

Recovering and Avoiding Consequential Damages in the Current Economic Climate

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In construction projects of any complexity, some nonconforming or untimely work is inevitable, and may lead to finger-pointing and claims for damages.

Whether each party is entitled to the damages it seeks frequently depends in large measure on whether the damages are classified as “direct” or “consequential.” Recovery of the latter requires proof of more elements with a greater degree of certainty under the common law, and often the need to address a contract provision purporting to waive or limit recovery of consequential damages altogether. Contract waivers of consequential damages add a dimension of complexity because these clauses often do not clearly define what damages are “consequential,” and the term is not self-defining.¹ Understanding and applying the likely implications of these common law elements and contract principles at the time of contracting better

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enables parties to avoid or shift responsibility for problems down the road.

This article explores the recovery and avoidance of consequential damages—particularly important given the current economic climate—in three parts. Part one discusses the nuanced distinctions between direct and consequential damages, the required showings for and limitations on recovery of each, and efforts by various courts to make sense of those distinctions, requirements, and limitations. Part two discusses particular categories of consequential damages commonly sought by contractors and owners, respectively. Part three discusses contractual waivers of consequential damages, including issues of enforceability and scope, and recommends negotiation strategies aimed at reducing uncertainty and shifting risk.

Part One: Overview of Consequential Damages *Breach of Contract Damages Generally*

The appropriate measure of damages arising from breach of an enforceable contract is often said to be “the difference between the value expected from the contract and the value actually received by the non-breaching party.”² Such damages are meant to place the injured party in the same position as if the promised performance had been rendered, and not to confer a windfall.³ Parties to a contract are free to limit or modify the remedies available in the event of a breach, and thus this general measure of damages is subject to such contractual provisions.⁴

Distinction Between “Direct” and “Consequential” Damages

Actual damages are either “direct” or “consequential.”⁵ There is no bright-line test for distinguishing consequential from direct damages. Attempts by courts from different jurisdictions to distinguish the two have sometimes yielded inconsistent results and failed to provide needed clarity.

Direct damages are those that flow naturally and necessarily from the breach and compensate for loss that is presumed to have been foreseen or contemplated by the parties as a consequence of breach.⁶ Whether a given damage item is direct or consequential turns primarily on pertinent contract language, but also may be influenced by such factors as the parties’ sophistication.⁷ Common examples of direct damages include unpaid contract amounts, cost to repair defective work, and reduced project value due to nonconforming work.

Consequential damages, in contrast, are losses to the nonbreaching party that “result naturally, but not necessarily, from the breach.”⁸ They “must be foreseeable and

... directly traceable to the wrongful act and result from it.”⁹ A classic example of consequential damages is lost profit on collateral business arrangements.

Requirements for Recovery of Consequential Damages

The degree of proof as to the amount of damages is higher for consequential damages than for direct damages, and consequential damages must be pled with greater specificity. The plaintiff must prove such damages are the proximate consequence of the breach and were reasonably foreseeable or within the contemplation of the parties at the time the parties entered into the contract.¹⁰ The “general rationale underlying the foreseeability principle is a party who can reasonably foresee the consequences of a breach of contract can adjust the contract price accordingly to compensate for the risk that is being assumed.”¹¹

Although some courts tend to apply an objective test in determining foreseeability, other courts seem to require a subjective showing that the particular damages were actually within the contemplation of the contracting parties.¹² Review of case law across jurisdictions suggests the “foreseeability” element receives greater attention and discussion where a party seeks more novel categories of consequential damages, such as lost profits resulting from lost bonding capacity.¹³

Once the nonbreaching party demonstrates the consequential damages it seeks to recover were or should have been within the breaching party’s contemplation at the time of contracting, it must prove the amount of damages actually caused by the breach, as opposed to other factors (e.g., a downturn in the economy). Some courts have expressly required the amount of consequential damages to be proven “with reasonable certainty,” while requiring only a “reasonable estimate” of direct damages.¹⁴ Moreover, “[t]here are specific rules of damages formulated for particular situations, which are subordinate to the broad rule of damages expressed above. These subsidiary rules of damages, as well as the broad rule, require considered judicial discretion as to their applicability in a particular situation.”¹⁵ Some of these “subsidiary rules of damages” are discussed below in part two.

Federal Rule of Civil Procedure 9(g) and many state rules¹⁶ require parties to specifically plead “special damages,” a synonym for consequential damages. Evidence of special damages is inadmissible if those damages are not specifically pled in the complaint.¹⁷ Courts have specifically held that many damages categories typically deemed “consequential” are subject to this specific pleading requirement, including lost profits, lost opportunity, and diminished bonding capacity.¹⁸

The current economic climate may have implications for both pleading and proof of consequential damages. In light of widespread losses throughout the construction industry resulting from plummeting property values and a dearth of new projects, a plaintiff may be required to specifically plead and prove facts causally connecting its losses to the defendant’s particular actions, as opposed to the economic downturn.¹⁹

Duty to Mitigate

The nonbreaching party must act reasonably and timely to mitigate its damages caused by the breach.²⁰ This “duty to mitigate” presents another potential limitation on recoverable damages. Although the defendant bears the initial burden of proof on this issue,²¹ if the defendant carries its burden, the plaintiff’s damages are decreased by the amount that could have been mitigated or by the amount plaintiff recovered through its mitigation efforts.²²

Part Two: Common Construction-Related Damages

General Contractor/Subcontractor Damages

Contractors pursuing claims against project owners (or higher-tier contractors) for withheld retainage and unapproved change orders frequently also seek to recover damage items typically deemed “consequential damages.” Some of these commonly encountered add-on damage categories are discussed below.

There is no bright-line test for distinguishing consequential from direct damages.

