



LONERGAN V. SPEARIN

A Tale of Two Cases

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Allocation of Liability Between Owner and Contractor for Defective Plans and Specifications

- ❖ Who is responsible? Who bears the burden?
- ❖ Does the Owner warrant the plans?
- ❖ Or does the Contractor warrant to deliver a building free of defects
- ❖ Often comes up when “differing site conditions” are encountered

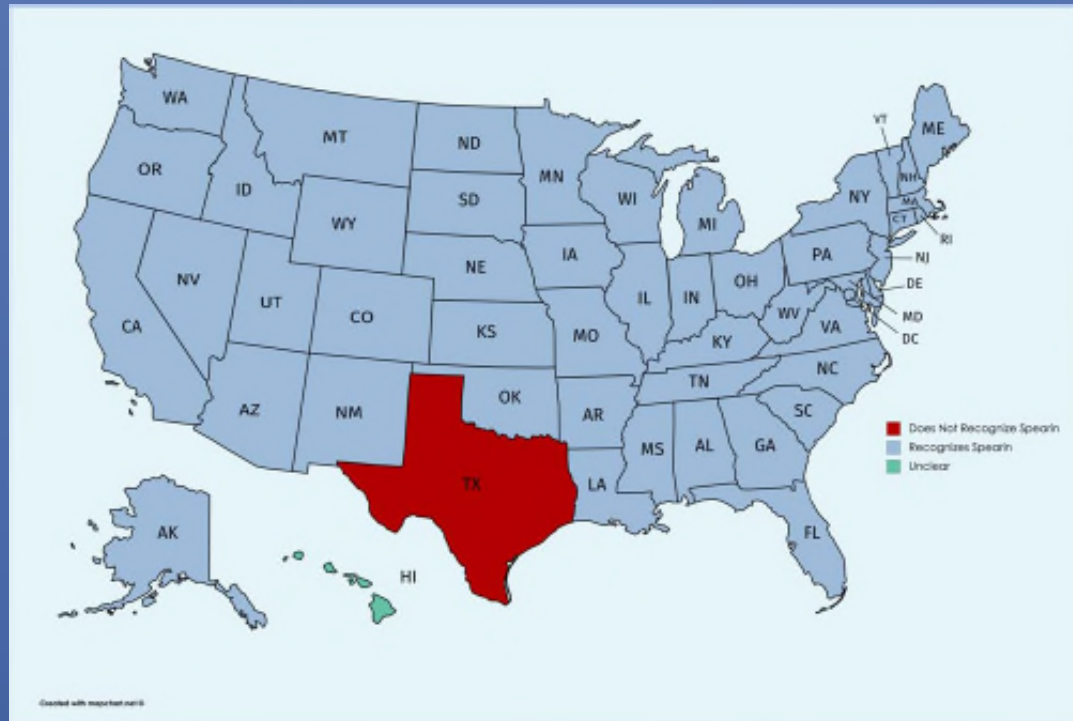


Two Different Approaches

Texas

Everyone else

States Recognizing *Spearin*





The Cases

U.S. v. Spearin - SCOTUS

Contractor not responsible for defects in plans and specs

Lonergan v. San Antonio Loan & Trust – TX. S. Ct.

