



NATIONAL CONSTRUCTION DEFECT CONFERENCE



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Separating Fact from Fiction for Stakeholders: Common Design Professional and Contractor (and even Insurer) Misconceptions



Moderator:
Anthony D. Capasso, Esq.
*Murphy Schiller
& Wilkes LLP
Newark, NJ*



Tom Gesner, CRIS
*Vice President
Construction Defect
Applied Claims Group
Dover, NH*



Christopher Ling
*AIA, NCARB, LEEDap
The Vertex Companies
New York, NY*



James Liskow, Esq.
*DeCaro, Doran, Siciliano,
Gallagher & DeBlasis, LLP
Bowie, MD*



Tristen Pomerance, Esq.
*Legally Built
Calgary, AB, Canada*



Misconception #1

All Construction Defects Can Be Blamed On the Contractor(s)

Sometimes YES

- Owner/Developer/Design Team Position
- Patent deviations:
 - Design documents (e.g., PPV-SOE)
 - Manufacturer instructions (e.g., CPVC/DHWS inadequate cure)



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Misconception #1 (cont'd)

All Construction Defects Can Be Blamed On the Contractor(s)

Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.

\$400M Design-Build Hospital [2015 BCCA 347]

- Flat-plate concrete slab over-deflection & cracking > \$20M repair & damage
- Slabs structurally sound, but functionally deficient (e.g. uneven floors)
- Appeal Finding: CD caused by defective workmanship/construction (defective formwork & re-shoring), *not design*

Duty to Warn: Expanding Scope of Contractor Standard of Care?

- ***Nowlan v. Brunswick Construction Ltd.***



Misconception #1 (cont'd)

All Construction Defects Can Be Blamed On the Contractor(s)

Sometimes NO

- **Design Defects**
 - Spearin Doctrine
 - Implied duty on Owner for design defects.
 - Breach of Standard of Care
 - E.g., ADA/FHA/Codes and Standards
 - Detail (e.g., acoustics)



Misconception #1 (cont'd)

All Construction Defects Can Be Blamed On the Contractor(s)

Greater Vancouver Water District v. North American Pipe & Steel

Major water transmission infrastructure project [2012 BCCA 337]

- Owner designed supply & installation of steel pipe to meet AWWA or alternative superior standard. NAPS/Supplier express warranty for design defects
- CD: Coating delaminated & disbond > corrosion & water leak risk
 - **Appeal:** NAPS liable. Owner approval *not* determinative
 - Contractor assumed liability for Owner design defect because express guarantee despite no fault/built to spec

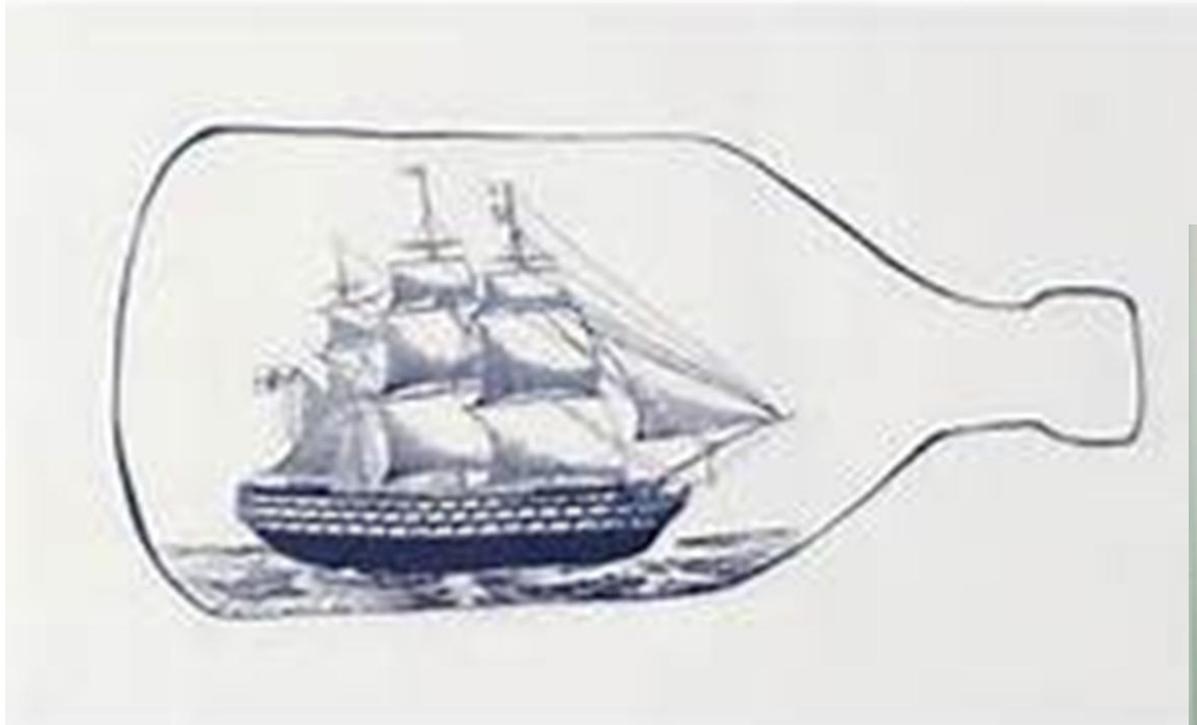
Design Coordination vs Construction Coordination



