



Owner Warranties

by Jeffrey G. Gilmore & Bill Fisher

This is the final installment in our series of articles on the subject of warranties. Previous articles discussed express and implied warranties, emphasizing the provisions of the Uniform Commercial Code (UCC). In addition to these warranties, there are certain other implied warranties which are of special interest to those engaged in the construction industry and which may be lumped together under the label "owner warranties."

Plans and Specifications

Perhaps the most important of the owner warranties is that the plans and specifications are accurate, adequate and feasible. This warranty is founded on the notion that when one party prepares specifications for the performance of a contract, he is responsible for the specifications and the other party has no duty to verify them. This type of warranty, recognized in almost all states, may be divided into two categories: 1) the warranty of *accuracy* of the description of the natural condition of the property, and 2) the warranty of *suitability* of the plans and specifications (i.e., that by following the plans and specifications the contractor will produce a suitable result). This warranty only applies to *design* specifications, and not to *performance* specifications. Design specifications address how the work is to be performed or the materials to be used. Performance specifications, on the other hand, merely state a standard or objective that is to be obtained.

If the owner knows of unusual ground-water conditions, he is obligated to inform the contractor.

The Spearin Doctrine

The seminal case in this area was *United States v. Spearin* (1918). In that case, Spearin was hired to build a dry dock after moving an existing storm sewer, following detailed plans and specifications. After Spearin moved the storm sewer, the sewer broke due to defective design and the dry dock was flooded. Spearin suspended work and demanded compensation for damages caused by the flooding. The owner then terminated the contract, claiming that Spearin had assumed responsibility for the design by virtue of a contract provision requiring Spearin to inspect the site and inform himself regarding actual conditions. The owner also argued that an implied warranty guaranteeing the strength of the sewer pipe could not be read into the contract. Spearin sued the owner to recover his damages.

The Supreme Court held that the owner was liable, finding that the general language in the contract requiring

the contractor to conduct a site inspection was not sufficient to relieve the owner of responsibility. The Court's holding that the owner warrants the information, plans and specifications as accurate and suitable for use has become widely known as the *Spearin Doctrine*.

Escape Devices

Since owners generally control the drafting of contracts, they often will include language intended to avoid the warranty by shifting responsibility to the contractor. The provision may simply require the contractor to conduct a site inspection to validate the plans and specifications. As seen in *Spearin*, such provisions do not avoid the warranty. An example of another common provision would be as follows: "The contractor is responsible to furnish whatever is necessary to make a functioning system, regardless of whether shown on the contract documents." Such a provision would be an attempt to recast the design specification as a performance specification. Most courts would rule that such a provision does not avoid the owner's liability.

Yet another attempt to avoid owner responsibility would be a provision requiring the contractor to make an independent investigation of facts stated in the plans and specifications. In *Hollerbach v. United States* (1914), the Supreme Court ruled that such a provision does not avoid owner's liability. The Court noted that if the owner wanted to leave a matter open to contractor investigation, the owner could easily omit the specification as to that condition.

Although courts are reluctant to allow owners to disclaim the warranty for plans and specifications, not all attempted escape devices fail. For example, a contract may require that the contractor request the architect's interpretation when the plans and specifications call for work which the contractor believes is impossible. If the contractor fails to request the architect's assistance, he may be denied the protection of the owner's warranty. See, e.g., *Bethesda Lutheran Church v. Twin City Construction Co.*, (Minn. App. 1984).

Other Warranties

The owner makes other implied warranties to the contractor in a construction project. The owner warrants that he will disclose material information of which he is aware if it is unknown to the contractor or not readily discoverable. For example, if the owner knows of unusual ground water conditions, he is obligated to inform the contractor. However, if the contractor has *equal access* to the information, the owner is under no duty to make such a disclosure.

The owner warrants that he will cooperate and not interfere with the contractor's performance, and that he has or will have the financial resources to perform under the contract. (These

warranties, in fact, are part of every contract.)

The owner also warrants that any materials and equipment he provides are adequate for the intended use. If they are not, the owner will be liable. Finally, in a multi-prime project, the owner warrants that he will coordinate the work of the various prime contractors. In such cases, the owner acts in the same capacity as a general contractor and has the same duty as a general contractor to coordinate the work.

If the parties have not agreed otherwise, the "owner warranties" will be implied as a matter of law. These principles provide the contractor a possible remedy in the absence of any clear contract language allowing recovery against the owner. ■

Jeffrey G. Gilmore and Bill Fisher are lawyers with the firm of Wickwire, Gavin & Gibbs of Vienna, Va., specializing in construction and public contract law. Questions may be sent to the authors c/o The Legal Column, New England Builder P.O. Box 5059, Burlington, VT 05402.