Contractor responsible to deliver building free from defects

Freedom / sanctity of contract

Cooper & Scully
A Professional Corporation

Spearin

Justice Louis Brandeis

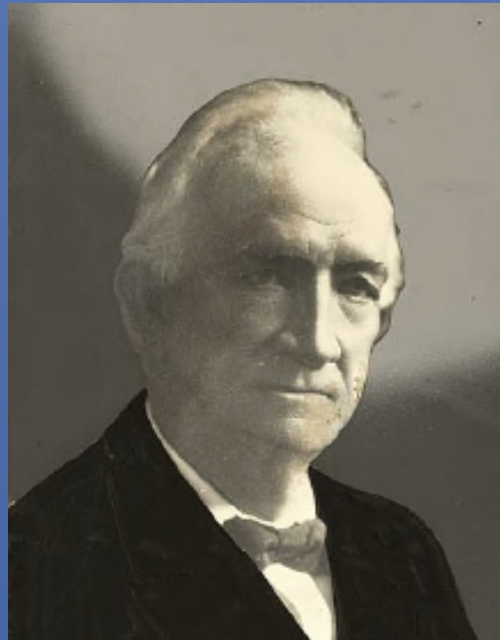


Photo from Library of Congress



Lonergan

Justice Thomas Jefferson Brown



Tarlton Law Library, The University of Texas



Spearin

Dry dock project for Navy

- ❖ Based on government's plans

Parties were at odds from the beginning

Flooding during construction causing a newly installed sewer line to fail

- ❖ Adjacent sewer line with dam diverted water to new sewer line – causing it to fail
- ❖ Existence of dam and area being prone to flooding not disclosed



Spearin

Gov. demanded Spearin repair the sewer and complete the project

Spearin refused

Gov. annulled the contract

- ❖ **Claimed Spearin had underbid contract**

Second Contractor encountered serious soil issues and could not complete contract

Third Contractor completed

- ❖ **After government took remedial measures on sewer in original plans**
- ❖ **Total cost ended up being 3X original contract**



Spearin Holding/Doctrine

“[I]f 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”

The Owner “imparted a warranty that if the specifications were complied with, the sewer would be adequate”

Duty of contractor to check the plans and inform itself of requirements of the work didn't impose an obligation to confirm adequacy of plans.



Lonergan

Prior to Spearin

Bank building in San Antonio

Owner – San Antonio Loan & Trust Co. (SALT)

Contractor (Lonergan) from Chicago



Lonergan

Building collapsed near completion of construction

Defect in architect's plans

- ❖ **Dispute over whether corrected plans ever delivered to contractor**

Collapse occurred after a violent storm



“The Trust building
... caught the full
blasts of all the
combined furies.”

The Bastrop Advertiser, Vol. 48, No. 20, Ed. 1 Saturday, May 19, 1900



“The steel pillars and
girders ... were
swept by the angry
hand of the storm
demon....”



“...the Trust building swayed, trembled for a moment, turned from its sills and collapsed rapidly”



“It was an awful sight
and I shall never forget
it, ... the weirdness,
grandeur and terrible
features of it...”



Lonergan Holding

Owner does not impliedly warrant plans

Contractor not relieved of responsibility by defects in plans and specifications

Matter of contract (sanctity of contract)

- ❖ “. . . [T]his is a matter of contract in which the parties are at arm’s length.”
- ❖ “Liability of the builder does not rest upon a guaranty of the specifications, but upon his failure to complete and deliver the structure.”



Lonergan - Trial and Procedural Issues

Directed Verdict case

- ❖ Jury never determined what caused collapse
- ❖ Storm?
- ❖ Defect in plans and specifications?
- ❖ Jury never determined whether plans in fact defective

Issue on appeal became who's responsible when plans are defective



Lonergan – The Legal Back Story

Lonergan broke – didn't even appear for trial

Failed to get Builders' Risk insurance

Surety was the target

- ❖ **Fashioned a strategy that had best chance to result in recovery**
- ❖ **Ultimately, failed due to ambiguity or changes to the underlying bonded contract**



