Your General Counsel

Plus, Defective Plans:

a Dive into *Spearin* & Some Very Odd Texas Law

What does a General Counsel Do?

- Risk Management
  - Insurance
  - Contract Review
  - Claims Support
    - *Spearin* Doctrine
    - *Lonergan* and Texas's New Law
    - The False Claims Act
- General Counseling Generally

Risk Management

- **Insurance**
  - Auto
  - General Liability
  - Professional Liability
  - Pollution
  - Builders Risk
  - Employer Liability

Risk Management

- **Upstream Contract Review (Owner Contracts)**
  - Indemnity – We're responsible for their sins or maybe it simply protects them from ours
  - No Damages for Delay – They dawdle, we go broke
  - Liquidated Damages –the cost (a guess) of late completion
  - Actual Damages – limited only by the imagination of the owner's lawyers
  - Unknown and Differing Site Conditions

Risk Management

- **Downstream Contracts**
  - We make everything in the owner's contract the subs problem (to the extent we can—and sometimes because we have to)
  - Sub/P.O. Insurance Requirements
  - Payment and Performance Bonds

Claims

- **The Mechanics of Making a Claim**
  - Notice
  - Timing?
  - What costs can be claimed? What can’t?
  - Format?

Claims

- **What claims are permissible?**
  - Differing Site Conditions
  - Added Work
  - Owner Interference
  - Errors in the Plans or Specification (does *Spearin* Doctrine apply?)

Spearin Doctrine

- **Comes from a United States Supreme Court Decision:**
  - *United States v. Spearin,* 248 U.S. 132 (1918)
  - This is “common law” (judge-made law), not statutory law (mostly)