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Design vs Means and Methods



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Design Standard of Care



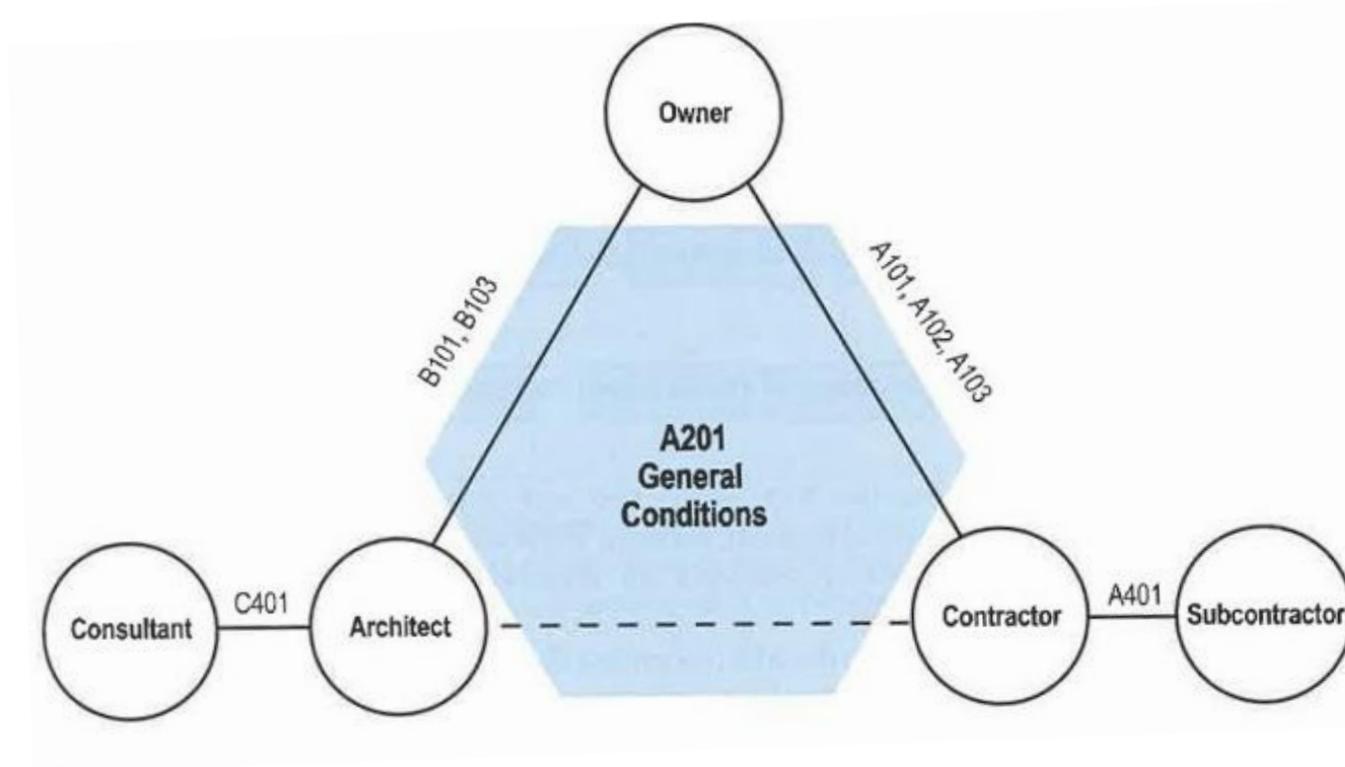
Spearin Doctrine

United States v. Spearin

"...the holding in Spearin provided that the owner impliedly warranted to the general contractor that the plans and specifications to be followed by the general contractor would enable the general contractor to produce the desired improvement."