Lonergan – The Political Backstory

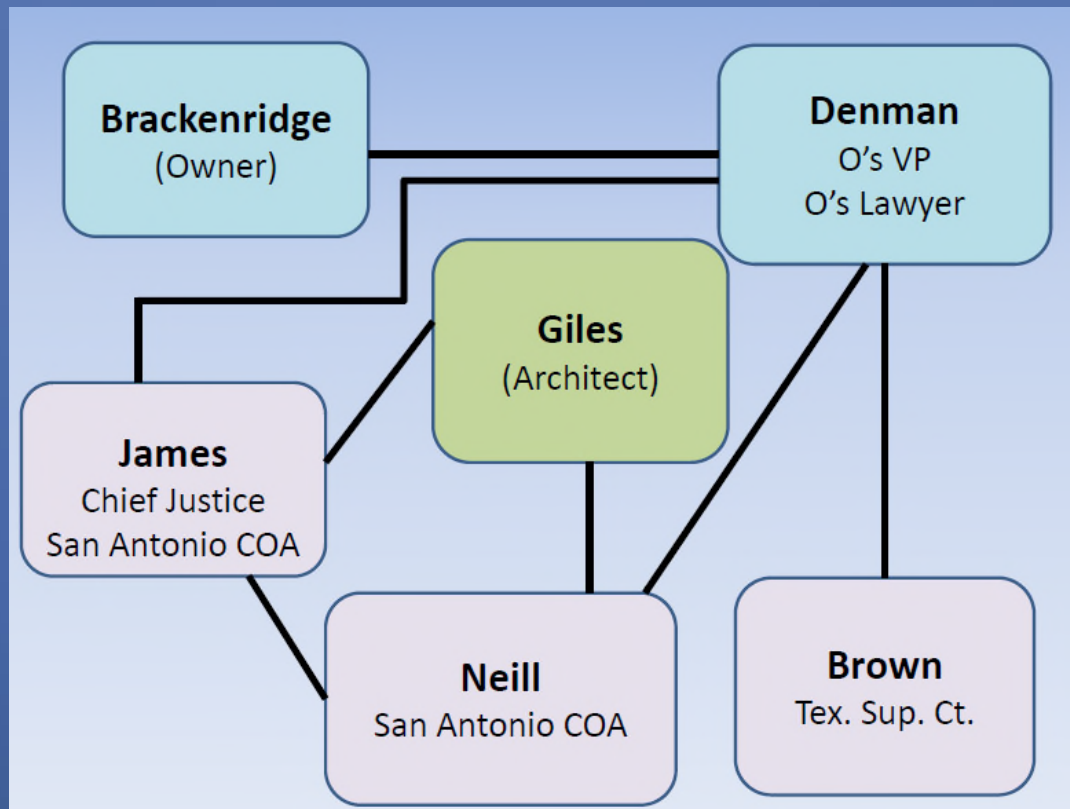
Lonergan branded as a deadbeat ne'er-do-well