A contractor that is required to remain on “standby” during a period of owner-caused delay and is unable to take on replacement work may be entitled to recover unabsorbed home office overhead expenses.²³ Overhead expenses include fixed, continuous expenses of a business incurred regardless of reduced business, e.g., rent, taxes, and administrative salaries; and expenses that vary in proportion to business volume.²⁴

The standard measure for *quantum* of unabsorbed overhead incurred is the three-step *Eichleay* formula: (i) the home office overhead allocable to the contract is determined by multiplying the total home office overhead by the ratio of the delayed contract billings to the total billings of the contractor for the contract period; (ii) a daily overhead rate is computed by dividing the overhead allocable to the contract by the number of days of contract performance; and (iii) the total overhead recoverable is determined by multiplying the daily overhead rate by the number of days of compensable delay.²⁵

Contractors often may seek recovery for lost profits. In evaluating recoverability and other issues related to lost profits, it is important to distinguish between a reduction in the amount of profits a contractor expected to earn on the subject project and a loss of profits a contractor claims it would have earned on other projects. In addition to being easier to establish, lost profits on the project at issue are direct damages, and thus arguably not precluded

by industry-standard contractual waivers of consequential damages.²⁶

Although a plaintiff must establish causation and damages elements to recover lost profits on the subject project, it faces an easier burden than when seeking lost profits on other projects. Foreseeability is more easily established (if not presumed), and the amount of damages need not be established with the degree of certainty required for recovery of lost profits on other projects.²⁷ Note, however, a contractor seeking to recover lost anticipated profits on work the owner prevented it from performing faces the reasonable certainty standard.²⁸

Where contractors have been required to perform extra work because of the owner's interference, and sought additional profit as a percentage of the value of the extra work, results have varied. Some courts have refused to recognize this extra profit as a compensable damage, awarding the contractor the amount of profit it originally anticipated earning, but not increasing that amount based on the extra work the contractor did not originally anticipate performing.²⁹ Even less likely is recovery of "lost profit" in the form of a percentage of "indirect expenses" incurred by the contractor on the project.³⁰

Evidence of special damages is inadmissible if those damages are not specifically pled in the complaint.

Where project completion is delayed, contractors sometimes seek to recover "lost opportunity damages," such as those profits they believe they would have made on other projects, but for delayed completion of the project at issue. Such damages are more speculative than lost profits on the subject project, and constitute consequential damages. Although small- to midsized contractors with limited manpower, resources, and bonding capacity may have a colorable argument that delayed completion consumed their resources and precluded them from securing or performing contracts on other projects, they will face many hurdles.

To recover lost profits on other projects, a party must prove the damages were within the parties' contemplation at the time they signed the contract³¹ and prove with reasonable certainty the additional net profits it would have earned but for the defendant's breach.³² A contractor's simple showing of a reduced net profit level in the year in which delayed completion was finally achieved, as compared with the prior few years, by itself will rarely carry the day. The contractor will need to demonstrate, through expert testimony, that the reduced profit level for a given

period was more likely than not caused by the defendant's actions.³³ If a contractor does not have a track record of making a profit, it will face an even greater challenge in meeting its burden of proof.³⁴

Contractors sometimes assert that the owner's refusal to pay change orders or retainage, or the dispute itself, has negatively impacted the contractor's balance sheet or otherwise made it impossible (or expensive) to obtain bonds needed to bid or perform work on other projects. The contractors therefore seek lost profits on future unawarded contracts.

Diminished bonding capacity claims should be carefully evaluated to determine whether the "foreseeability" and "reasonable certainty" requirements can be met. In considering whether a contractor has established that its lost profits resulting from lost bonding capacity were foreseeable, a number of courts have found such lost profits "were not actually foreseen nor reasonably foreseeable."³⁵

Even if a contractor proves its lost bonding capacity was reasonably foreseeable at the time of contracting, it must still prove with reasonable certainty the amount of profit it would have earned, but for the lost bonding capacity.³⁶ Intuitively, this would seem to require the contractor to—at a minimum—identify specific jobs it bid on, or would have bid on, but for its inability to obtain a bid bond, and demonstrate the profit it would have earned on each such project using generally accepted accounting principles.³⁷ However, at least one court held that such evidence was not required.³⁸

Due to project delays beyond a contractor's control, contractors often incur additional expenses relating to the financing of operations. For instance, it is not uncommon for contractors to obtain additional financing to fund operations through the extended contract period relating both to the payment of subcontractors and suppliers and to the payment of internal salaries and overhead. Similarly, contractors may incur additional financing-related costs on pre-existing loans such as higher market interest rates, penalties, and late fees. As is typically the case with consequential damages, the ultimate inquiry hinges on whether these loan-related expenditures were foreseeable by the parties at the time of contract formation,³⁹ and whether the contractor can demonstrate with reasonable certainty the amount of damages resulting from the owner's breach.⁴⁰ This consequential damage item should not be confused with prejudgment interest that a prevailing plaintiff may be entitled to recover on its "out-of-pocket, pecuniary losses" once a verdict has liquidated the plaintiff's damages.⁴¹

Contractors sometimes incur additional insurance carrying costs due to delays that they attribute to acts or omissions of the owner. Common costs include additional insurance and bond premiums paid by contractors during the delay period both for employee salaries and for equipment.⁴² Other related costs include related professional fees such as attorneys' fees paid in connection with the payment of these additional costs and premiums.⁴³

Absent a controlling contract provision, whether these items are recovered is determined through the consequential damages analysis discussed above (i.e., whether the damages were actually contemplated by the parties or otherwise, reasonably foreseeable, and can be proven with reasonable certainty).

Common Owner/Developer Damages

Like other contracting parties, a project owner is entitled to the benefit of its bargain. Thus if a contractor furnishes incomplete or nonconforming work, the owner generally is entitled to recover the cost of completing or correcting the work, less the unpaid balance of the original contract.⁴⁴ Stated differently, the owner is entitled to the difference between the original contract price and the actual cost to complete the project in conformance with the parties' agreement.⁴⁵ However, where the cost of correction substantially exceeds the diminution of value attributable to the nonconforming work, the owner's recovery may be limited to the latter damage measure, at least in jurisdictions recognizing the "economic waste doctrine."⁴⁶

An owner also may be entitled to recover consequential damages resulting from untimely or defective work.⁴⁷ Discussed below are particular categories of damages project owners commonly seek, through either setoffs or affirmative claims.

