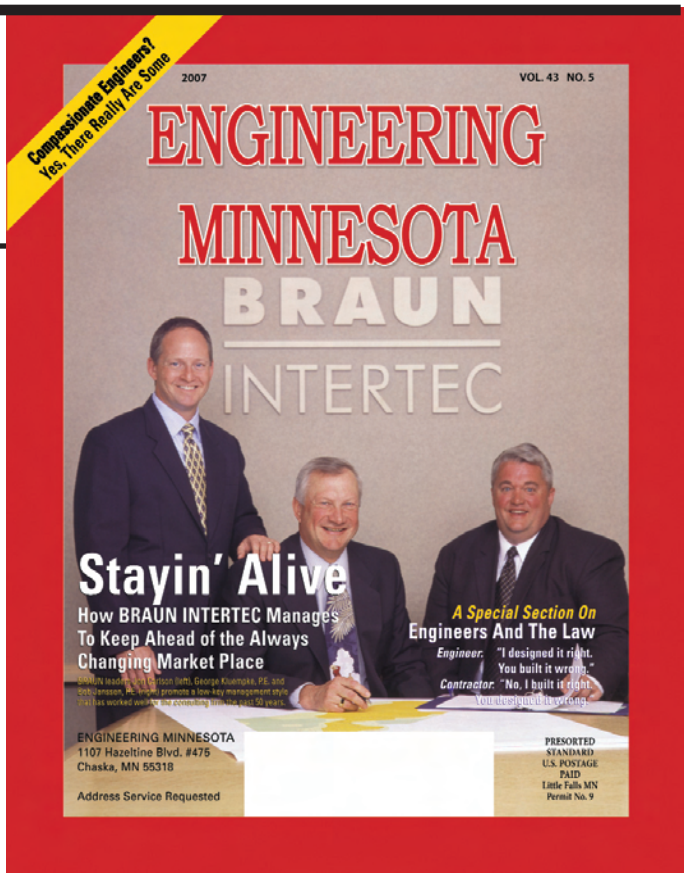
ENGINEERS AND THE LAW



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Building Mistakes: Who Is Responsible?

Attorney John Trout found his client in an awkward situation. His client was the unhappy owner of a condominium with a leaking parking ramp. The owner felt that the Professional Engineer previously hired to solve the problem had not performed the work properly. The owner said that while the ramp repair work was completed as specified by the engineer, the leaking continued. He maintained the engineer was guilty of professional negligence.

Trout, with the law firm of Hellmuth & Johnson, PLLC, hired another Professional Engineer to analyze the quality of the design work and offer an opinion. The engineer reported that while the work was flawed, it did meet the standards of the engineering profession, and that other professionals would have specified the same response to solve the leaking problem. A second Professional Engineer hired by Trout reached a similar conclusion – that although the design work did not solve the problem, it did in fact conform to industry standards. In other words, the Professional Engineer acted professionally, but had still not eliminated the problem.

According to Trout, the explanation for this apparent contradiction is that the assessment of a Professional Engineer's work is compared to the performance level of his or her peers – not what the best in the profession might do. "An 'All Star' may have been able to come in and find a solution," Trout pointed out, "but not every Professional Engineer is expected to perform at the highest level." As long as the engineer's work meets the standards of similarly situated members of the profession, the engineer cannot be held liable for professional negligence, also known as malpractice.

The case is among those that continue to make Trout's work interesting and challenging. He is one of 15 attorneys practicing construction law at the Eden Prairie law firm.

A graduate of St. John's University in Collegeville, Minnesota, Trout has a strong background in the construction industry. His father was a contractor in Chicago and Trout ran his own St. Paul structural concrete and masonry restoration firm for 10 years after college graduation. His firm did work on a number of locks, dams and tunnels, as well as water treatment plants. Many of those projects were funded by federal money. That funding was reduced significantly in the late 80s and Trout was faced with a career decision. He always had an interest in law so he felt that was a good time to make a career change and enter law school. "Construction law is a natural fit," he said. "I can speak the same language as contractors, engineers and architects. It is a very comfortable area for me."