- ❖ Insolvent
- ❖ AWOL
- ❖ Yankee

Claimant (SALT) involved powerful high society people

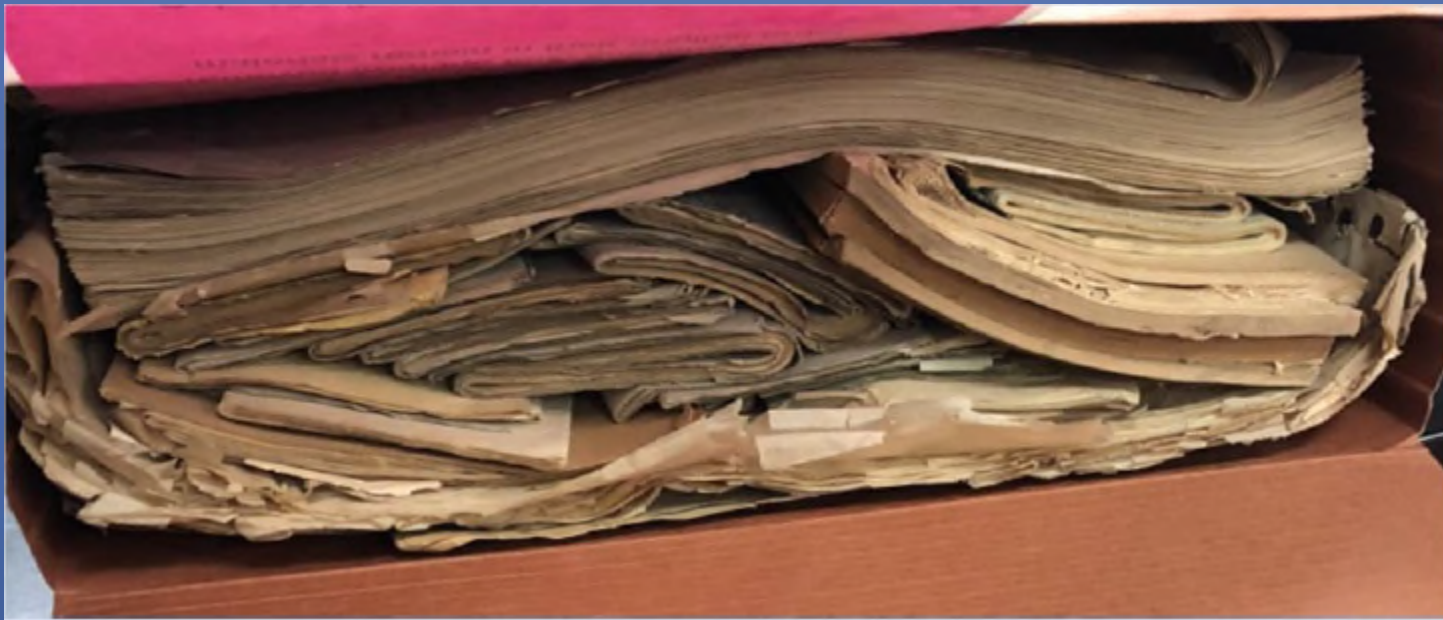
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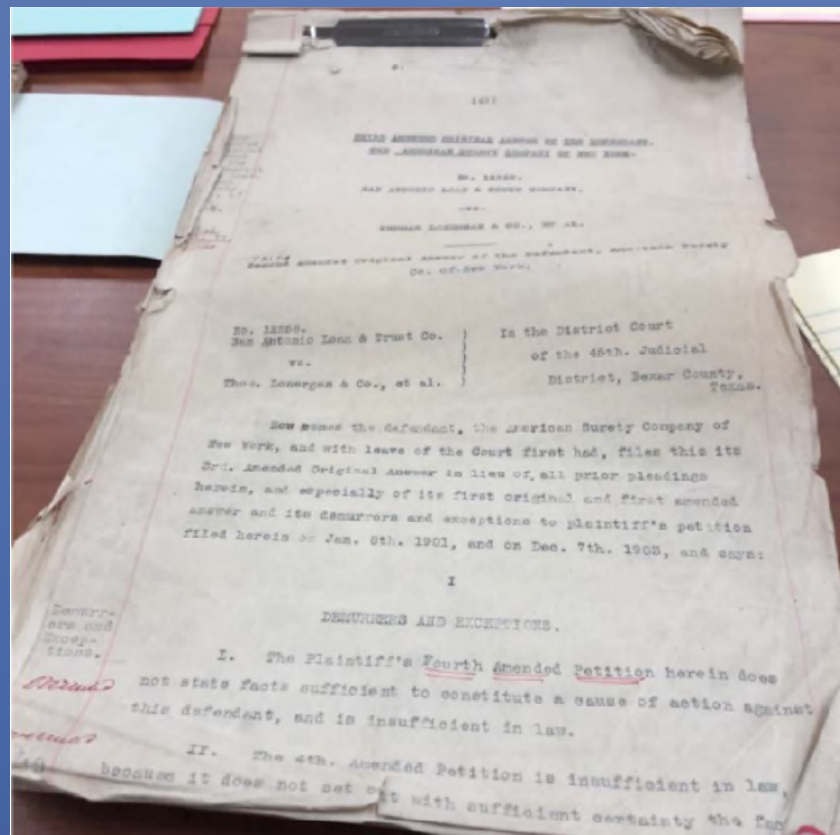
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The *Lonergan* File



