional interpretation, application, judgment, or opinion should form the basis of actionable negligent misrepresentation claims for economic damage by a contractor against the design professional. Notably, under such an expanded theory of liability, a contractor may seek to recover economic damage against a design professional on the basis that the latter's negligently-prepared design contained errors or other deficiencies that delayed or increased the contractor's cost of performance.

### A.3 Recent Court Decisions

Certain recent court decisions evidence a more specific focus and analysis regarding the scope and application of the negligent misrepresentation exception to the economic loss doctrine, resulting in more constraint in recognition of third-party claims against design professionals. More specifically, these decisions concentrate on the underlying basis of the alleged negligent misrepresentation in the context of the §552 Restatement formulation. Is the alleged misrepresentation one of information (as literally and explicitly required by §552 of the Restatement), or some other communication or work product attributable to the professional's performance, including the exercise or expression of professional interpretation, judgment, opinion, or design?

Two recent (non-appellate) court decisions are instructive in this regard—Delaware Art Museum v. [Architectural Firm], 2007 WL 2601 472 (D. Del. 2007) (“Delaware Art”), and KDK Enterprises, Inc. v. [Architectural Firm], Commonwealth of Massachusetts, Middlesex Superior Court, Civil Action No. 04-1305, Memorandum of Decision and Order, June 1, 2006 (“KDK”).

In the Delaware Art case, the Museum asserted a negligent misrepresentation claim against an engineering consultant (the "Engineering Consultant"), with whom it had no contract (the Engineering Consultant had contracted with the Project Architect which, in turn, had a contract with the Museum). The Engineering Consultant filed a motion to dismiss on the basis that the economic loss doctrine barred the Museum's claims against it. In opposing that motion, the Museum relied upon the negligent misrepresentation exception to the economic loss doctrine. According to the Museum's allegations, the Engineering Consultant “produc(ed) drawings that resulted in incorrect clearance heights for ceilings, structural steel with insufficient support, mechanical rooms that are inaccessible to maintenance personnel, and other material flaws and inefficiencies.” The Museum contended that these deficiencies were the result of the Engineering Consultant's negligence, and resulted in additional project costs to the Museum.

The Federal District Court dismissed the Museum's claims, stating:

“[The Museum] does not dispute that only economic damages are claimed. Accordingly, in order to survive a motion to dismiss, [the Engineering Consultant] would have to fall within the exception to the Economic Loss Doctrine [under Section 552 of the Restatement].

For a ... defendant to be considered in the business of supplying information [under Section 552 of the Restatement], a ‘case-specific inquiry’ must be made, ‘looking to the nature of the information and its relationship to the kind of business conducted.’... When information is the ‘end and aim’ product of a defendant's work, Delaware Courts have found the potential for liability. ...

A designer's end product is considered to be the tangible of their design ... thus, 'the provision of plans and design drawings used to construct the project do not constitute the business of supplying information.'...

As a class of defendants, engineers fall on both sides of the §552 exception as their 'business has dual purposes, one of which may shield them from liability, the other of which may expose them to liability.'... The mere provision of calculations, specifications or reports for a project will result in an engineer being considered a pure information provider. ... When an Engineer's responsibility involves more, such as designing components of a project, however, his role will not fall within the exception to the economic loss doctrine. ...

In the present case, it is clear from the pleadings that [the Engineering Consultant] was responsible for designing particular components of the renovation and expansion of the Museum, and as such, did not act as a pure information provider. [The Museum's] complaint states that [the Engineering Consultant] 'produc[ed] drawings that resulted in incorrect clearance heights for ceilings, structural steel with insufficient support, mechanical rooms that are inaccessible to maintenance personnel and other material flaws and inefficiencies.'... As a party responsible for the design of certain components of the renovation and expansion of the Delaware Art Museum, [the Engineering Consultant's] 'end and aim' was to provide [the Museum] with certain completed systems that they designed, and any information provided was ancillary to the same."