When a construction contract requires the owner to pay particular expenses, such as inspection and testing, wastewater removal, and utilities, increases in such expenses resulting from delay are likely to be recoverable as direct damages.⁴⁸ By contrast, increased labor or fuel expenses resulting from delayed installation of highly automated or energy-efficient equipment may be deemed consequential damages.⁴⁹

A second damage claim owners may seek involves project financing. Under the terms of most construction loan documents, the project owner/borrower is required to pay additional interest and other fees (e.g., a "loan extension fee") in the event project completion and conversion to permanent financing are not achieved by a specified date. An owner required to pay such fees because of contractor delays generally can recover them from the contractor as either direct or consequential damages, depending on such variables as the "sophistication" of the parties and whether the construction contract references or incorporates the pertinent financing provision.⁵⁰

Another common damage claim by owners is lost profits, such as loss of income resulting from loss of use during delayed completion or remediation.⁵¹ When an owner loses the use of a structure because of delay in its completion, reasonable rental value during the period of delay may be an appropriate damage measure.⁵² However, an owner may need to show the project was in fact planned to generate rental income, and thus that lost rental income in the event of delay was reasonably foreseeable at the time of contracting.⁵³

A second form of lost income is loss of resale profits due to inexcusable delay, measured by the difference in fair market value on the actual date of completion and the date specified in the contract.⁵⁴ Owners seeking to recover loss of resale profits in the current economy, reasoning the units/buildings would have been sold prior to the downturn absent the contractor's delay, will need to show lost profits resulting from its inability to sell (or its need to lower the sale price) were within the reasonable contemplation of the parties at the time of contracting.⁵⁵

Many construction contracts contain a "liquidated damages" provision specifying a particular amount of damages that will be assessed for each day project completion is delayed. In most jurisdictions, a contractual liquidated damages provision will be enforced if (i) at the time of contracting, the amount fixed was a reasonable forecast of the just compensation for harm caused by the breach; and (ii) the harm caused by the breach is very difficult to estimate accurately.⁵⁶ Stated another way, a liquidated damages provision is enforceable as long as "the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression."⁵⁷ A liquidated damages provision will not be enforced if, taking into account the above factors, it is more in the nature of a stipulation for penalties.⁵⁸ Whether the liquidated damages provision passes this test is a question of law.⁵⁹ A party challenging a liquidated damages clause bears the burden of proving it unenforceable.⁶⁰

Liquidated damages serve as a substitute for actual damages; thus, recovery of liquidated delay damages bars recovery of actual delay damages.⁶¹ A provision that allows the owner to choose between liquidated delay damages and actual delay damages "each of which would allow full recovery," or that permits the owner to pursue them both is unenforceable.⁶² However, an owner pursuing recovery of liquidated delay damages could pursue additional damages resulting from breaches other than delayed completion, such as the cost of correcting defective work.⁶³

In a typical design-bid-build contract, where the owner furnishes the design, a "latent defect" can be defined as an item of work not in compliance with project specifications, but not discoverable at project acceptance by reasonable inspection. Based on the distinction between direct and consequential damages set forth above, the costs of repairing latent defects (or, alternatively, diminished value) will usually be deemed recoverable direct damages. Other damages resulting from the latent defects are more likely to be considered consequential damages, recoverable only if the required elements for recovery of latent defects are established.⁶⁴ Recovery also may depend on the language of applicable contractual warranties or indemnity provisions, or on statutory or common law implied warranties.

Part Three: Avoiding Consequential Damages by Waiving Them in Advance—Negotiating Waivers of Consequential Damages in the Current Economic Climate

Introduction—Consequential Damages Waivers

Architects and contractors increasingly attempt to allocate risk and responsibilities for consequential damages with owners via contract waivers. This movement was instigated by a court decision affirming an arbitration panel's award of \$14,500,000 in damages for lost profits arising from a \$24,000,000 casino remodeling contract on which the contractor earned a \$600,000 fee.⁶⁵

Contractors voiced concern over that decision, which resulted in damages grossly in excess of the contractor's anticipated fee, amounted to a catastrophic loss contractors should attempt to prevent with contract waivers. The result, beginning in 1997, was the inclusion by the major design and construction trade organizations, the American Institute of Architects (AIA), and the Associated General Contractors of American (AGC), of forms of waivers in their standard design and contractor trade association contracts. Most other construction industry trade organizations have followed suit.

Because of this trend, consequential damages waivers are often also addressed and developed on a case-by-case basis in custom documents. Designers and contractors increasingly leverage the promotion of these waivers by their trade organizations with the contention during negotiation that inclusion of consequential damage waivers in contracts is now "standard practice." However, owners too have increasingly insisted upon waivers worded to suit their interests, and often benefit from greater bargaining power, especially in the current economic climate. Given the increased interest and the widespread use of trade association forms, it is important for construction lawyers negotiating these clauses to become familiar with the complex issues the waivers address, and the contract interpretation issues inherent within them.

These contract waivers attempt to identify certain risks considered by the parties to be "consequential damages," for which one party waives the right to recover from the other, and requiring that the contracting parties waive in advance any future claims they might have against the other. Unfortunately, such a waiver can have unintended results, and thus any waiver should be carefully evaluated and modified to reflect the parties' expectations regarding which damages are to be waived, and those that are not.

This section addresses certain factors to consider when negotiating a mutual waiver of consequential damages, and the potential challenges to their enforcement in the claims context, including reference where appropriate to the current AIA *General Conditions of the Contract for Construction*, AIA Document A201-2007 (A201).⁶⁶

Common Trade Association Waiver – AIA 201-2007 (§ 15.1.6)⁶⁷

The basic mutual waiver in A201⁶⁸ reads as follows:

§ 15.1.6 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

Initial analysis of the extent of this waiver (note that the opening sentence does not include the common qualification "includes by way of example only and without limitation") suggests the waiver may be limited to the damages identified in sections 15.1.6.1 and 15.1.6.2.⁶⁹ Reading further, the "without limitation" qualification is found only in the sentence related to damages due to "termination in accordance with Article 14." The final sentence, "Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages when applicable in accordance with the requirements of the Contract Documents" creates a carve-out for liquidated damages. Although "liquidated damages" is not specifically defined, in context this provision appears to apply to delays in substantial completion,⁷⁰ indicating that any identified delay damages would otherwise be within the scope of the mutual waiver.

