

DISTINGUISHING BETWEEN CONSTRUCTION DEFECTS AND FAILURES

By Scott C. Powers – January 2021

I. DEFECTS

A. Defining Defects.

Defect is defined as “an imperfection or abnormality that impairs quality, function, or utility.” <https://www.merriam-webster.com/dictionary/defect>. A “construction defect” in turn is generally understood to be a defect in the design, materials, workmanship that can affect aesthetics, mechanical systems, building components, and/or structural integrity. Some bodies, such as the American Law Institute, have defined a “construction defect” as a failure to comply with reasonable standards of construction.¹ These general definitions are consistent with Utah law.² That said, construction defect lawsuits are often brought based on the allegation that the work is defective because it fails to conform with the buyer’s expectations under the contract. Notably, Utah law limits lawsuits for defective construction, in the absence of bodily injury or damage to other property (i.e. the property not being improved) to contract and warranty claims.³

B. Causes of defects

The causes typically fall into three different types: design defects, material defects, and workmanship defects.

1. Design Defects

Design defects most typically result from a design professional’s failure to produce accurate and well-organized construction documents. Design defects usually occur as the result of some error or omission in the creation of those documents. These errors range from minor, easily-resolved issues to life-safety issues that render the project unsalvageable.

It is critical that the plans and specifications be carefully drafted, as owners and contractors depend upon these documents, and are tasked with carefully reviewing and following them. For this reason, construction contracts often include language

¹ See, e.g., MOLD DISCLAIMER AND WAIVER, SH034 ALI-ABA 951 , 953.

² See, e.g., *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 22, 329 P.3d 815, 821 (superseded on other grounds and addressing defects in the context of deviation from the industry standard of care).

³ See Utah Code Ann. § 78B-4-513.

obligating the contractor to perform its work “in accordance with the plans and specifications.”

In fact, in construction contracts between owners and contractors there is an implied warranty of the adequacy of the plans and specifications, which has come to be known as the “Spearin doctrine” after a U.S. Supreme Court case from 1918.⁴ In *United States v. Spearin*, the court ruled

if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, [] to inform themselves of the requirements of the work, ... and to assume responsibility for the work until completion and acceptance.

Id. at 136. The Spearin doctrine is used often in construction defect cases as a defense by the contractor, the allegation being that the defective work is not the result of any failure by the contractor, but rather due to a fault in the design and/or engineering of the project.

2. Material Defects

Construction defects can also occur as a result of substandard materials, materials that are designed improperly, misused, or have been produced/manufactured incorrectly. Defects can arise in all manner of construction materials, including lumber, cement, metal, concrete, electrical wiring, insulation, glass, architectural and decorative hardware, plumbing, drywall, paint, stucco, or roofing. When these defects stem from a manufacturing defect, the parties using these materials are often unaware of the defect until after the material has been incorporated into the project. Defective construction materials can result in the premature failure of structural and other components, leading to direct and indirect property damages.

3. Workmanship Defects

Workmanship defects generally occur when a contractor fails to build a structure or component part in accordance with the contract requirements, construction documents, applicable code provisions, and industry standards. Workmanship defects can range from simple aesthetic issues to structural integrity problems. Allocating liability and determining how (and even who) failed to abide by the

⁴ *United States v. Spearin*, 248 U.S. 132 (1918).

property standard of care can be extremely complex, especially where second- and third-tier subcontractors and suppliers are involved.

C. Proving Defects.

In construction, the project participants are expected to perform their contractual obligations up to a designated “standard of care.” This includes, but is not necessarily limited to, performing the work in accordance with all of the contract and design documents, code requirements, and industry standards. For example, the AIA general conditions require a contractor to:

- visit the site to become familiar with the local conditions;
- review the contract documents to facilitate coordination onsite;
- to perform work in accordance with the acceptable standards of workmanship.

In Utah, expert testimony is generally required to establish a breach of the standard of care in construction defect cases.⁵ In my practice, I seen defects alleged on a variety of bases, including the following:

- The compliance or noncompliance with the minimum requirements of applicable building code(s) and/or construction standards, as established by:
 - Applicable building codes (IBC, IRC, etc.)
 - Product manufacturer’s installation recommendations and specifications
 - The approved construction plans and specifications for the project (early iterations, etc.)
 - Industry standard customs and practices pertaining to the proper use of building materials and quality of workmanship and,
 - Local Ordinances
- A failure to construct the home consistent with the buyer’s reasonable expectations
- Whether materials and building products used were suitable for their intended purposes (i.e., mastic on tiles turning color when exposed to chlorinated water)
- Whether the construction was performed in a good workmanlike manner (sloppy, etc.)
- Premature deterioration of the building materials
- Whether or not the original project’s plans and subsequent changes were plan checked and approved by the Building Department.