KDK involved a negligence claim for economic damage by a subcontractor against an architect, which was under contract with the Project Owner. The subcontractor claimed that, while the project specifications prepared by the architect called for a "Level 4" drywall vertical surface, the architect required during the punch list process that the subcontractor achieve a Level 5 drywall surface. Thus, according to the subcontractor, the architect's specification calling for a Level 4 drywall vertical surface constituted a negligent misrepresentation. In rejecting and dismissing the subcontractor's claim against the architect, the Massachusetts Superior Court stated:

"KDK is seeking recovery from [the Architect] for purely economic loss. However, KDK and [the Architect] are not in contractual privity. Therefore, the Economic Loss Doctrine is applicable to the claims. The Economic Loss Doctrine, which is recognized in Massachusetts, prohibits recovery on negligence claims for purely economic loss where there is an absence of contractual privity. ... However, a narrow exception to the Economic Loss Doctrine has been carved out for claims of negligent misrepresentation. ... In other words, a complainant may recover his economic losses from one who has made a negligent misrepresentation to him, even in the absence of contractual privity. ... Thus, the critical question before the Court is whether KDK has a reasonable expectation of proving the essential elements of a negligent misrepresentation, in view of the undisputed facts set forth in the summary judgment record. ...

To recover for negligent misrepresentation, a plaintiff must prove that the defendant (1) in the course of his business (2) supplied false information for the guidance of others, (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others, (5) by their justifiable reliance upon the information, and (6) with failure to exercise reasonable care or competence in obtaining or communicating the information. ...

The Court is mindful of the notion that an Architect may not escape liability for a negligent misrepresentation merely because he is not in the business of supplying specific information for the guidance of others. ... However, false information in an Architect's plans and specifications is only actionable as a misrepresentation if the information concerns a matter that is 'susceptible of actual knowledge.'... In other words, information provided by an Architect in plans and specifications that concerns a matter of judgment is not actionable as a misrepresentation. ...

KDK's claim of negligent misrepresentation is premised on the specification calling for a Level 4 drywall surface in view of the other specifications set forth in the Contract Documents. In essence, KDK argues that had [the Architect] exercised due care, [the Architect] would have realized that a Level 4 drywall surface would not achieve a satisfactory surface finish in combination with the required painting and lighting specifications. The determination as to what combination of drywall surface would produce an acceptable surface finish in view of the painting specifications and critical lighting requirements is, in the view of the Court, a matter of judgment. It is a specification upon which the Architect is asked to render his professional opinion, given his education, training, and experience. It is not akin to a statement concerning the location and quality of subsurface ledge, or the description of an area of land for construction of a road. Having premised its negligent misrepresentation claim on specifications concerning a matter of judgment, rather than on specifications that are susceptible to actual knowledge, KDK's claim fails as a matter of law. ...

KDK's reliance on Alpert v. Commonwealth, 357 Mass. 306 (1970) is unavailing. In Alpert, the Court noted 'where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended.' ... However, the specification at issue in Alpert also concerned a matter susceptible of actual knowledge. It involved a positive representation as to the amount of unsuitable material that [the excavator] could expect to encounter. ... The Department of Public Works set forth a figure in bidding specifications that was based on allegedly deficient boring tests that the Department had completed. Unlike the specifications here, which concern a matter of judgment, the specifications in Alpert were susceptible of actual knowledge. ...

Moreover, according to the Court in Klein v. Catalano, 386 Mass. 701, 719 (1982), an Architect does not generally warrant that his work is fit for its intended purpose. Rather, an Architect impliedly promises to exercise a standard of reasonable care that is required of members of his profession. ... The Klein Court concluded that the plaintiff's claim against an Architect for breach of an implied warranty was tantamount to a claim for professional negligence. ...

Therefore, to the extent that KDK's claim concerns the failure of [the Architect] to exercise reasonable care in determining what level of drywall surface would produce an acceptable surface finish, in view of the painting and critical lining specifications, the claim actually amounts to one in negligence and, as previously discussed, it is barred by the Economic Loss Doctrine."

The Delaware Art and KDK decisions provide support for the opinion that the negligent misrepresentation exception to the economic loss doctrine does not apply in circumstances in which the alleged misrepresentation relates to communications, (representations of non-factual and non-informational subject matter), but rather involves representations reflective or expressive of professional opinion or judgment, such as design (rather than pure objective fact or information), or if the representation relates to a design process (construction documents reflective or expressive of the exercise of professional acumen, judgment, skill, or opinion) intended to achieve an end result (a completed construction project). These are important and positive distinctions and limitations on the negligent misrepresentation exception. S. Stein, Construction Law, ¶5A.06[4], at 5A-83 (Matthew Bender & Co. 2006).