The discussion below focuses on a comparison of the A201 mutual waiver with selected other provisions in the A201 to illustrate issues that can arise when drafting, or interpreting after the fact, a mutual waiver of consequential damages within the context of the overall contract between the parties.

One example of ambiguity within the entire contract is the apparent lack of interplay between A201 section 15.1.6 and A201 article 6, which sets out the owner's and contractor's respective rights and responsibilities with regard to "separate contractors" (referring to other entities engaged directly by the owner to furnish services outside the contractor's scope of work). Recognizing the greater risk of sequencing issues, delays, and attendant cost increases inherent in the multiple-contractor situation (absent impeccable scheduling, design coordination, and other oversight), A201 section 6.2.3 allocates the burden of such increased costs in advance:

The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

Does section 15.1.6 waive either (i) the contractor's claim for consequential damages caused by a separate contractor; or (ii) the owner's claim against the contractor for damages the owner is required to pay to its separate contractors, when the contractor interferes with their activities? At one level, it seems contractor claims for delay damages caused by separate contractors are sufficiently akin to owner-interference delay damages, within section 15.1.6, at least with respect to delay damages. Owner claims against the contractor have no such affinity with section 15.1.6 because the terms and concepts used are not linked and section 6.2.3 does not itself place any express limit on damages recoverable by either party relating to separate contractors. The sections do not reference each other, and section 6.2.3 refers to terms not used in section 15.1.6, such as "separate contractors," "improperly timed activities," "defective construction," and the term "costs." It is not readily apparent whether section 15.1.6 was intended to trump or coordinate with section 6.2.3. As a result, there is room to argue (i) the lack of relationship was intended; (ii) there is an ambiguity permitting interpretation and section 15.1.6 was intended not to apply; or (iii) there is ambiguity permitting interpretation and the *ejusdem generis* principle of contract interpretation should be applied.⁷¹

Note, with respect to the owner's position, if section 15.1.6 is found to apply, the owner could be liable to the separate contractor for consequential delay damages the owner could not recover from the contractor, which would be an inconsistent result likely not contemplated by the owner when awarding separate contracts.

It appears that A201, as drafted, permits the conclusion that some, if not all, consequential damages resulting from separate contractors may not be within the scope of the mutual waiver. Parties negotiating the A201 for projects involving separate contractors may wish to consider including a mutual waiver, and modify article 6 and section 15.1.6 accordingly. Any resulting questions regarding consequential delay damages may be resolved by incorporating section 15.1.6 and including the appropriate liquidated delay damages clauses.

Other damages potentially not subject to section 15.1.6 are the costs and damages provided in A201 sections 3.2.2 to 3.2.4 and section 3.7.3 relating to damages incurred by the owner, if the contractor breaches its duty of disclosure with respect to plan defects or its duty to construct in accordance with applicable laws.

With respect to nondisclosure, A201 section 3.2.4 provides "if the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations." Section 3.2.2 provides that the contractor's obligation is to "promptly report to the Architect any errors, inconsistencies or omissions [in the Contract Documents] discovered or made known to the Contractor as a request for information in such form as the Architect may require." Section 3.2.3 provides for the contractor "to promptly report to the Architect any nonconformity [with respect to applicable laws, statutes, ordinances, etc.] discovered by or made known to the Contractor as a request for information in such form as the Architect may require." Section 3.7.3 adds, "[i]f the Contractor performs work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction."

One option is to add a provision expressly permitting recovery of actual damages if the liquidated damages clause is deemed unenforceable.

Costs and damages associated with the need to remedy errors, inconsistencies, or nonconformities in contract documents, and costs and damages associated with code violations, typically include loss of use, profits, and other consequential damages. However, the A201 is silent whether section 15.1.6 applies to these kinds of article 3 damages. The absence of specific cross-references, along with the differing terms used between the sections, leaves room for argument whether or to what extent section 15.1.6 limits the owner's remedies for damages flowing from breaches of sections 3.2.2 to 3.2.4 and section 3.7.3.

Section 15.1.6 provides that "[n]othing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents." Consider, however, the refusal of a court or arbitrator to enforce the liquidated damages provision, concluding the provision did not meet the requirements under applicable law for liquidated damages provisions. To protect themselves in such an instance, parties negotiating a liquidated delay damage clause in any agreement incorporating the A201 mutual waiver of consequential damages should take steps to mitigate against the liquidated damages clause being rejected as unenforceable, resulting in no recovery of any kind for delay. One option is to add a provision

expressly permitting recovery of actual damages if the liquidated damages clause is deemed unenforceable. Alternately, the parties could carefully delineate the specific categories of damages agreed to be recoverable (such as direct damages), notwithstanding anything in section 15.1.6 to the contrary.

Architects and contractors increasingly attempt to allocate risk and responsibilities for consequential damages with owners via contract waivers.

An example of an apparent question arising from within the mutual waiver itself is the following sentence in section 15.1.6: “This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14.” The initial question relates to the purposes of “in accordance with Article 14.” The majority of claims for consequential damages arising from termination relate to wrongful termination rather than termination in accordance with the contract. Does the phrase “termination in accordance with Article 14” carve out an exception from the waiver for wrongful termination? Or does section 15.1.6 reach beyond article 14 terminations? Does the phrase “without limitation” determine that section 15.1.6 is not restricted to terminations in accordance with article 14? Because of this ambiguity, parties considering application of the A201 should clarify whether section 15.1.6 applies to terminations not in accordance with article 14, and the nature of the damages that will be waived or preserved.

Another, and perhaps the most glaring, example of damages potentially not covered by the AIA mutual waiver is its complete absence of express reference to costs and damages caused by construction defects manifested after completion. These damages can be substantial, but often differ from damages incurred by owners or contractors from course-of-construction delays or termination, the two concepts specifically addressed in the AIA mutual waiver. Damages due to loss of use by owner (or contractor’s extended general conditions) resulting from delays in completion and damages due to termination can differ significantly from those caused by postcompletion damages, which disrupt established ongoing uses. Applying the *ejusdem generis* principle of interpretation, the examples of damages mutually waived (damages listed in sections 15.1.6.1 and 15.1.6.2, and damages due to termination), coupled with the two exceptions specifically listed in section 15.1.6 (“liquidated damages” and “loss of anticipated profit arising from the Work”), permits the conclusion that section 15.1.6 is intentionally limited to damages traditionally resulting from course of construction delays

and wrongful termination, and does not waive damages caused by construction defects after completion. Because of this, parties negotiating an A201 may avoid future issues arising from application of the mutual waiver to construction defects by adding text clarifying whether—and to what extent—the waiver addresses consequential damages resulting from construction defects.

