The 60-Second Construction Law Journal

MILES & STOCKBRIDGE

Summer 2022 | **MS Construction Industry Team**

Important contractual rights and remedies can be lost, hard-won statutory protections waived, and serious liabilities incurred—all through ignorance of the law. This newsletter is designed to give you, in 60 seconds, some more insight into legal problems faced by contractors, subcontractors, and suppliers in the construction industry, so that you do not repeat their mistakes and, instead, successfully complete the job.

You Be the Judge

FACTS: Constellation NewEnergy, Inc. ("GC") was the general contractor on a project to improve the energy efficiency of a federal prison in Florida. GC solicited bids for a subcontract to upgrade the exterior lights. GC told prospective bidders that they needed to provide pricing for the "Global Tech Solstice GTSOL5498-4X LED" retrofit kit manufactured by Global Tech LED, LLC ("Supplier"). The subcontract ultimately was awarded to Lighting Retrofit International, LLC ("Subcontractor"). Under the subcontractor agreement, Subcontractor warranted that "all equipment will be free from defects" and that Subcontractor would "obtain vendor/manufacturer/supplier warranties" for all installed equipment. The parties later executed a Scope of Work ("SOW") document that required Subcontractor to use the specific Supplier-manufactured retrofit kits on the project. The Supplier-manufactured retrofit kits proved to be unsuitable for the hot climate where they were installed. Several of the units' "drivers" had to be replaced. As a result, Subcontractor incurred significant costs in repairing the lights. GC did not pay for this, and Supplier refused to honor the product warranty. Eventually, Supplier became insolvent. The units suffered continued failures but Subcontractor refused to make any further repairs. GC then hired a third party to replace all of the units with a different lighting product. In a case brought under the Miller Act, the GC argued that the contract's express warranty meant that Subcontractor had to pay to replace all of the defective light fixtures. Subcontractor argued it was not responsible for the defective retrofit lights because GC had required that exact product. Citing the doctrine enunciated in *United States v. Spearin*, 248 U.S. 132, 136 (2019), it argued that GC had to pay for replacing the units because—by specifying the particular units to be used—it had implicitly warranted that those units were suitable, i.e., free from design defects.

ISSUE: Is a subcontractor liable for defective materials under a warranty provision where the defects were inherent in the very product specified in the contract documents?

(Ruling and Lesson continued on next page.)

Va. Law Banning "Pay if Paid" Provisions Goes Into Effect Jan. 1, 2023.

On April 27, 2022, the Governor of Virginia signed SB 550 into law. The new law invalidates "pay if paid" clauses in construction subcontracts. Such provisions state that the general contractor does not have to pay the subcontractor unless and until the owner pays the general contractor. Under the new law, pay-if-paid provisions "shall be unenforceable." The law also affirmatively requires that parties to projects involving at least one subcontractor include contract language stating that "any higher-tier contractor is liable to any lower-tier subcontractor" for work performed under the subcontracts. (There is a limited exception to these requirements where "the party contracting with the contractor is insolvent or a debtor in bankruptcy.") The new law applies to construction contracts "executed on or after January 1, 2023."

Have a lawyer review your construction contracts before you sign them. Know that you are protected before starting the work.

You Be the Judge

RULING: The United States District Court held that the express warranty provision required Subcontractor to pay to replace the defective units, even though GC had specified their use in the project. The Court noted that "the implied warranty set forth in *Spearin* and its progeny may be overcome by express agreement." Where, as in the case before it, "a general contractor and a subcontractor expressly agree to allocate the risk of a defective product to the subcontractor, that express agreement must prevail over *Spearin's* implied warranty." Because Subcontractor had "freely and willingly agreed" to "shoulder the risk" of defective equipment, Subcontractor had to pay to replace the inherently unsuitable equipment even though GC had required Subcontractor to procure it in the first place.

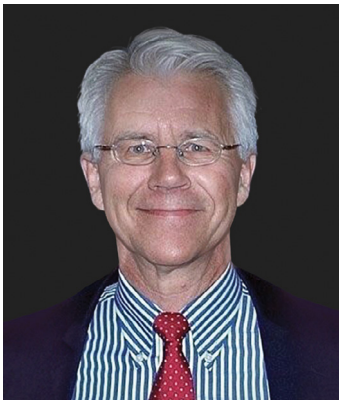
Lighting Retrofit International, LLC v. Constellation NewEnergy, Inc., No. 19-CV-02751-SAG, 2022 WL 541156 (D. Md. Feb. 23, 2022).

LESSON: This same reasoning would have made GC liable if it had been the Owner who specified the inherently defective product. General contractors and subcontractors should revise their upstream contracts to eliminate warranty liability for *specified products that are inherently defective or unsuitable for the project.* It's one thing to warrant a product you choose; it's quite another to accept liability for a defective product you were forced to use.

Construction Industry Team

Miles & Stockbridge's Construction Industry Team represents general contractors, subcontractors, suppliers and sureties in all aspects of construction law, including contract drafting and negotiation, mechanics liens, bid protests, and the preparation, litigation, arbitration and mediation of construction claims.

Key Construction Lawyer Profiles



804 905-6910
twolf@milesstockbridge.com

TOM WOLF is a co-leader of the Construction Industry Team at Miles & Stockbridge and is recognized by Best Lawyers in America® for pre-eminence in Construction Law, Construction Litigation and Commercial Litigation and by The Virginia Lawyers Hall of Fame. He has been Adjunct Professor, Construction Law at the University of Richmond School of Law since 1986 and lectures frequently on construction law issues for the Virginia State Bar, the Associated General Contractors of Virginia and various construction industry groups.

JACK ROBB is a Principal and former in-house general counsel with a focus on construction law. He also regularly advises owners, general contractors, subcontractors, and suppliers.
804 905-6916
jrobb@milesstockbridge.com

KEN STOUT is an Associate and former federal fellowship law clerk, with a focus on complex litigation.
ktstout@milesstockbridge.com

JASON GOLDSMITH is an Associate on the Miles & Stockbridge Construction Industry Team.
jgoldsmith@milesstockbridge.com

MILES & STOCKBRIDGE