#### B. Spearin Implied Warranty Doctrine

The Spearin implied warranty doctrine typically and primarily has been utilized in the context of competing claims between Project Owners and contractors. However, to the extent that a contractor's implied warranty claim against the Project Owner is based upon alleged deficient design, or other work product or services of the design professional, it is likely that the Project Owner may assert negligence or indemnification claims against the design professional arising out of the contractor's underlying claim. See D.J. Hatem, (ed), Subsurface Conditions, (Wiley 1998), ¶¶10.2.4, 10.2.5. Thus, even though design professionals typically are not directly a party in implied warranty claims, there is a distinct likelihood that such claims involving the design professional's services may give rise to negligence or indemnity claims by the Project Owner against the design professional. As such, the scope and contours of the Spearin implied warranty doctrine impact the potential professional liability risk exposures of the design professional.

The origin of the implied warranty doctrine is the landmark United States Supreme Court case of United States v. Spearin, 248 U.S. 132 (1918). In that case, detailed plans and specifications issued by the Government required the contractor, Spearin, to excavate the site and to relocate and reconstruct a six foot brick sewer line that intersected the site. The contract documents did not disclose the existence of a dam on the site. Spearin had no knowledge of the dam and performed its work in accordance with the requirements of the plans and specifications. After construction of the new sewer, the dam (which was located in a connecting sewer) caused the new sewer to burst. The Supreme Court ruled that the Government impliedly warranted the accuracy of plans and specifications that it issued to the contractor and, given the inaccuracy contained therein regarding the existence of the dam, the Government could not hold the contractor responsible for the cost of repairing the damage.

As the case law has evolved since the Spearin decision, courts have recognized that the Spearin implied warranty doctrine encompasses two distinct implied warranties: (1) a warranty that site conditions exist as represented or indicated by the Project Owner in the contract documents (the “warranty of accuracy”); and (2) a warranty that if a contractor follows detailed plans and specifications furnished by the Project Owner, the result will be a completed project suitable to the use as it was intended (the “warranty of suitability”). Stein, Construction Law, §18.02 (Matthew Bender & Company, Inc. 2006).

A point of controversy and uncertainty in the Spearin implied warranty doctrine relates to its applicability in claim scenarios in which the focus is not an inaccurate representation of existing site conditions or deficiencies in the suitability of the completed project (the end result), but a distinct scenario in which the contractor claims that it incurred delays or additional performance costs due to defects in Owner-furnished detailed design and construction documents. In other words, does the Spearin implied warranty doctrine apply in the context of a contractor implied warranty claim seeking recovery of delay damages or additional performance costs rather than recovery (or avoidance of responsibility) for unanticipated (inaccurately represented) site conditions or costs of correction for some defect (or other unsuitability) in the attainability of the final and completed project work?

Although Spearin was initially used in the defensive context by a contractor (to avoid performing or paying for corrective work), that original application was later expanded to utilize Spearin as the basis for offensive claims by contractors against Project Owners based on defects in owner-furnished detail design which result in a failure of the completed project to achieve the intent or objective of the owner-furnished project design. For example, in Big Chief Drilling Co. v. United States, 26 Ct. Ct. 1276, 1304 (1992), the Court stated that if defective design specifications issued by the Project Owner prevent or delay completion of the contract, the contractor is entitled to recovery damages for the Owner’s breach of the Spearin implied warranty obligation. In that case, the Court stated that it is well established that the Owner warrants the adequacy of design to the extent that compliance with that design will result in “satisfactory performance.” In circumstances in which a contractor is delayed or incurs additional cost due to design deficiencies, the contractor is allowed to recover additional costs resulting from delay due to such design deficiencies.

In the case of PCL Construction Services, Inc. v. United States, 47 Fed. CL 745 (2000), the United States Court of Federal Claims rejected a contractor’s claims of breach of implied warranty with respect to Government-furnished specifications. In that case, the Court stated:

“The warranty of government specifications, also sometimes referred to as the ‘Spearin doctrine,’ provides that if the Government furnishes specifications for the production of construction of an end product and proper application of those specifications does not result in a satisfactory end product, the contractor will be compensated for its efforts to produce the end product, notwithstanding the unsatisfactory results. ... PCL’s focus on the performance of the

contract appears to try to expand the Spearin doctrine, which focused on the final product of the contract, rather than on the contractor's performance. It is established in Government contract law that the Government warrants the performability of the design specifications. ...