Part of the work Trout does involves resolving disputes between building owners and the aforementioned trio. And a portion of that effort requires handling what amounts to "he said, he said" construction challenges. The engineer maintains: "I designed it right and you built it wrong." The contractor responds: "I built it right and you designed it wrong." Trout is frequently asked by one of the parties to enter the fray and help to find a solution.

Although no stranger to courtroom trials and arbitration hearings, the best solution in many cases, says Trout, is for

disputing parties to resolve their difference in mediation or some other form of alternative dispute resolution rather than fighting it to the end. "Often times the money spent as a result of a lengthy trial can be far more than if the parties agreed that each would contribute a portion to cover the financial dispute in question," he said. "Some times, if everyone throws something into the pot, it works out for the best."

Trout acknowledged that taking technical cases to court, even those appearing very solid, could be a risky proposition. He noted that lawyers are aware of how unpredictable juries can be, especially in trials involving highly technical issues. He said, for example, that not every juror is likely to follow closely testimony about whether a Professional Engineer specified the correct amount of soil compaction required on a drainage project.

But for those making a living as engineers, the issues Trout encounters in his day-to-day work make for interesting discussion. One intriguing area concerns the owner's guarantee — or implied warranty — of plans and specifications. It involves what is legally known as the Spearin Doctrine. The name comes from a 1918 U.S. Supreme Court case. That case clearly set forth a legal tenet that holds that when the owner of a proposed building project enters into a contract with a contractor to build according to the design provided by the owner, the owner impliedly warrants the accuracy of all factual representations contained within the design – as well as the suitability or adequacy of the design, including all materials and methods that might be specified.

In clearer terms, as long as the contractor follows the design specifications, the owner is economically responsible for what was built and any additional costs incurred due to a flawed design. Minnesota recognized the validity of the Spearin doctrine in 1922 and the Minnesota Supreme Court has since issued numerous opinions affirming the Spearin doctrine.

Interestingly, if the flawed design provided by the owner to the contractor had been prepared by a Professional Engineer hired by the owner, the person burdened with ultimate financial responsibility could be the owner – not necessarily the Professional Engineer. The P. E.'s obligation is to meet industry standards. An engineer is free of financial responsibility for malpractice as long as the error in the design did not reach the level of professional negligence. If it did, then the P. E. could be held liable for professional malpractice.

However, even absent malpractice, the P.E. might still be liable to the project owner if there is a contract provision requiring of the engineer a higher standard of performance, requiring indemnification of the owner or otherwise obligating the engineer in the event the owner winds up owing a financial obligation to a contractor or other person. Trout noted that sample contracts provided by the American Institute of Architects and American Council of Engineering Companies don't often contain such a provision. He said experienced owners will often include such provisions in contracts and engineers should be alert to the possibility.

John T. Trout is a partner with the law firm of Hellmuth & Johnson, PLLC, and concentrates his practice in the area of construction law, including construction and design defects, mechanic's liens, bonds, delay and disruption, payment, insurance and other disputes. For questions or comments, contact Trout at 952-941-4005 or jtrout@hjlawfirm.com.

ABOUT THE SPEARIN DOCTRINE

Engineers should be familiar with the Spearin Doctrine. The United States Supreme Court established it in 1918. In the case, a contractor followed plans for the relocation of a sewer in the Brooklyn Navy Yard, operated by the U. S. government.

The sewer had to be relocated to build a dry-dock. The contractor followed plans and the government accepted his work. A year later, a dam in a connecting sewer caused the relocated sewer to flood and burst, flooding the area excavated for the dry-dock. The flooding destroyed the contractor's equipment and otherwise inflicted great cost upon the contractor, who was forced to abandon the project when the government refuse to pay compensation. The dam was not shown on the owner's plans and specifications. The Supreme Court held that the owner (the U. S. government) created an "implied warranty" that, if the contractor complied with the relocation of the sewer according to furnished plans and specifications, the relocated sewer would be adequate. The court further held that general clauses requiring the contractor to examine the site and plans and to maintain responsibility for the work until completion did not override the implied warranty. In short, the government was forced to compensate the contractor for his losses due to the defective design.