Spearin Doctrine

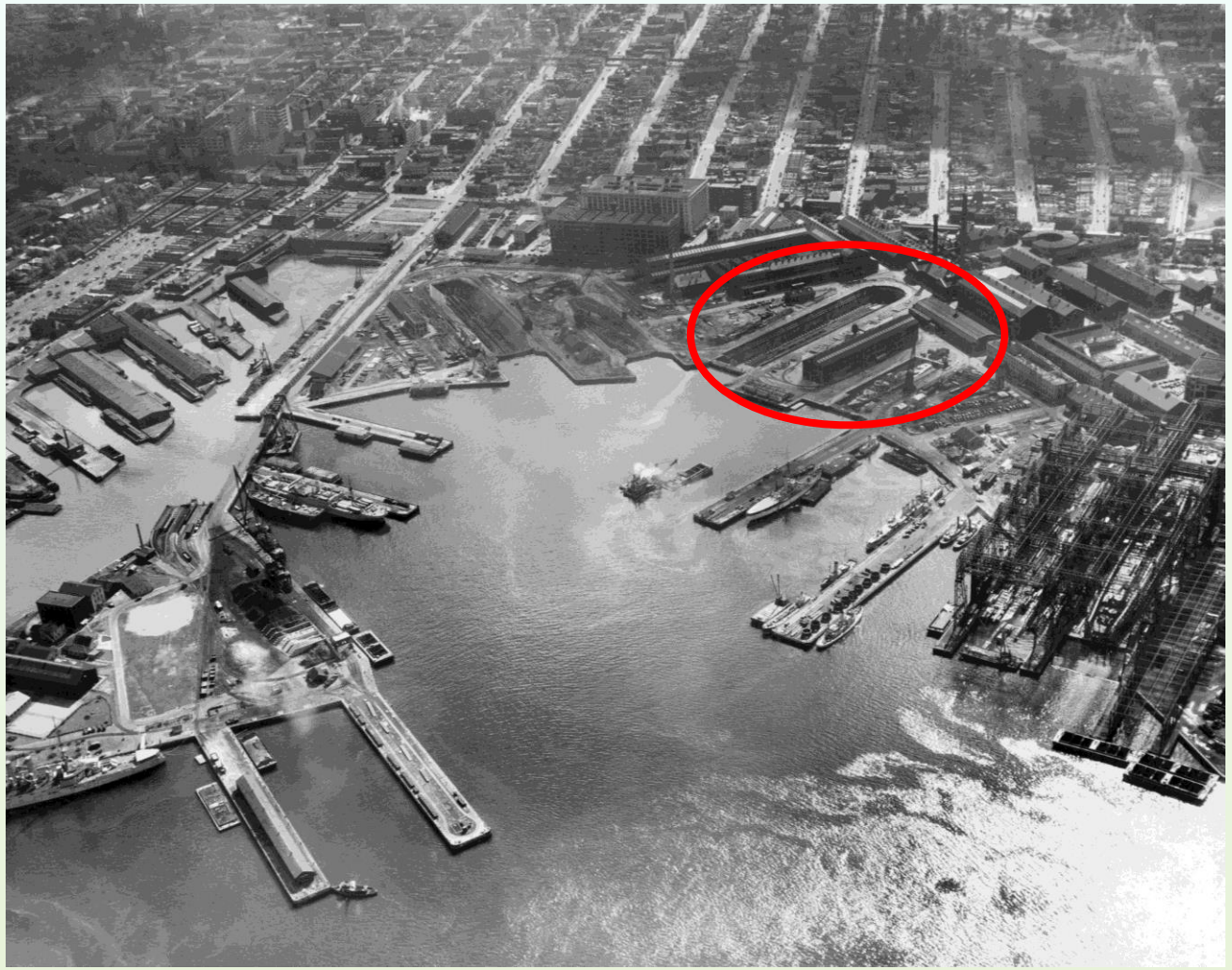
Brooklyn Navy Yard, 1918

By Adam Cuerden - Naval History