

**50-State Reference on Validity of Disclaimers and
Exculpatory Clauses under *Spearin*
2015**

State	Case Holding
Alabama	<i>Berkel & Co. Contractors v. Providence Hosp.</i> , 454 So.2d 496 (Ala. 1984) (holding that the owner may disclaim liability for negligent preparation of a report furnished to bidders, so long as an effective disclaimer accompanies it)
Alaska	<i>B-E-C-K Constructors v. State, Dep't of Highways</i> , 604 P.2d 578 (Alaska 1979) (statements included in report accompanying bid package did not constitute misrepresentation where they were to provide bidders with information concerning the soil conditions and not to warrant the structural integrity of a pier that later collapsed)
Arizona	<i>Ashton Co., Contractors & Engineers v. State</i> , 9 Ariz. App. 564, 454 P.2d 1004 (1969) (disclaimer relating to quantities of materials controlled where the statement was an estimate and not a positive and material representation within the knowledge of the government)
Arkansas	<i>Bryan v. City of Cotter</i> , 2009 Ark. 457, 344 S.W.3d 654 (2009) (“exculpatory clauses are strictly construed against the party relying on them” and courts will consider three factors in determining whether an exculpatory clause will be enforced: (1) when the party is knowledgeable of the potential liability that is released; (2) when the party is benefitting from the activity which may lead to the potential liability that is released; and (3) when the contract that contains the clause was fairly entered into.”)
California	Public Contract Code § 1104 states that “No local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects...” <i>Los Angeles Unified Sch. Dist. v. Great Am. Ins. Co.</i> , 49 Cal. 4th 739, 234 P.3d 490 (2010) (public entities retain the power to contractually disclaim responsibility for assumptions a contractor might draw from the presence or absence of information in plans and specifications, but may be required to provide extra compensation if it knew, but failed to disclose, material facts that would affect the contractor’s bid or performance)
Colorado	<i>E. Tunneling Corp. v. Southgate Sanitation Dist., Arapahoe Cnty., Colo.</i> , 487 F. Supp. 109 (D. Colo. 1979) (only when the government does not provide correct factual representations are exculpatory clauses not given their full force and effect and the plaintiff could have protected itself from unforeseen soil conditions by bidding a higher unit price for rock excavation)

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Connecticut	<i>Maskel Constr. Co. v. Town of Glastonbury</i> , 158 Conn. 592, 264 A.2d 557 (1969) (the government was entitled to limit its commitment to bidders, and in the fact of a disclaimer in the bid documents, the plaintiff took its chance on the number and extent of conflicts it might discover in the course of the work)
Delaware	<i>James Julian, Inc. v. Morris</i> , No. CIV.A. 1197, 1979 WL 185859 (Del. Super. Dec. 28, 1979) (suggests that courts will not uphold disclaimers because disclaimers may cause contractors to either take a gamble, which will inevitably lead to higher bids, or refrain from bidding)
Florida	<i>Miami-Dade Water & Sewer Auth. v. Inman, Inc.</i> , 402 So. 2d 1277 (Fla. Dist. Ct. App. 1981) (a disclaimer is not invalid per se where there is no misleading, and may be interposed to negate the liability of the contracting authority)
Georgia	<i>Anderson v. Golden</i> , 569 F. Supp. 122 (S.D. Ga. 1982) (the implied warranty is not vitiated by standard disclaimers because contractors cannot be expected to perform certain investigations, and bidders must be able to rely on representations by owners; “[e]ven where no implied warranty exists, the owner may be liable because of misrepresentations of material facts about the site conditions.”)
Hawaii	<i>J. A. Thompson & Son, Inc. v. State</i> , 51 Haw. 529, 465 P.2d 148 (1970) (“when there is no misrepresentation of factual matters within the state’s knowledge or withholding of material information, and when both parties have equal access to information as to the nature of the tests which resulted in the state’s findings, the contractor may not claim in the face of a pertinent disclaimer that the presentation of the information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found.”)
Idaho	Idaho courts would most likely look to decisions from other courts in the Ninth Circuit.
Illinois	<i>W. H. Lyman Constr. Co. v. Vill. of Gurnee</i> , 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980) (“Exculpatory clauses designed to relieve the party from his own or his servant’s negligence or liability for damages are generally valid and will be enforced unless: (1) it would be against the settled public policy of the State to do so, or (2) there is something in the social relationship of the parties militating against upholding the agreement.”)
Indiana	<i>Indiana Dep’t of Transp. v. Shelly & Sands, Inc.</i> , 756 N.E.2d 1063 (Ind. Ct. App. 2001) (enforcing an exculpatory clause where the contract placed the contractor on notice of the possibility of problems on the site)
Iowa	<i>Midwest Dredging Co. v. McAninch Corp.</i> , 424 N.W.2d 216 (Iowa 1988) (exculpatory clauses had no effect where it would not have been feasible to require bidder to undertake the tremendously expensive procedure of taking test borings)
Kansas	<i>Green Constr. Co. v. Kansas Power & Light Co.</i> , 1 F.3d 1005 (10th Cir. 1993) (“where a contractor has a duty to make an independent inspection, reliance on the owner’s specifications may very well be unreasonable”)
Kentucky	<i>Bd. of Educ. of Henderson Cnty., Ky. v. Spinazzolo Sys., Inc.</i> , 986 F.2d 1421 (6th Cir. 1993) (disclaimers enforced where they were express and unqualified as to the accuracy of the information such that reliance on the plans was