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Efforts to Get Around Lonergan

- * **Suing for Misrepresentation – *City of Dallas v. Shortall*, 131 Tex. 368. 114 S.W. 536 (TEX. 1938).**
 - ❖ **City contracted for construction of tunnel**
 - ❖ **Suit for additional expense due to unexpected soil conditions**



**Suing for Misrepresentation – *City of Dallas v. Shortall*,
131 Tex. 368. 114 S.W. 536 (TEX. 1938).**

- ❖ **Must be a positive assertion of fact with justifiable reliance without any investigation on the plaintiff's part**
- ❖ **No “affirmative” misrepresentation found by jury**



IMPLIED WARRANTY?

NO – *Interstate Contracting Corp. v. City of Dallas*, 407 F.3d 708 (5th Cir. 2005) –

- ❖ No justifiable reliance given contract disclaimers to inspect and test

YES – *Shintech, Inc. v. Group Constructors, Inc.*, 688 S.W. 2d 144 (Tex. App. – Houston [14th Dist.] 1985, no writ) -

- ❖ Where contract is silent, there is an implied warranty that plans and specs are accurate and sufficient



Representations / Duties

Plans and Specs as an Affirmative Representation – *Newell v. Mosley*, 469, S.W. 2d 481 (Tex. Civ. App. – Tyler 1971, writ ref'd n.r.e.) -

Plan and Specs Create Contract Duties – *City of Baytown v. Bayshore Constructors, Inc.*, 615 S.W. 2d 792 (Tex. Civ. App. – Houston [1st Dist] 1980, writ ref'd n.r.e.) -

- ❖ Owner breached contract by supplying inaccurate plans and specifications



Representations / Duties

Turner, Collie & Braden, Inc. v. Brookhollow, Inc., 624 S.W. 2d 203 (Tex. Civ. App. – Houston [1st Dist. 1981, rev'd o.g., 642 S.W. 2d 160 (Tex. 1982) –

“Our courts have recognized . . . cause of action . . . in favor of a contractor against an owner or architect who furnishes defective plans and specifications.”



Texas Supreme Court Reaffirms *Lonergan*

El Paso Field Services, LP v. Mastec North America, Inc., 389 S.W.3d 802 (Tex. 2012).

- ❖ Numerous pipeline crossings encountered during construction
- ❖ Owner was to exercise due diligence in locating pipeline and crossings and notify Owner before excavation
- ❖ Owner failed to locate and disclose 85-90% of crossings
- ❖ Contractor included mark-up pricing for encountering unidentified crossings/pipelines



The Contract Controls the Result

Supreme Court Follows *Lonergan* -

- ❖ Contract must 'fairly imply' a guarantee of accuracy
- ❖ Parties shifted risk – “where one agrees to do, for a fixed sum, a thing possible . . . he will not . . . become entitled to additional compensation, because unforeseen difficulties are encountered.”
- ❖ “The Court’s role is not to redistribute these risks and benefits but to enforce the allocations that the parties previously agreed upon.”



- ❖ “Sophisticated parties, like all parties to a contract, have ‘an obligation to protect themselves by reading what they sign.’”
- ❖ “... long recognized Texas’ strong public policy in favor of preserving the freedom of contract.”



Contract Language Dictates

Alamo Community College District v. Browning Const. Co.,
131 S.W.3d 146 (Tex. App. – San Antonio 2004, Pet.
Denied) – Contract created Owner Liability

“The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions discovered [in the contract documents].”

Millgard Corp v. McKee/Mays, 49 F.3d 1070 (5th Cir. 1995)
– Contract language shifted risk to contractor

Owner disclaimed responsibility for accuracy by contract



Read the Contract — It Matters

- ❖ Be very explicit when negotiating contracts
- ❖ If going to assume any responsibility for plans – do your due diligence
- ❖ Act right – treat people fairly
- ❖ It never hurts to have powerful people in your corner



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