United States v. Spearin, is a 1918 [United States Supreme Court](#) decision

Contract Forms (AIA Family)



- C. Adhesive: Contact adhesive recommended in writing by pedestrian traffic-coating manufacturer.
- D. Reinforcing Strip: Fiberglass mesh recommended in writing by pedestrian traffic-coating manufacturer.

PART 3 - EXECUTION

3.1 EXAMINATION

- A. Examine substrates, areas, and conditions, with Installer present, for compliance with requirements for surface smoothness, surface moisture, and other conditions affecting performance of pedestrian traffic-coating work.
- B. Verify that substrates are visibly dry and free of moisture.
 - 1. Test for moisture content by method recommended in writing by traffic-coating manufacturer.
- C. Prepare written report, endorsed by Installer, listing conditions detrimental to performance of pedestrian traffic-coating work.
- D. Proceed with installation only after substrate construction and penetrating work have been completed and unsatisfactory conditions have been corrected.
 - 1. Begin coating application only after minimum concrete-curing and -drying period recommended in writing by traffic-coating manufacturer has passed and after substrates are dry.
 - 2. Application of coating indicates acceptance of surfaces and conditions.

3.2 PREPARATION

- A. General: Before applying pedestrian traffic coatings, clean and prepare substrates according to ASTM C 1127 and manufacturer's written instructions to produce clean, dust-free, dry substrate for traffic-coating application. Remove projections, fill voids, and seal joints if any, as recommended in writing by traffic-coating manufacturer.
- B. Schedule preparation work so dust and other contaminants from process do not fall on wet, newly coated surfaces.
- C. Mask adjoining surfaces not receiving pedestrian traffic coatings to prevent overspray, spillage, leaking, and migration of coatings. Prevent traffic-coating materials from entering deck substrate penetrations and clogging weep holes and drains.

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- D. Concrete Substrates: Mechanically abrade surface to a uniform profile acceptable to manufacturer, according to ASTM D 4259. Do not acid etch.
 - 1. Remove grease, oil, paints, and other penetrating contaminants from concrete.
 - 2. Remove concrete fins, ridges, and other projections.
 - 3. Remove laitance, glaze, efflorescence, curing compounds, concrete hardeners, form-release agents, and other incompatible materials that might affect coating adhesion.
 - 4. Remove remaining loose material to provide a sound surface, and clean surfaces according to ASTM D 4258.
- E. Plywood Substrates:
 - 1. Fill plywood imperfections with sealant as recommended by pedestrian traffic-coating manufacturer.

3.3 TERMINATIONS AND PENETRATIONS

- A. Prepare vertical and horizontal surfaces at terminations and penetrations through pedestrian traffic coatings and at expansion joints, drains, and sleeves according to ASTM C 1127 and manufacturer's written instructions.
- B. Provide sealant cants at penetrations and at reinforced and nonreinforced, deck-to-wall butt joints.
- C. Terminate edges of deck-to-deck expansion joints with preparatory base-coat strip.
- D. Install sheet flashings at deck-to-wall expansion and dynamic joints, and bond to deck and wall substrates according to manufacturer's written recommendations.

3.4 JOINT AND CRACK TREATMENT

- A. Prepare, treat, rout, and fill joints and cracks in substrates according to ASTM C 1127 and manufacturer's written recommendations. Before coating surfaces, remove dust and dirt from joints and cracks according to ASTM D 4258.
 - 1. Comply with recommendations in ASTM C 1193 for joint-sealant installation.
- B. Apply reinforcing strip in pedestrian traffic-coating system where recommended in writing by traffic-coating manufacturer.

3.5 PEDESTRIAN TRAFFIC-COATING APPLICATION

- A. Apply pedestrian traffic coating according to ASTM C 1127 and manufacturer's written instructions.
- B. Apply number of coats of specified compositions for each type of pedestrian traffic coating at locations as indicated on Drawings.





- C. Start pedestrian traffic-coating application in presence of manufacturer's technical representative.
- D. Verify that wet film thickness of each coat complies with requirements every 100 sq. ft.
- E. Uniformly broadcast aggregate on coats specified to receive aggregate. Embed aggregate according to manufacturer's written instructions. After coat dries, sweep away excess aggregate.
- F. Apply pedestrian traffic coatings to prepared wall terminations and vertical surfaces to height indicated; omit aggregate on vertical surfaces.
- G. Cure pedestrian traffic coatings. Prevent contamination and damage during application and curing stages.