and Heritage Command Catalogue No.: NH 117794

Spearin Doctrine

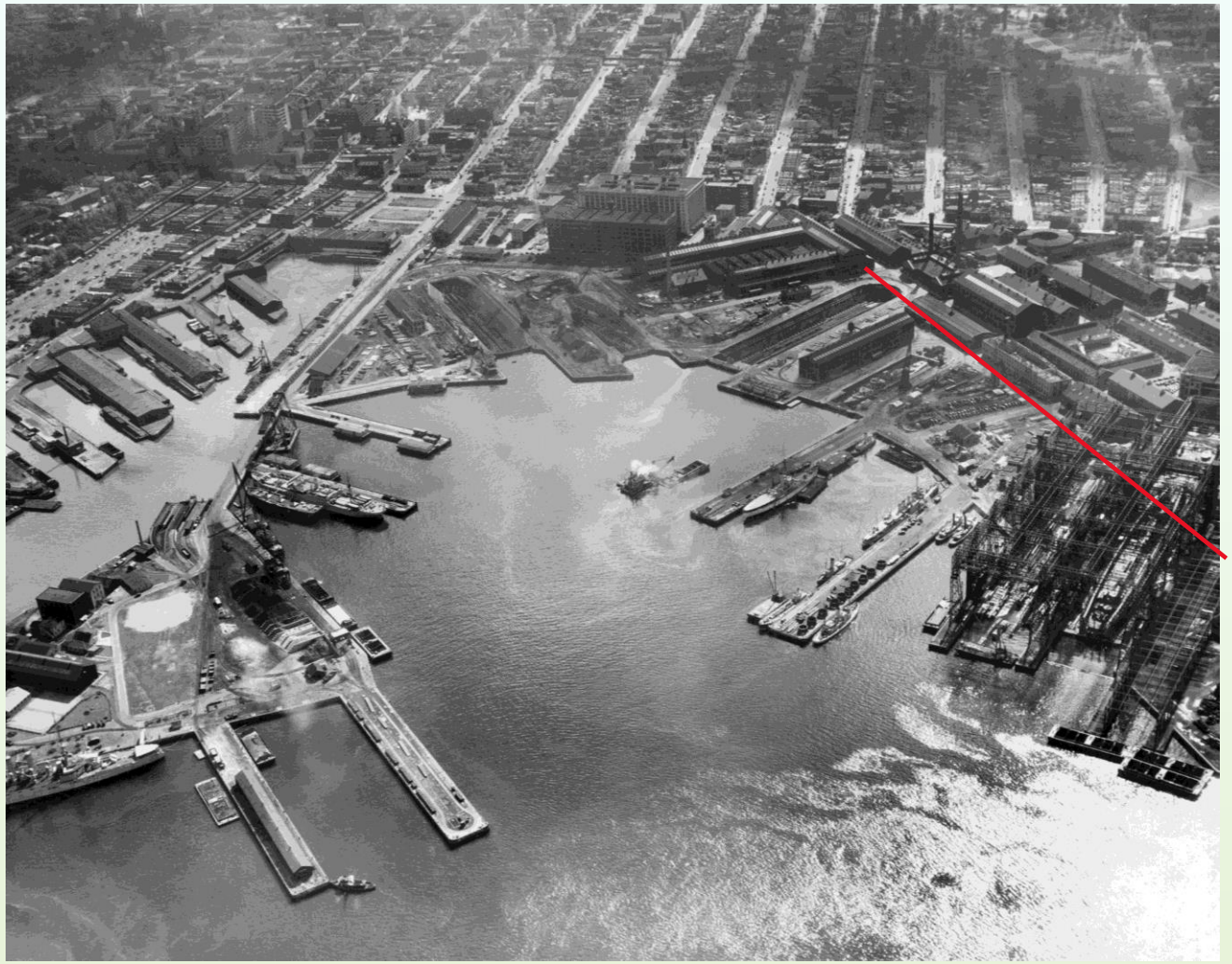
Project:

- Build a drydock
- Contract executed in February 1905



Spearin Doctrine

- Need to relocate a 6-ft diameter brick sewer first. Work is shown on the plans.



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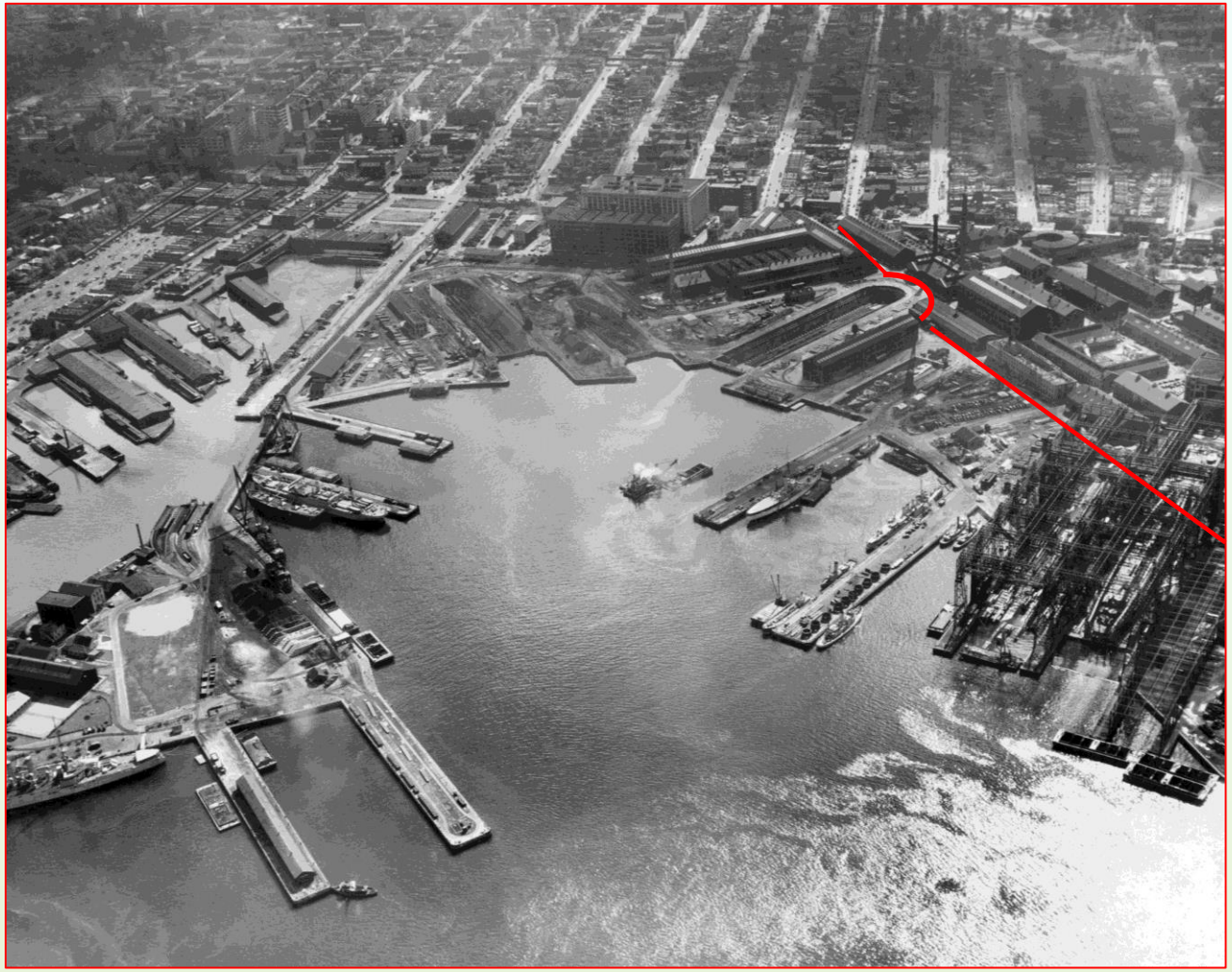