It is also well-established that a contractor cannot prevail by showing that the specifications were less complete than it would have preferred. The Courts and Board of Contract Appeals have repeatedly rejected the notion that the Government is liable for difficulties encountered by a Contractor because performance specifications supplied by the Government were insufficiently detailed to enable the Contractor to perform the contract in an efficient or profitable manner. ...

Contrary to PCL's assertions that [the Government's] fixed price contract carried with it assurances regarding the 'standard of care' used to design the project and the degree of certainty which was implied by the term 'estimated' in the drawings, there can be no doubt that PCL assumed substantial risk pursuant to the contract, especially because the contract was largely a performance specification and it was indicated regarding the design provided that supplementation was required. Although this contract, along with any contract that contains a changes and differing site conditions clause, whether fixed-price or not, guaranteed PCL that it would be compensated for costs incurred as a result of Government-directed contract changes and, for example, for material differences between the subsurface conditions depicted in the contract and encountered in the field, it is well-established that 'absent unusual circumstances, a fixed-price contractor ... shoulders the responsibility for unexpected losses, as well as for his failure to appreciate the problems of the undertaking.'...

This contract required the successful awardee to construct a complex set of structures in a logistically difficult site in a relatively short period of time. PCL knew this, or should have known this, when it submitted its proposal, and recognized that this project was going to be challenging. It, therefore, should have been evident to PCL that its proposal preparation demanded an especially careful evaluation of the solicitation. ...

Thus, with regard to whether USBR's design was defective, and not as detailed and complete as PCL would have preferred, the level of detail and completeness was readily ascertainable by a bidder performing a detailed bid estimate, as PCL did. Therefore, PCL 'took a calculated risk, the unfortunate consequence of which it must now bear alone.'...

Here, PCL's contractual responsibilities included coordinating and implementing a large array of tasks related to the construction of the project, the preparation of a large number of contracts, submissions and schedules, documentation of construction activities, oversight and inspection, and quality control to insure that its work was contractually compliant. PCL was obligated to perform these activities at a complex and difficult site within a specified time frame. Moreover, PCL was explicitly informed that its obligations would be governed by a contract package containing estimated information, that the contract package was imperfect, and that a contract package would be supplemented and refined as necessary during construction. All of these facts were fully disclosed to PCL during the bid preparation period, and USBR's specifications and drawings that were part of the solicitation, and these facts, were reiterated for all bidders at USBR's pre-bid conference. After reviewing the extensive evidence presented at trial through the witnesses and the voluminous exhibits, the court finds that the plaintiff's claim for breach of warranty is unsupported."

More recently, the Supreme Court of Ohio also grappled with the boundaries of the Spearin implied warranty doctrine. In Dugan & Meyers Construction Co., Inc. v. Ohio Department of Administrative Services, 113 Ohio St. 3d 226 (2007), a Contractor asserted a claim against a Project Owner for additional performance costs and delays due to inaccurate, defective, and incomplete plans issued by the Project Owner. During the progression of the legal dispute, a Court-appointed referee, relying upon the Spearin implied warranty doctrine, recommended that the contractor be awarded damages for the “cumulative impact” of the excessive number of design changes required during construction. The referee ruled that under the Spearin implied warranty doctrine, a contractor has a contractual right to expect complete, accurate, and buildable plans and may recover its damages resulting from the Owner’s failure to meet the contractual obligation.

The Supreme Court of Ohio rejected the Referee’s decision, ruling:

“Dugan & Meyers raises as its primary issue the question whether a construction-law doctrine known as the Spearin Doctrine is recognized in Ohio and, if so, the parameters of the doctrine. Dugan & Meyers suggests that an Owner of a competitively-bid construction project impliedly warrants that the plans issued are buildable, accurate, and complete and that a contractor may recover damages if the Owner breaches that implied warranty, resulting in delay or increased cost to complete the contract. ...