3.6 FIELD QUALITY CONTROL

- A. Testing Agency: Owner will engage a qualified testing agency to perform the following field tests and inspections:

1. Materials Testing:

- a. Samples of material delivered to Project site shall be taken, identified, sealed, and certified in presence of Contractor.
- b. Testing agency shall perform tests for characteristics specified, using applicable referenced testing procedures.
- c. Testing agency shall verify thickness of coatings during pedestrian traffic-coating application for each 600 sq. ft. of installed traffic coating or part thereof.

- 2. If test results show pedestrian traffic coating does not comply with requirements, remove and replace or repair the membrane as recommended in writing by traffic-coating manufacturer and make further repairs after retesting until traffic-coating installation passes.

- B. Final Pedestrian Traffic-Coating Inspection: Arrange for traffic-coating manufacturer's technical personnel to inspect membrane installation on completion.

- 1. Notify Architect or Owner 48 hours in advance of date and time of inspection.

- C. Additional testing and inspecting, at Contractor's expense, will be performed to determine compliance of replaced or additional work with specified requirements.

- D. Prepare test and inspection reports.

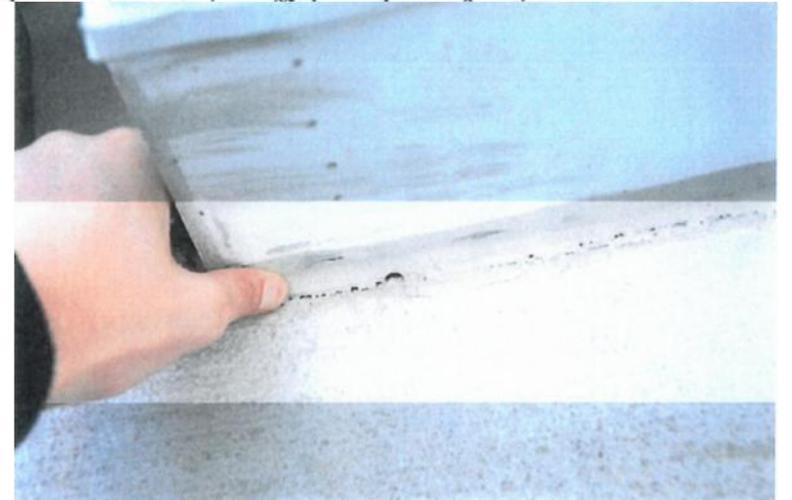
3.7 PROTECTING AND CLEANING

- A. Protect pedestrian traffic coatings from damage and wear during remainder of construction period.

- B. Clean spillage and soiling from adjacent construction using cleaning agents and procedures recommended by manufacturer of affected construction.



Small cracks and staining reveal big problems



View from the top



Soffit failures and soffits removed







Destructive Testing: Cross-section





Misconception #1 (cont'd)

All Construction Defects Can Be Blamed On the Contractor(s)

Sometimes NO

- **Owner Issues**
 - Value Engineering
 - Unreasonable Client
 - unrealistically compressed schedules
 - out-of-sequence access
 - directives to proceed despite known risks
 - over-budget and late owner directed changes
 - public, private, foreign owners and purpose/type of project



Misconception #2

A&E Liability is Always Limited By Contract

Sometimes YES

- Standard of Care Revisited: The Perfection Standard
- Limitation of Liability
- Waiver of Consequential Damages
- Indemnification
- Third-Party Beneficiary Exclusion
 - Contractual Relationship?



Misconception #2

A&E Liability is Always Limited By Contract

Centurion Apartment v. Sorenson Trilogy Engineering

Trustee owned multi-story apartment [2024 BCCA 25]

- No contractual relationship between Owner & engineer
- Major structural deficiencies > building evacuation
- Trial: Engineer *not* liable because lack privity of contract and duty of care
 - **Appeal: Engineer liable because sufficient proximity with Owner to impose duty of care**
 - Structural deficiencies = real and substantial danger



Misconception #2

A&E Liability is Always Limited By Contract

Sometimes NO

- No limiting contract language
- Gross Negligence or Willful Misconduct
- Violation of Law or Professional Standards
- Third-Party Tort Claims
- **Case Studies:**
 - **Bond claims practicalities**



Misconception #3

Any Claims are Covered

- Insurance
 - Coverage/Exclusion
 - Professional Liability Insurance
 - Eroding Limits
 - Contractual Liability
- Bonds
- Warranties
 - Maintenance and Notice Obligations
- **Case Studies:**