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	unjustified)
Louisiana	<i>Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co.</i> , 551 F.2d 945 (5th Cir. 1977) (contractors are entitled to rely upon positive statements of the government and are not obligated to make an independent investigation into their accuracy; exculpatory clauses will not shift the liability of an express or implied representation made by the government and reasonably relied on by the contractor)
Maine	<i>Associated Builders, Inc. v. Oczkowski</i> , 2002 ME 115, ¶ 12, 801 A.2d 1008 (Me. 2002) (disclaimers enforced where the disclaimer was explicit as to the problems associated with the engineering, which negated any warranty that might be implied by law)
Maryland	<i>Department of General Services v. Harmans Associates Ltd.</i> , 633 A.2d 939 Md.App. 535 (1993) (differing site conditions clauses supersede other contractual terms and conditions which might attempt to place responsibility for unknown conditions on the contractor) <i>Raymond Int'l, Inc. v. Baltimore County</i> , 45 Md.App. 247, 412 A.2d 1296 (1980) (concluding that it would have been an “undue burden” on the contractor to conduct its own testing “to verify the information given it in the plans and specifications.”)
Massachusetts	<i>Alpert v. Com.</i> , 357 Mass. 306, 258 N.E.2d 755 (1970) (when the government makes a positive assertion, the contractor has a right to rely without further investigation and irrespective of the general language of exculpatory clauses in the contract)
Michigan	<i>Valentini v. City of Adrian</i> , 347 Mich. 530, 79 N.W.2d 885 (1956) (the requirement that the contractor examine the specifications and make a personal examination of the site does not bar the plaintiff from recovering damages caused by undisclosed subsoil conditions)
Minnesota	<i>Stanton v. Morris Constr. Co.</i> , 159 Minn. 380, 199 N.W. 104 (1924) (builders may rely on plans and specifications furnished by the owner even where the contract contains a cautionary notice that the owner does not assume responsibility for the plans and specifications)
Mississippi	Mississippi courts would most likely look to decisions from other courts in the Fifth Circuit.
Missouri	<i>Sanders Co. Plumbing & Heating Inc. v. City of Independence</i> , 694 S.W.2d 841 (Mo. Ct. App. 1985) (a boiler plate disclaimer does not negate the representations made by test results where those results are positive representations of material fact)
Montana	<i>Clark Bros. Contractors v. State</i> , 218 Mont. 490, 710 P.2d 41 (1985) (exculpatory language in the contract is a factor in determining justifiable reliance, but is not controlling)
Nebraska	<i>Knight Bros. v. State</i> , 189 Neb. 64, 199 N.W.2d 720 (1972) (affirmed decision in favor of the defendant, finding that: “If the contract is fairly entered by an experienced builder, the fact that a portion of the work proves to be more expensive than was estimated does not entitle the builder, in the absence of

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	fraud or mistake, to any allowance beyond the contract price.”)
Nevada	Nevada courts would most likely look to decisions from other courts in the Ninth Circuit.
New Hampshire	<i>Peter Salvucci & Sons, Inc. v. State</i> , 110 N.H. 136, 268 A.2d 899 (1970) (“Where a bidder is allowed insufficient time within which to make a personal study, the State cannot invoke the general exculpatory clauses to exonerate itself from liability.”)
New Jersey	<i>P.T. & L. Constr. Co. v. State of N.J., Dep’t of Transp.</i> , 108 N.J. 539, 531 A.2d 1330 (1987) (“[W]hen the State actually makes false representations in its contract documents that are more than gratuitous and amount to positive averments of site conditions, it will remain liable to the public contractor despite a general exculpatory clause in the contract.”)
New Mexico	<i>W. States Mech. Contractors, Inc. v. Sandia Corp.</i> , 110 N.M. 676, 798 P.2d 1062 (1990) (whether it was reasonable for the contractor to rely on the plans and specifications was a question for the trier of fact)
New York	<i>Warren Bros. Co. v. New York State Thruway Auth.</i> , 34 A.D.2d 97, 309 N.Y.S.2d 450 (1970) (state may be liable regardless of exculpatory clause, “if said conditions are not as represented and (1) inspection would have been unavailing to reveal the incorrectness of the representations or (2) the representations were made in bad faith”)
North Carolina	<i>Ray D. Lowder, Inc. v. N. Carolina State Highway Comm’n</i> , 26 N.C. App. 622, 217 S.E.2d 682 (1975) (“(1) A contracting agency which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory, and (2) instructions to bidders to make their own independent investigations of the conditions to be encountered cannot be given full literal reach. It is simply unfair to bar recovery to contractors who are misled by inaccurate plans and submit bids lower than they might otherwise have submitted.”)
North Dakota	N.D. Cent. Code Ann. § 9-08-02.1 states that “[a]ny provision in a construction contract which would make the contractor liable for the errors or omissions of the owner or the owner’s agents in the plans and specifications of such contract is against public policy and void.” <i>Markwed Excavating, Inc. v. City of Mandan</i> , 2010 ND 220, ¶ 17, 791 N.W.2d 22 (2010) (explaining that exculpatory clauses are strictly construed against the benefitted party and will not be enforced if they are ambiguous or release the party from liability for intentional, willful, or wanton acts)
Ohio	<i>S & M Constructors, Inc. v. City of Columbus</i> , 70 Ohio St. 2d 69, 434 N.E.2d 1349 (1982) (in the absence of fraud or bad faith, a clear and unambiguous disclaimer is legal and enforceable)
Oklahoma	<i>Cook v. Oklahoma Bd. of Pub. Affairs</i> , 1987 OK 22, 736 P.2d 140 (1987) (“A contract clause which requires a contractor to rely upon its own inspection does not control when there is a finding of misrepresentation as to existing conditions.”)
Oregon	<i>Inland Constr. Co. v. City of Pendleton</i> , 116 Or. 668, 242 P. 842 (1926) (test