Negotiating Consequential Damages Waivers Generally

Owners and contractors typically approach negotiation of consequential damages waivers from markedly different perspectives. Contractors tend to view such waivers as “level[ing] the risks between the owner and contractor so that a contractor’s potential exposure is proportional to its compensation under the contract.”⁷² Owners, in contrast, generally believe the contractor should be responsible for damages caused by its failure to manage risks within its control, regardless of their magnitude. Further, owners may perceive certain industry-standard waivers as unduly favoring contractors. This tension can be resolved by fair allocation to the contractor of risks it can or cannot effectively manage⁷³ (provided it makes reasonable efforts to mitigate those risks if they do occur), compensation commensurate with those risks, insurance, and offsets to the owner in exchange for an agreement to limit the risks to the contractor under applicable law.

Parties negotiating mutual waivers may wish to consider the following general approaches: (i) attempt to identify each type of risk and expressly allocate prevention/mitigation responsibility between the parties; (ii) identify damages that may result from breaches of particular contractual obligations and decide in advance (a) whether such damages will be recoverable, and (b) the appropriate measure of such damages; (iii) identify damages the parties agree to waive with the greatest precision possible, and define (or avoid) ambiguous terms such as “consequential”; (iv) consider other provisions of the draft contract that might later be construed as inconsistent with or excepted from the waiver; and (v) add cross-references, order-of-precedence language, and other terms necessary so the contract as a whole clearly and accurately reflects the parties’ intent.⁷⁴

Checklist: Enforceability of the Consequential Damages Waiver

As this part three has shown, it can be a challenge to determine whether a mutual waiver of consequential damages will be interpreted to apply to a specific element of damages. Below is a proposed abbreviated checklist approach to consider when evaluating the merits of a challenge to, or a defense of, a mutual waiver.

The first line of analysis, when prosecuting or defending a claim for damages, is whether the damages are best characterized as direct or consequential. This characterization, addressed elsewhere in this article, involves application of express contract provisions, local law, and the facts of the case.

Next, if the damages are determined to be consequential, determine if they are subject to the waiver clause itself. As discussed above, it is conceivable the waiver does not address many categories of damages otherwise considered consequential, and therefore will not operate to preclude or limit their recovery. Alternatively, to the extent the waiver of consequential damages waives damages considered nonrecoverable under common law, the waiver may arguably be unenforceable as illusory.


The challenger should determine whether the mutual waiver is susceptible to attack on public policy grounds. The overwhelming majority of courts addressing the issue in the context of commercial dealings have upheld consequential damages waivers against claims of unconscionability.⁷⁵ In most jurisdictions, the challenging party faces the high burden of pleading and proving both procedural⁷⁶ and substantive unconscionability.⁷⁷

In appropriate circumstances, courts conceivably may decline to enforce consequential damages waivers based on the proponent's active interference, bad faith, or fraud. This "active interference" exception has been applied to preclude application of "no damages for delay" clauses (allowing the contractor additional time but not compensation in the event of delay). The exception is equitable: it would be unfair for a party that actively interferes with and delays the other party's work to hide behind the "no damages for delay" clause.⁷⁸ Similarly, a plaintiff may be able to escape the bar of an exculpatory clause by establishing a defendant's "bad faith" breach, or its otherwise "willful, malicious, or grossly negligent conduct."⁷⁹

Conclusion

Parties can maximize their chances of obtaining the benefit of their intended bargain prior to contracting by carefully evaluating proposed contract language in an effort to fully understand the risks they are undertaking. To the extent their foresight and bargaining power allow, parties may want to identify and set forth particular expenses they stand to incur in the event of widespread defects or substantial project delays. This will facilitate a subsequent argument that their damages are either direct (and thus easier to prove) or recoverable consequential damages. Further, each party should consider damages the other party might incur in the event of breach, and either negotiate for appropriate exculpatory language or bargain for additional compensation commensurate with such risks.

During construction, parties should periodically refer back to their contract, particularly when disputes arise, and make reasonable, good faith efforts to understand and perform their respective obligations. Clear contract language and communication among parties that understand their respective rights and obligations go a long way toward diffusing problems and minimizing collective expense. If a dispute intensifies despite one or both sides' best efforts, and a party begins to incur expenses it did not agree to assume, it should take reasonable efforts to mitigate such expenses and carefully document those that

prove unavoidable and why. In the event claims ultimately ensue, each party will want to have on hand evidence necessary to establish its claims and damages, to plead its "special damages" with requisite particularity, and to counter the other party's damage claims as effectively as possible. Additionally, parties should anticipate hurdles to recovery posed by the current economic climate, including causation problems and insolvency of the party directly responsible, and evaluate other potential sources of recovery. 

Endnotes

1. See, e.g., *Gulf Amer. Indus. v. Airco Indus. Gases*, 573 So. 2d 481, 489 (5th Cir. 1990) (noting that "the term 'consequential damages' . . . is never explained or clarified anywhere in the contract" and thus the court had "no way of knowing" what the term meant, and the contract "does not contain a valid waiver of [plaintiff's] right to collect consequential damages . . . arising out of the breach of the contract").

2. *Tenn. Gas Pipeline Co. v. Technip USA Corp.*, No. 01-06-00535, 2008 WL 3876141, at *5 (Tex. 1st D.C.A. 2008).