⁵ *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 22, 329 P.3d 815, 821 (plaintiff’s claims dismissed as a result of not having an expert to prove a violation of the standard of care).

Generally, the allegations include a number of the above bases, and the parties rely heavily upon their experts (even during the fact discovery period) to sort through the potential causes/bases and determine how to best resolve the issues presented.

II. FAILURES

A. Defining Failures.

American Society of Civil Engineers (ASCE) Technical Council on Forensic Engineering has defined “failure” as “an unacceptable difference between expected and observed performance.”⁶ This definition includes catastrophic structural collapse, but also includes performance problems that are not necessarily catastrophic or life-threatening, including “serviceability problems such as distress, excessive deformation, premature deterioration of materials, leaking roofs and facades, and inadequate interior environmental control systems.”

B. Causes of Failures

Although defects are often the cause of a construction failure, not all failures are the result of defects. Furthermore, while failures are sometimes caused by one single factor, there are usually multiple factors that contribute to a construction failure. Indeed, failures usually result from a combination of mistakes, erroneous assumptions, oversights, miscommunications, misunderstandings, ignorance, lapses, slips, incompetence, intentional violations or noncompliance, and/or inadequate quality assurance. When faced with a significant failure, the parties typically retain experts to determine the cause of the failure.

That having been said, there are a variety of failures that do not arise out of defective construction or design. These include, but are not limited to:

1. Deterioration

Deterioration is the cause of many construction failures. While there may be related design and construction deficiencies, deterioration-related failures often occur as a result of a property owner’s failure to properly maintain the failing improvement. Indeed, most construction projects involve components with limited lifespans. These components will thus require ongoing maintenance, repair, and/or

⁶ Jacob Feld and Kenneth L. Carper, CONSTRUCTION FAILURE § 1.1 (2d ed. 1997) (quoting from Leonards, G., (1982). “Investigation of Failures,” *Journal of the Geotechnical Engineering Division*, American Society of Civil Engineers, New York (February) (hereinafter “CONSTRUCTION FAILURE”).

replacement in order to ensure that the improvement can continue to perform as expected. Examples of components with limited lifespans that need maintenance and/or replacement include exposed wood, stucco, roofing materials, concrete flatwork, exposed metal work, and paint. In addition to neglect, improper maintenance can lead to premature deterioration and failure as well (i.e., salt-related spalling on concrete flatwork).

2. Unintended Use

A construction failure can also result from the use of an improvement in a way that was not intended or anticipated by the design thereof. If an improvement is subjected to use that goes beyond the design intent (which form the basis for the creation of the plans and specifications), it risks failure even if the design conformed with the intent of the owner and was constructed in full compliance with the design.

3. Acts of God

A corollary to the “unintended use” failure is the “Act of God” failure. An “act of God” generally refers to an accident or event resulting from natural causes without human intervention, and could not have been prevented by reasonable foresight or care. Although design professionals, construction professionals, and the promulgators of the applicable building codes generally take reasonable steps to ensure that improvements are designed and constructed safely and to otherwise withstand reasonably foreseeable events, they cannot plan for everything. These things include fires, floods, earthquakes, etc.

III. SUMMARY AND CONCLUSION

As explained above, defect is defined as “an imperfection or abnormality that impairs quality, function, or utility.” From the owner’s perspective, a defect in the work means that the owner did not receive the exact product or improvement for which it paid. Whether a particular feature of a project amounts to a “defect” must be judged against various standards from which relevant questions can be formulated such as was the construction performed in a reasonable workmanlike fashion, was the design performed with reasonable care, does the alleged defect need to be repaired, replaced or redone, does it reduce the value or utility of the project, does it comply with applicable codes and industry standards and norms and does it comply with the contract documents. The answers to the majority of these questions must come from experts.

The term “failure” is generally the result of some condition. That condition may or may not be a construction defect. In the absence of a defect, the cause of a failure may be due to deterioration (negligent or otherwise), unintended use, or some naturally unforeseen event such as an earthquake, flood, or fire.