Spearin involved the existence of a site condition that precluded completion of the construction project. Ohio courts have recognized that the ‘Spearin Doctrine holds that, in cases involving Government Contracts, the Government impliedly warrants the accuracy of its *affirmative indications regarding job site conditions*.’ ... In contrast, the case before us concerns the allocation of damages flowing from *delay* in completion of a construction project due to plan changes. Despite the interest in the Spearin Doctrine and the arguments of counsel from the various amici, we decline the opportunity to extend the Spearin Doctrine from job-site conditions cases to cases involving delay due to plan changes. The Court has long recognized that ‘where a contract is plain and unambiguous, it does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto and a corresponding advantage to the other [and] that it is not the province of courts to relieve parties of improvident contracts.’...

The Contract in the case at bar contained several relevant provisions, which were valid under Ohio law when the contract was signed. ... The Contract also contained a no-damages-for-delay clause, which provided that ‘extension of time granted ... shall be the sole remedy which may be provided by the Department.’...

In the case at bar, even if the plans required more changes than originally contemplated, the Contractor established a detailed procedure to be followed for all changes. In order to hold in favor of Duggan & Meyers, we would need, first, to find that the State had implicitly warranted that its plans were buildable, accurate, and complete, and, second, to hold that the implied warranty prevailed over expressed contractual provisions. To do so, would contravene established precedent, which we will not do.

Our decision is in accord with numerous decisions throughout the country. ...”

A Justice of the Supreme Court issued a dissenting opinion, stating:

“I dissent. This case calls for an application, not an extension, of [Spearin]. As in all Spearin Doctrine cases, the fault in this case lies with the Owner’s plans. It requires no leap to find that the State implicitly warranted that its plans were buildable and that that warranty prevailed over general contract provisions. An Owner’s plans and specifications must be reliable for the contractual process to work. The 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.

In Spearin, the Contract at issue required the Contractor relocate a section of sewer piping as part of the construction of a dry dock. ... Neither the Government, nor Spearin was aware that the design of the existing sewer system caused a large amount of water to be diverted into the pipe that was to be replaced during periods of heavy water flow. ... Spearin complied with the Contract requirements for the relocation of the sewer pipe, including the location, dimensions, and materials required by the Government.

The relocated sewer line proved inadequate and burst in several places after a heavy rainfall, flooding the excavation for the dry dock. ... Spearin refused to continue working on the project until the Government rectified the sewer-line situation. ... The Government argued that the responsibility of remedying existing conditions rested with the Contractor. ... Because Spearin refused to restore the sewer and continue work, the Government annulled the Contract. ...

Spearin sets forth the general rule of law that the Contractor usually assumes the risk of work-site conditions. ...

But when the Contractor’s difficulties are a result of faulty specifications by the Government, the burden changes. ...

Under Spearin, construction changes caused by unexpected site conditions remain the responsibility of the Contractor. But when the Government’s plans themselves are the cause of turmoil, things change:

‘Justice Brandeis recognized [in Spearin] that a Contractor might well agree to assume risks relevant to design. By stating in his opinion that one who undertakes to erect a structure upon a particular site ‘assumes ordinarily the risk of subsidence of the soil,’... Justice Brandeis recorded the obvious assumption that the Contractor’s responsibility for Contract completion begins where the Owner’s detailed design ends. In essence, the Court recognized that the Contractor’s right to recovery for the Owner’s breach of its implied warranty of the adequacy of design was conditioned upon the Contractor’s reasonable reliance upon the Owner’s defective design in preparing its bid and in doing the work.’ 3 Bruner & O’Connor on Construction Law (2002), Section 9:78. ...

Here, the principal cause of the delay, as determined by the finder of fact, was ‘an excessive number of errors, omissions and conflicts in the design documents furnished to bidders by the State and incorporated into [Dugan & Meyer’s] Contracts.’ There were no shifting sands, no acts of God, no surprising aquifers. As in Spearin, the designs themselves were the root of the problem. Here, the Contract contained procedures for dealing with design problems, but like the overburdened sewer pipe in Spearin, the procedure buckled under the torrent of required design changes.”<sup>6</sup>

### C. Conclusion

The recent Court decisions discussed in this article demonstrate a willingness—and perhaps a trend—by courts to pull back on the reigns of two legal bases that have served as significant predicates of third-party negligence claims for economic damages against design professionals.

These decisions need to be understood and publicized, as they provide sound reasoning for limitations of the economic loss and Spearin implied warranty doctrines, particularly in the context of third-party professional liability claims against design professionals.