3. *Hees v. Burke Constr., Inc.*, 290 Conn. 1, 8, 961 A.2d 373, 378 (2009) ("The injured party, however, is entitled to retain nothing in excess of that sum which compensates him for the loss of his bargain. . . . The concept of actual loss accounts for the possibility that the breach itself may result in a saving of some cost that the injured party would have incurred if he had had to perform. . . . In such circumstances, the amount of the cost saved will be credited in favor of the wrongdoer. . . ."); *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 789, 107 P.3d 1219, 1228 (2005) ("A party is not entitled to recover damages 'not the proximate result of the breach of contract and those which are remote, contingent, and speculative in character.'").

4. *Tenn. Gas*, 2008 WL 3876141, at *6 (discussing provision in general contract waiving recovery of "indirect, special, incidental or consequential loss or damage" and owners contention that damages awarded by jury were direct, not consequential, and thus should not have been limited by lower court). See part three, *infra*, for discussion of contractual limitations on recovery of damages.

5. *Tenn. Gas*, 2008 WL 3876141, at *6

6. *Id.*; but cf. *Spang Indus., Inc., Ft. Pitt Bridge Div. v. Aetna Cas. & Sur. Co.*, 512 F.2d 365, 370 (2d Cir. 1975) ("It is also pertinent to note that the rule does not require that the direct damages must necessarily follow, but only that they are likely to follow"); see also *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 801, 214 S.E.2d 155, 160 (1975) (discussing direct damages as those that arise "naturally" or "ordinarily" from a breach of contract; they are damages that, in the ordinary course of human experience, can be expected to result from a breach); *Pa. DOT v. Morrissey, Inc.*, 682 A.2d 9, 16, n.15 (Pa. Commw. 1996) (declining to decide whether recoverable damages must be "both (1) a natural and ordinary result of the breach, and (2) reasonably foreseeable and within the contemplation of the parties at the time they made the contract" because both tests were met).

7. *Metric Constructors, Inc. v. Hawker Siddeley Power Eng'g, Inc.*, 468 S.E.2d 435 (N.C. App. 1996) (where subcontractor presented extensive documentation and witness testimony as to the nature and amount of damages suffered because of contractor's delay, contractor was "sophisticated corporation with extensive experience on projects of this nature," and subcontract specifically permitted recovery of delay damages).

8. *Tenn. Gas Pipeline Co. v. Technip USA Corp.*, No. 01-06-00535, 2008 WL 3876141, at *6 (Tex. 1st D.C.A. 2008). See also *K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 24, 280 S.W.3d 1, 10 (2008) (defining consequential damages as those that "do not flow directly and immediately from

the breach, but only from some of the consequences or results of the breach”); *Roanoke Hosp.*, 214 S.E.2d at 160 (“Consequential damages are those which arise from the intervention of ‘special circumstances’ not ordinarily predictable.”).

9. *Tenn. Gas*, 2008 WL 3876141, at *6; *Waterbury Feed Co., LLC v. O’Neil*, 181 Vt. 535, 540 (2006).

10. *Spang Indus.*, 512 F.2d at 368 (“it is essential under *Hadley v. Baxendale* and its Yankee progeny that the notice of the facts which would give rise to special damages in case of breach be given at or before the time the contract was made. The principle urged cannot be disputed”); *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000). *But see Roanoke Hosp.*, 214 S.E.2d at 160 (general rule that “contemplation must exist at the time of contracting” is not absolute).

11. ABA MODEL JURY INSTRUCTIONS FOR CONSTR. LITIG. 10.04 cmt. (citing, among other cases, *Nat’l Controls Corp. v. Nat’l Semiconductor Corp.*, 833 F.2d 491 (3d Cir. 1987) (stating that “[t]he element of causation defines the range of socially and economically desirable recovery,” and requires not only “‘but-for’ causation in fact” but also “that the conduct be a ‘substantial factor’ in bringing about the harm”)).

12. *Porous Media Corp. v. Midland Brake*, 220 F.3d 954, 961–62 (8th Cir. 2000) (“Under Minnesota law, consequential damages suffered due to a breach, can be recovered so long as the party breaching the contract had reason to know of the potential losses. *See Minn. Stat. § 332.2-715(2)* . . . [T]he parties did not contemplate allowing [plaintiff] damages for post-contractual lost profits.”).

13. More common delay-related damages, such as overtime premium costs, loss of productivity, unabsorbed overhead, and loss of early completion bonus have been deemed direct damages by some courts. *See Metric Constructors, Inc. v. Hawker Siddeley Power Eng’g, Inc.*, 468 S.E.2d 435 (N.C. App. 1996).

14. *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 322 (S.D.N.Y. 2009) (addressing whether the breach of contract damages sought by plaintiff “are general, thus merely requiring a ‘reasonable estimate’ of damages before an award can be made, or instead consequential, thus requiring CEPSA to prove such damages ‘with reasonable certainty’”).

15. ABA MODEL JURY INSTRUCTIONS FOR CONSTR. LITIG. 10:03 cmt. (citing *525 Main Str. Corp. v. Eagle Roofing Co.*, 34 N.J. 251, 168 A.2d 33 (1961)).

16. *See, e.g., ARK. R. CIV. P. 1.120(g); FLA. R. CIV. P. 1.120(g); MINN. R. CIV. P. 9.07; PA. R. CIV. P. 1019(f)*.

17. *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287 (Fla. 4th D.C.A. 2002).

18. *See, e.g., Safeco Title Ins. Co. v. Reynolds*, 452 So. 2d 45, 48 (Fla. 2d D.C.A. 1984) (plaintiffs “were not entitled to [an] additional \$26,000.00 award as lost profits because they did not plead for such special damages”); *Italiano v. Jones Chems., Inc.*, 908 F. Supp. 904, 907 (M.D. Fla. 1995) (under similar FEDERAL RULE OF CIVIL PROCEDURE 9(g), court held plaintiff properly pled lost business opportunities because the item of damage was pled with specificity); *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 102 P.3d 257, 266 (Cal. 2004) (lost profits and diminished bonding capacity are items of special damage); *Rodgers Builders, Inc. v. McQueen*, 331 S.E.2d 726, 730 (N.C. App. 1985) (noting without comment that impairment of bonding capacity was an item of special damages).

19. *C.f. Finkel v. Stratton Corp.*, 754 F. Supp. 318, 330 (S.D.N.Y. 1990) (recognizing in real estate securities litigation that loss causation aspect of investors’ pleadings “not sufficient given other plausible explanations for the investors’ ultimate disappointment, such as changes in . . . a downturn in the real estate market”).