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	borings provided by the city could not be considered representations or warranties, and the contractor assumed the risk in relying on the test borings)
Pennsylvania	<i>Dep't of Gen. Servs. v. Pittsburgh Bldg. Co.</i> , 920 A.2d 973 (Pa. Commw. Ct. 2007) (exculpatory clauses do not provide a shield from liability where the state engages in constructive fraud)
Rhode Island	<i>Fondedile, S.A. v. C.E. Maguire, Inc.</i> , 610 A.2d 87 (R.I. 1992) (exculpatory provisions stating that the site conditions were based on the “best available information” shifted the risk and liability for existing and unforeseen conditions to the contracting party)
South Carolina	<i>Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville</i> , 248 S.C. 84, 149 S.E.2d 55 (1966) (contractor was entitled to rely on owner’s representations and the owner’s responsibility was not overcome by the disclaimers).
South Dakota	<i>Morris, Inc. v. State ex rel. S. Dakota Dep't of Transp.</i> , 1999 S.D. 95, 598 N.W.2d 520 (1999) (general disclaimers are of no effect when the government makes material misrepresentations, and there was a question of fact as to whether the government acted in good faith by incorporating stale data into the bid package)
Tennessee	<i>Brown Bros. v. Metro. Gov't of Nashville & Davidson Cnty.</i> , 877 S.W.2d 745 (Tenn. Ct. App. 1993) (the risk is not removed from the contractor without some proof of negligence on the part of the defendant)
Texas	<i>Interstate Contracting Corp. v. City of Dallas, Tex.</i> , 407 F.3d 708 (5th Cir. 2005) (given the contract’s disclaimers, the contractor would not have been justified in relying on an affirmative statement that the project could be completed according to the plans)
Utah	<i>Frontier Foundations, Inc. v. Layton Constr. Co.</i> , 818 P.2d 1040 (Utah Ct. App. 1991) (the contractor could not recover damages because of differing soil conditions where the contract unambiguously provided that the contractor could not rely on the boring logs)
Vermont	<i>United Constr. Co. v. Town of Haverhill, N.H.</i> , 9 F.2d 538 (2d Cir. 1925) (to place the risk upon the contractor “would be a perversion of the parties’ intention”)
Virginia	<p><i>Modern Cont'l S. v. Fairfax Cnty. Water Auth.</i>, 72 Va. Cir. 268 (2006) (where the contractor was required to verify all details shown on the drawings, contrary to <i>Spearin</i>, the contractor implicitly warranted that the drawings were free from defects or ambiguities)</p> <p><i>McDevitt & St. Co. v. Marriott Corp.</i>, 713 F. Supp. 906 (E.D. Va. 1989) <i>aff'd in part, rev'd in part</i>, 911 F.2d 723 (4th Cir. 1990) (the contractor assumed the risk that actual soil conditions would be different from those reported where the contract contained express disclaimers that the risk of differing soil conditions remained on the contractor)</p>
Washington	<i>Dravo Corp. v. Municipality of Metro. Seattle</i> , 79 Wash. 2d 214, 484 P.2d 399 (1971) (court enforced the disclaimer placing the risk of unexpected conditions on the contractor)

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West Virginia	<i>Affholder, Inc. v. N. Am. Drillers, Inc.</i> , No. 2:04-0952, 2006 WL 3192537 (S.D.W. Va. Nov. 1, 2006) (refusing to enforce exculpatory clauses)
Wisconsin	<i>Metro. Sewerage Comm'n of Milwaukee Cnty. v. R. W. Constr., Inc.</i> , 72 Wis. 2d 365, 241 N.W.2d 371 (1976) (“broad admonitory and exculpatory clauses do not restrict the application of the changed-conditions clause”)
Wyoming	<i>Excel Construction, Inc. v. HKM Engineering, Inc.</i> , 228 P.3d 40 (Wyoming 2010) (exculpatory clause enforced to bar contractor claim against engineer for breach of covenant of good faith and fair dealing)