The Delaware Art and KDK decisions draw important distinctions that derive from the nature of the source of the alleged actionable conduct—the distinction between (i) objective or informational sources, and (ii) representations or other communications of professional opinion, interpretation, judgment, or the application or expressions of same, in design or contract documents. According to the reasoning of these decisions, objective or informational sources may provide the basis of actionable negligent misrepresentation claims, while representations or other communications do not. Dugan & Meyers, in applying the Spearin implied warranty doctrine, focused on the representations of site conditions and design expressions, with the latter forming the basis of an actionable claim by a contractor only if a design defect is produced in the end product or completed construction, or negatively impacts the contractor’s ability to achieve the end result in a completed form suitable with the intent of the design.

In effect, these decisions, taken together, appear to be indicating a view that—outside the specific context of indicated or represented (and non-disclaimed) site conditions—contractors should be responsible for the cost of performing their work and achieving the end result, with entitlement (if any) to additional time or compensation governed by the terms of the contract between the contractor

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<sup>6</sup> See M. Schneier, No-Damages-For-Delay Clause Precludes a Contractor’s Recovery of Delay Damages Under the Implied Warranty of Design, 28 No. 6 Construction Litigation Reporter 5 (2007) (stating that Dugan & Meyers made clear that, under the Spearin implied warranty doctrine the government [only] impliedly warrants the accuracy of its affirmative indications regarding job site conditions; the doctrine does not apply to a claim of delay damages caused by defective design, where the design itself was buildable).

and the Project Owner. Similarly, a contractor's entitlement to cost, or time impact associated with differing or concealed site conditions, should be governed by the risk allocation (differing terms, including any concealed conditions provisions) and other disclaimers contained in the contract between the Project Owner and the Contractor.<sup>7</sup> These are fundamentally sound principles that recognize the centrality of contracts in defining and allocating performance, cost, time, site condition, and other risks between them. Those same principles should extend to preclude—by reasonable limitation and application of the negligent misrepresentation exception to the economic loss doctrine—third-party claims against design professionals. Third parties should not be allowed to circumvent and subvert their contractually-accepted risk by the assertion of negligent claims for economic damage against design professionals, and courts should not countenance such tactics.

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<sup>7</sup> See, e.g., S&M Constructors, Inc. v. City of Columbus, 70 Ohio St. 2d 69 (1982) (holding that specific contractual disclaimers for accuracy of site conditions preclude recovery under more general Spearin implied warranty doctrine).

**David Hatem** is a Founding Partner of the Boston-based law firm, Donovan Hatem LLP. He leads the firm's Professional Practices Group, which represents engineers, architects and construction management professionals. Attorney Hatem is nationally recognized for his expertise in law related to the design and construction industry. He is regularly called upon by this country's leading architect and engineering firms to provide procurement advice to public owners contemplating major projects and to propose risk management strategies, and solutions, especially on major subsurface projects.

Throughout his career, Attorney Hatem has dominated the representation of consulting engineers and construction managers, providing services to major Boston-area construction projects, including: the Massachusetts Water Resources Authority's Boston Harbor Cleanup Project, and its Metrowest Tunnel Project; the Massachusetts Highway Department's Route 3 Design-Build Project; the Massachusetts Bay Transit Authority's Greenbush Project; and, most prominently, the Massachusetts Transit Authority's Central Artery/Tunnel Project. In addition, Attorney Hatem has been retained by professional liability insurers under Owner-Controlled Insurance Programs to represent engineering consultants and construction program management professionals on major underground projects throughout the United States, including New York City's East Side Access Project and Second Avenue Subway Project, L.A. Metro's Red Line and East Side Extension Projects, Seattle's Sound Transit Project, Milwaukee Metropolitan Sewage District's Deep Tunnel Project, Dallas' DART Light Rail Transit Project and Houston's Rapid Transit Project. Attorney Hatem is presently providing risk management/insurance advice regarding a proposed professional liability OCIP Program for the Second Avenue Subway Project in New York.

Attorney Hatem frequently lectures on issues of professional liability for design and construction management professionals, risk management, and Design-Build procurement issues, and he has authored numerous related articles. Attorney Hatem also teaches a course at Tufts University, "Legal Aspects of the Engineering Process."

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## About Donovan Hatem

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