20. *See Spodek v. U.S.*, 73 Fed. Cl. 1 (Fed. Cl. 2006) (“The doctrine of mitigation also requires that the non-breaching party act within a reasonable time after default to mitigate its damages.”); *cf. Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997)

(“A plaintiff’s failure to mitigate damages is excused, if mitigation would require inordinate or unreasonable measures or if there were reasonable grounds for failure to mitigate.”).

21. *See Pierce v. Drees*, 607 N.E.2d 726, 729 (Ind. App. 3d 1993) (awarding damages to landowner due to contractor’s breach of garage construction contract and recognizing that “[w]hile it is true that a non-breaching party must mitigate damages, the breaching party has the burden of proving the non-breaching party has not used reasonable diligence to do so”).

22. *See Smith v. Erftimier*, 315 N.W.2d 445, 450 (Neb. 1982) (owner mitigated damages by using defectively constructed items prior to repair).

23. Overcoming the initial hurdle of proving entitlement to unabsorbed overhead can be difficult, at least in the government contracting context. Unless a written order was issued suspending all work for an uncertain duration and requiring the contractor to remain ready to resume work immediately or on short notice, the contractor must show three things by indirect evidence: (1) the government-caused delay was substantial and of an indefinite duration; (2) during that delay, the contractor “was required to be ready to resume work on the contract, at full speed as well as immediately”; and (3) there was an effective suspension of much if not all of the work on the contract. *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1370–71 (Fed. Cir. 2003). Proving “effective suspension” may be the most difficult hurdle to overcome in proving entitlement. *See Sunshine Constr. & Eng’g, Inc. v. U.S.*, 64 Fed. Cl. 346, 350 (2005); *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536, 540 (Fla. 4th D.C.A. 2005) (evidence that contractor faced delays at “virtually every turn” because “either the plans were deficient and we had trouble getting a response” or “we couldn’t get change orders” and “we couldn’t get anything we needed in the way of support from either the owner or the architect” was insufficient to show effective suspension of much, if not all, of the work on the contract).

24. *See Ameristar Jet Charter, Inc. v. Dodson Int’l Parts, Inc.*, 155 S.W.3d 50 (Mo. 2005).

25. *See Eichleay Corp., A.S.B.C.A. No. 5183, 60-2 B.C.A. (CCH) 2688 (1960), aff’d on recon.*, 61-1 B.C.A. (CCH) 2894.

26. *See, e.g., AIA A201, §15.1.6 (2007)*, in which the contractor expressly waives damages for “. . . loss of profit except anticipated profit arising directly from the Work.” *See also Tenn. Gas Pipeline Co. v. Technip USA Corp.*, No. 01-06-00535, 2008 WL 3876141, at *7 (Tex. 1st D.C.A. 2008) (owner successfully argued that consequential damages waiver at issue “excludes only ‘lost profits’ and ‘loss of use’ that also qualify as consequential,” while contractor unsuccessfully argued that the contract provision evidenced the parties’ intention to define “all claims for loss of use, opportunity, or profits” as consequential) (emphasis in original); *see also K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 24–25, 280 S.W.3d 1, 10–11 (2008) (trial court erred in finding that contractual waiver of right to recover “loss of profits not related to this Project” barred contractor’s recovery of profit on extras, in accordance with terms of cost-plus contract at issue).

27. *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110–11 (2d Cir. 2007) (“Certainty,” as it pertains to general damages, refers to the fact of damage, not the amount, for “when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. . . . The plaintiff need only show a ‘stable foundation for a reasonable estimate’ of the damage incurred as a result of the breach. Such an estimate necessarily requires some improvisation. . . .”) (internal citations omitted).

28. *Levitt-ANSCA Towne Park P’ship v. Smith & Co., Inc.*, 873 So. 2d 392, 396 (Fla. 4th D.C.A. 2004) (reversing judgment for contractor for lost profits on unperformed work where contractor improperly relied on percentages of work performed to determine

costs and profits”).

29. *See, e.g., Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 102 P.3d 257, 264–65 (Cal. 2004). (contractor’s general/direct damages were limited to its projected profit on the project at issue, measured by the contract price less contractor’s cost of full performance, as reflected in its bid); *Dep’t of Cmty. Affairs v. Craftech Int’l, Ltd.*, 456 A.2d 247, 251–52 (Pa. Commw. 1983) (contractor awarded excess costs plus dollar amount contractor originally anticipated earning on contract, without adjustment for increased contract value). *But see K.C. Props. of N.W. Ark.*, 280 S.W.3d, at 10–11.

30. *C.J. Langenfelder & Son, Inc. v. Pa. Dep’t of Transp.*, 404 A.2d 745, 754 (Pa. Commw. 1979) (where dredging contractor’s claims were not for extra work, but rather “for escalation of labor costs and indirect expenses incurred . . . as the result of being on the job longer than anticipated,” it was not “entitled as profits to a percentage of the damages awarded to reimburse him for his additional costs and expenses”).

31. *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000) (“[P]laintiff . . . must prove that lost profit damages were within the contemplation of the parties when the contract was made . . . or which should have been foreseen at the time the contract was made. Where the contract is silent on the subject, the court must take a ‘common sense’ approach, and determine what the parties intended by considering ‘the nature, purpose and particular circumstances of the contract known by the parties . . . as well as what liability the defendant fairly may be supposed to have assumed consciously.’” (internal citations omitted)).

32. *Blue Water Env’tl, Inc. v. Inc. Village of Bayville, N.Y.*, 2006 WL 1642691, at *6 (N.Y. Sup. 2006) (summary judgment entered against contractor on its lost profits claim where it failed to submit any proof as to the manner in which the owner’s delay caused it to be unable to bid on or perform other projects); *Rooney v. Skeet’r Beat’r of Swt. Florida*, 898 So. 2d 968, 969 (Fla. 2d D.C.A. 2005) (speculation and conjecture will not suffice); *Himes v. Brown & Co. Secs. Corp.*, 518 So. 2d 937, 939 (Fla. 3d D.C.A. 1988) (missed opportunities constitute speculation and conjecture and do not constitute evidence that would allow a fact finder to determine damages of lost profits with a reasonable degree of certainty, as required by Florida law).