Spearin Doctrine

The Issue:

- 18 months into the project …
- it rains – hard, during a high tide.
- The relocated sewer bursts.

Spearin Doctrine

- **Government's Position**
  - Contractor was responsible for remedying the existing conditions.
  - Contractor should repair the damage caused by the burst sewer.
  - Contractor should make sure it doesn't happen again.
- **Contractor's Position**
  - Not doing anything until the government tells us how to make this safe (and pays for it).

Spearin Doctrine

- **Supreme Court's Decision**
  - "Where one agrees to do, for a fixed sum, a thing possible to be performed, **he will not be excused** or become entitled to additional compensation, **because unforeseen difficulties are encountered**."
  - "The risk of the existing system proving adequate might have rested upon Spearin, **if** the contract for the dry-dock had not contained the provision for relocation of the 6-foot sewer."

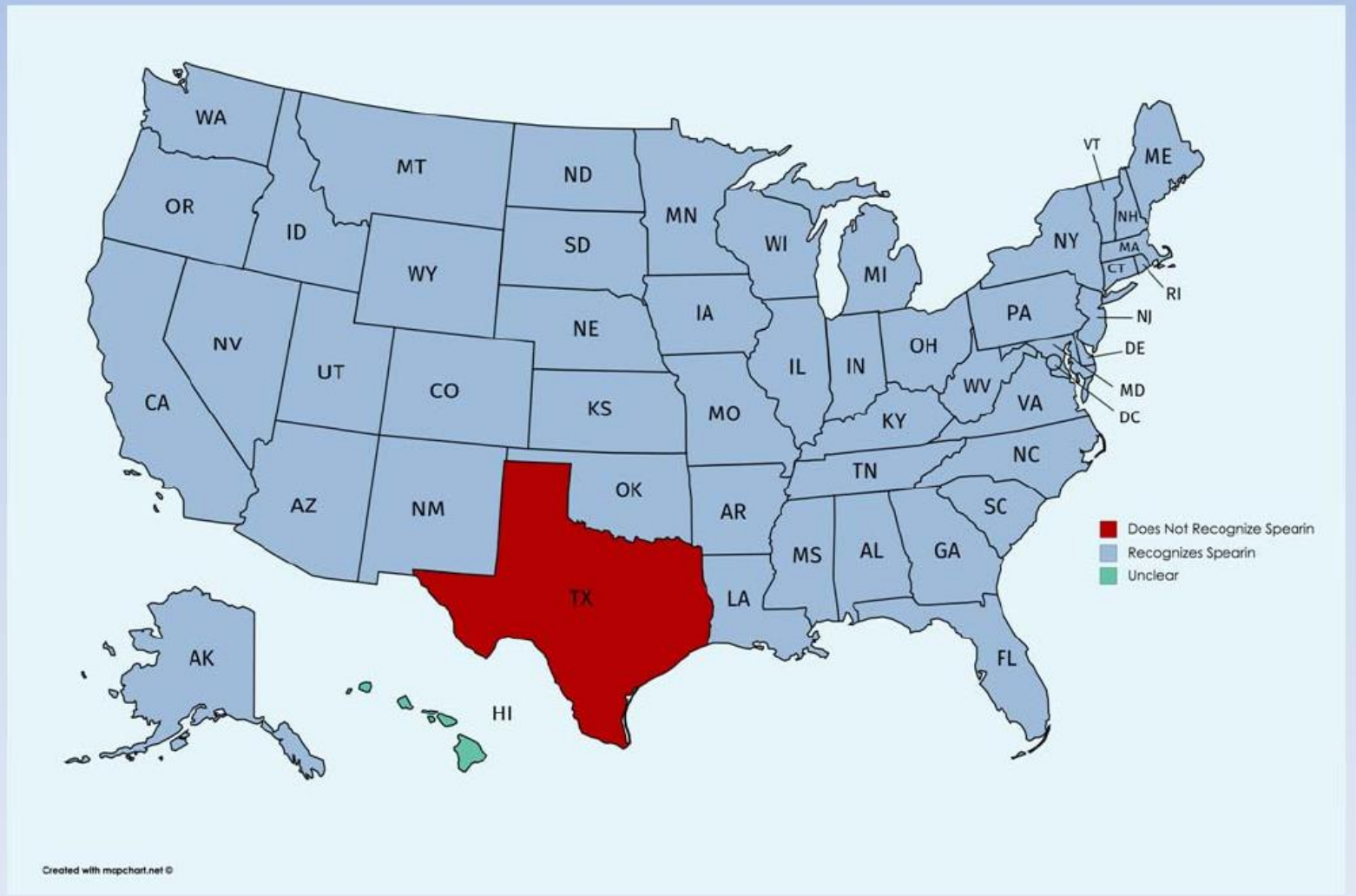
Spearin Doctrine

- **Supreme Court's Decision**
  - "But 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."
  - The duty to check plans did not obligate the contractor to verify that the plans would accomplish the owner's purpose.
  - "[T]he insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate."

Spearin Doctrine

- Who must abide by the *Spearin* decision?
  - Federal courts deciding cases under Federal law
  - NOT state courts deciding private or state cases
- But …

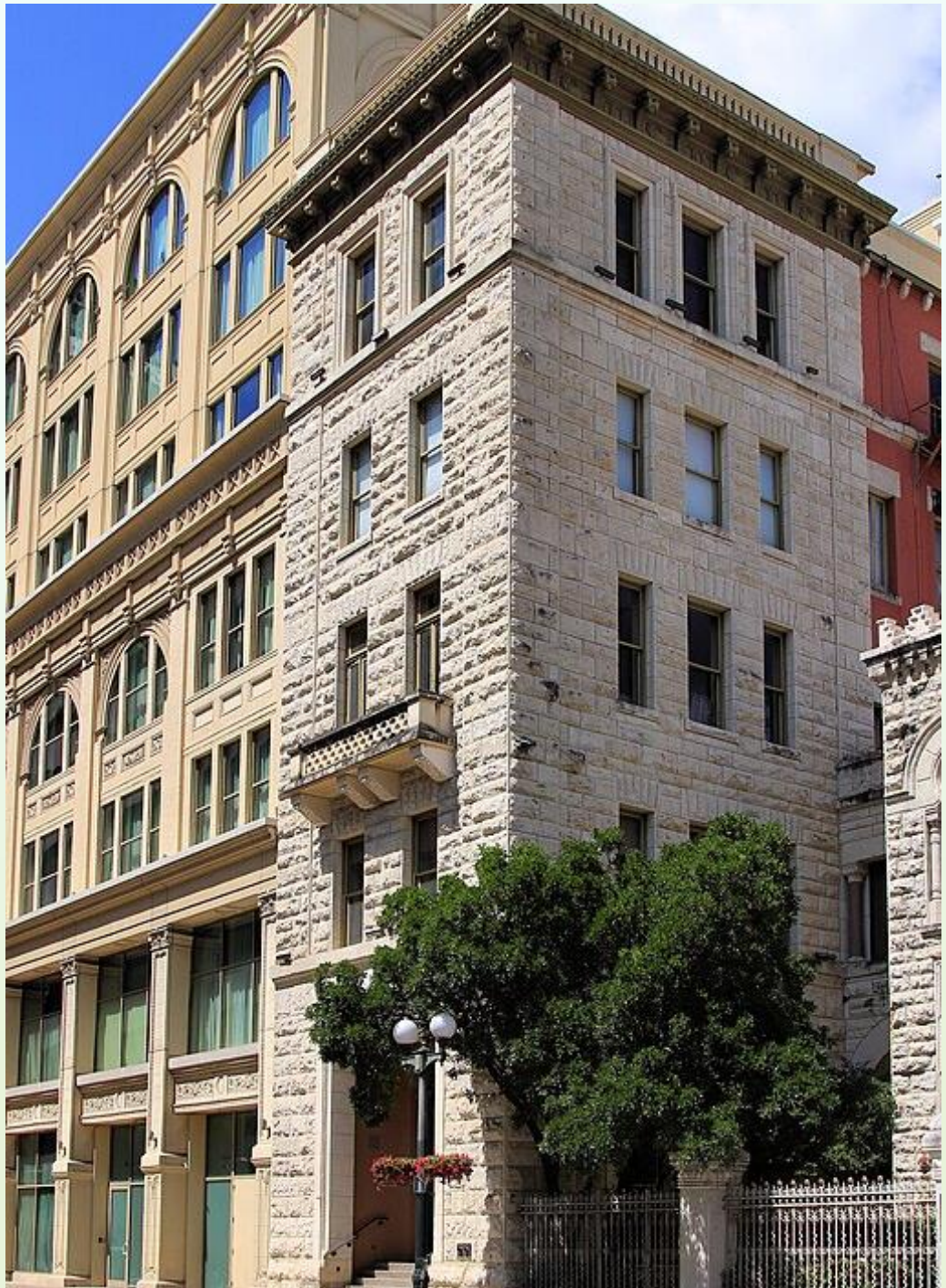
States Recognizing *Spearin*



Fred D. Wilshusen and Misty H. Guitierrez, *A Look Behind the Curtain*, 32nd Annual Construction Law Conference (2019)

Spearin Doctrine in Texas

- Or, *Spearin* upside down spells *Lonergan*
- *Lonergan v. San Antonio Loan & Trust Company,* 101 Tex. 63, 74 (1907)



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Lonergan v. S.A.L.T.

- Thomas Lonergan & Co. is a Chicago Contractor.
- S.A.L.T is a local business owned by a prominent San Antonian (Brackenridge).
- The building falls down during a storm, in May 1900, a year into construction.
- Lonergan's partner dies insolvent.
- Lonergan & Co. is bankrupt.
- But … there is a surety.

UTSA Libraries Special Collections

Lonergan v. S.A.L.T.

- S.A.L.T. sues Lonergan & Co. and the Surety.
- Trial court orders a directed verdict for S.A.L.T.
- Lonergan appeals and loses.
- Lonergan loses in the Texas Supreme Court (but the surety wins).

Lonergan v. S.A.L.T.

Not that it means anything but …

- S.A.L.T.'s attorney was a former justice of the Court with the author of the Supreme Court decision.
- The attorney was also a VP of S.A.L.T.
- The architect's brother-in-law was the Chief Justice of the appeals court alongside the judge that wrote the appellate decision in favor of S.A.L.T.
- There was no professional registration of Texas architects and engineers until 1937 (after a school explosion).

Lonergan v. S.A.L.T.

- Texas Supreme Court Decision
  - The contractor had as much opportunity as the owner to decide whether he was “satisfied” with the building’s plans and specifications.
  - The contractor was “probability much better” able to discover any defects in the architect’s work than the owner.
  - “[The contractor], having failed to comply with their agreement to construct and complete the building in accordance with the contract and the specifications, must be held responsible for the loss, notwithstanding the fact that the house fell by reason of its weakness arising out of defects in the specifications and without any fault on the part of the builder.”

Lonergan is Dead (or is it?)

- *Newell v. Mosley*, 469 S.W.2d 481 (Tex. Civ. App. 1971, writ ref'd n.r.e.)

  "Subject to some exceptions, if a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby **impliedly warrants their sufficiency** for the purpose in view, particularly if the party furnishing the plans is the owner."

Lonergan Lives!

- *El Paso Field Services., L.P. v. MasTec North Am., Inc.*, 389 S.W.3d 802 (Tex. 2012)
  - El Paso Field Services hired MasTec to replace a 68-mile-long deteriorated propane pipeline constructed in the 1940s.
  - El Paso's surveyor identifies 280 utility interferences.
  - Actually, there were about 794.

Lonergan Lives!

- The Texas Supreme Court decides:

  "As in *Lonergan*, El Paso did not guarantee the accuracy" of its surveyor's work.

- Some oddities:
  - El-Paso actually disclaimed the accuracy of its surveyor's work, stating that the contractor had "full and complete responsibility for … all risks" regarding "subsurface conditions [and] obstructions."
  - The Court found that the parties' contract "clearly place[d] the risk of undiscovered foreign crossings on MasTec."

Lonergan Lives!

but only for about a decade …

2021 Texas Senate Bill 219

AN ACT

relating to civil liability and responsibility for the consequences of defects in the plans, specifications, or related documents for the construction or repair of an improvement to real property or of a road or highway.

Texas Business and Commerce Code, Title 4, Chapter 59

Texas Business and Commerce Code, Title 4, Chapter 59

- “A contractor is not responsible for the consequences of design defects” for documents provided to it by an owner.
- A contractor is prohibited from warrantying “the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design documents.”
- Contracts that would include terms making a contractor liable for design defects are “void.”

Texas Business and Commerce Code, Title 4, Chapter 59

- BUT, If the contractor learns of a "defect, inaccuracy, inadequacy, or insufficiency" or it should have "reasonably … discovered" the issue "using **ordinary diligence**," then the contractor will be liable.
- How will a court or arbitrator reconcile this with standard clauses:
  - AIA A201 General Conditions § 6.2.2:
    - A contractor "shall, prior to proceeding with that portion of the Work, promptly notify the Architect of **apparent** discrepancies or defects."
    - The contractor is not responsible "for discrepancies or defects … that are not **apparent**."
  - Is "apparent" the same as discoverable with "ordinary diligence"?

Texas Business and Commerce Code, Title 4, Chapter 59

- EJCDC C-700 (Rev. 1), § 3.03.A.3:
  - The contractor "shall not be liable … for failure to report any conflict, error, ambiguity, or discrepancy [unless it] had actual knowledge."
- "Actual knowledge" is not the same as discoverable with "ordinary diligence."

What does a General Counsel Do?

- We review these plan-error-risk allocation terms with an eye to how enforceable we **think** they are.
  - We'll guess what arbitrators will do.
  - We'll watch what the courts do.
  - We'll advise our companies accordingly:

    Can we assert a claim for plan or specification error **in good faith**?

The False Claims Act

- Federal Law: 31 USCS §§ 3729-3733
- State Laws or “Little False Claims Acts”
- So, who is in violation of the False Claims Act:
  - Any person who **knowingly presents, or causes to be presented**, a false or fraudulent claim for payment or approval; or **knowingly** makes, uses, or causes to be made or used, a false record or statement **material** to a false or fraudulent claim.

The False Claims Act

- Keys Points in the Context of Construction Projects
  - “Presents or causes to be presented” means any communication the contractor causes to go to the government.
  - “Knowingly” means knows or should have known.
  - “Material to a false claim” means anything that is intended to convince the government to pay money, including backup to a claim:
    - Subcontractor proposals
    - Payrolls
    - Lower tier invoices
    - And yes … schedules

The False Claims Act

- *City and County of San Francisco v. Tutor-Saliba Corporation*
  - Government Allegation: The contractor "**falsely represented** the progress of the work … and the impact of [owner]-initiated changes to the work, **[using] monthly schedules and schedule reports … to obtain additional payments for acceleration and inefficiency**."
  - Court: Yep, that can be a false claim (still needs to be proved).

The False Claims Act

- *United States ex rel. Wall v. Circle C Construction, LLC* (even when you win, you lose)
  - $9,900 underpayment of electrician wages (admitted Davis Bacon violation).
  - Government alleges all $554,000 of the electrical work was "tainted."
  - Government sues for treble damages, $1.66 million, and wins at trial.
  - After a decade of litigation, including two appeals, Circle C Construction has the judgment reduced to $14,748.
  - It cost them $468,704 in legal fees.

Some Final Thoughts

- Remember – the General Counsel Represents the company, not the employees. The company has the attorney-client privilege.
- All the same, tell your General Counsel everything—the good the bad the ugly. Good decisions require knowing all the facts and all the risks.
- Document, document, document some more.
- Save opinions, rants, and speculation for phone and in-person conversations (with no third parties present).
- Stuff happens—let us help you through it.

Questions?