33. *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 322–23 (S.D.N.Y. 2009).

34. *See, e.g., Water Eng’g Consultants, Inc. v. Allied Corp.*, 674 F. Supp. 1221, 1224 (S.D.W. Va. 1987) (expert’s opinion insufficient to establish lost profits to a reasonable certainty); *Bldg. Materials Wholesale, Inc. v. Triad Drywall, LLC*, 287 Ga. App. 772, 777 (Ga. Ct. App. 2007) (“well-established, profitable business was relevant to show that [drywall installer] was entitled to [lost profits]”); *Country Club Assocs. Ltd. P’ship v. F.D.I.C.*, 918 F. Supp. 429, 436 (D.D.C. 1996) (lost profits claim based on new, undeveloped business “based on speculation and conjecture” and therefore not recoverable); *but cf. Leoni v. Bemis Co., Inc.*, 255 N.W.2d 824, 825 (Minn. 1977) (“Damages for lost future profits of a new business ordinarily are not recoverable because the evidence is inherently too speculative; but where, as in this case, a business, established on a national scale and with a proven record of substantial success, expands its sales activity to another state, the evidence of prospective profits does not lack the requisite certainty.”).

35. *See, e.g., Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 102 P.3d 257, 266 (Cal. 2004) (explaining that contractor’s loss of potential profits on unearned future construction projects due to impaired bonding capacity is too speculative and thus not recoverable as special damages because termination of a contract might or might not cause the contractor’s surety to reduce its bonding capacity, and when owner signed the contract “it did not know what [contractor]’s balance sheet showed or what criteria [contractor]’s surety ordinarily used to evaluate

a contractor’s bonding limits”); *Frenz Enters. v. Port Everglades*, 746 So. 2d 498, 504 (Fla. 4th D.C.A. 1999) (Trial court did not abuse its discretion in denying dredging contractor’s jury instruction as to lost profits based on an alleged inability to obtain a bond; contractor “failed to establish that . . . the [owner] should have known [the contractor] would lose his bond line. To the contrary, it would have been reasonable to expect [the contractor]’s business to continue to some extent”).

36. *Daniel Int’l Corp. v. Better Constr., Inc.*, 593 So. 2d 524 (Fla. 3d D.C.A. 1991) (“reversal is also required because [contractor] failed to present competent and substantial evidence that cancellation of its bonding was caused by the late contract payments, or that the lost bonding was the cause of [contractor]’s claimed \$2,000,000.00 in diminished business value”).

37. *See Rocky Mountain Constr. Co. v. U.S.*, 218 Ct. Cl. 665 (1978) (where complaint alleged that delayed completion of project due to government changes precluded subcontractor from bidding on other contracts, court granted motion to dismiss on basis that “it is wholly conjectural whether [subcontractor] would have been awarded those additional contracts [and] such an attenuated theory of damages is legally insufficient”).

38. *See Begl Constr. Co. v. Los Angeles Unified Sch. Dist.*, 154 Cal. App. 4th 970, 66 Cal. Rptr. 3d 110, 113–14 (Cal. 2d D.C.A. 2007) (although the contractor did not present evidence regarding specific projects or sums lost as a result of its impaired bonding capacity, the court found other evidence presented sufficient).

39. *See, e.g., RAJ Partners, Ltd. v. Darco Const. Corp.*, 217 S.W.3d 638, 649 (Tex. App. 2006) (contractor not entitled to interest expenses for loans it took out to maintain cash flow due to owner-caused delays because the evidence did not conclusively establish that the claimed damages were foreseeable).

40. *Dep’t of Transp. v. Arapaho Constr., Inc.*, 349 S.E.2d 196, 201 (Ga. Ct. App. 1986) (interest paid on loans to obtain working capital by contractor not recoverable from state’s breach of contract where the loans were taken out from the beginning of the project and contractor was prevented from maintaining its cash flow by a number of different events).

41. *Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20 (Fla. 4th D.C.A. 1998).

42. *C.J. Langenfelder & Son, Inc. v. Pa. Dep’t of Transp.*, 404 A.2d 745, 752 (Pa. Commw. 1979) (dredging contractor entitled to recover premiums paid for insurance on dredge during period the dredge was idled by fault of the Dep’t of Transp.).

43. *Arapaho Constr.*, 349 S.E.2d, at 201 (fees for required insurance floaters on equipment used as collateral for loans and fees paid attorneys for services in connection with loans not recoverable).

44. *Hees v. Burke Constr., Inc.*, 290 Conn. 1, 8, 961 A.2d 373, 378 (2009); *Louise Caroline Nursing Home, Inc. v. Dix Constr. Corp.*, 362 Mass. 306, 311, 285 N.E.2d 904, 907–08 (1972).

45. *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 788–92, 107 P.3d 1219, 1228–30 (2005) (where original earthen trench system was discovered to be deficient, state was entitled to recover as damages the cost of building a concrete trench system; state’s recovery was limited to what it would have cost to build an earthen trench system as of the date the deficiency was discovered, not by the original cost of the deficient earthen trench system).

46. *Heine v. Parent Constr., Inc.*, 4 So. 3d 790, 791, 2009 WL 763534, at *1 (Fla. 4th D.C.A. 2009) (homeowners who sought \$930,000 in damages as cost to tear down and rebuild home that was built at an elevation of 7.5 feet, instead of the contracted-for 8.5 feet, were awarded \$25,000 as the home’s diminution in value based on the 1-foot elevation differential). The converse is not true: an owner cannot recover diminution in value where the “cost-to-complete” measure is less. *See Stonehill-PRM WC I, L.P. v. Chasco*, No. 03-08-00494-CV, 2009 WL 349136 (Tex. App.-Austin 2009).

47. *Stovall*, 107 P.3d at 1229–30 (“The balance of the State’s damage claims [costs of repair to the earthen trench system before

abandonment; costs to repair damages to other utilities; and energy losses] are separate and apart from the State's direct costs to build the concrete trench system. Consequently, it is factually and legally inconsistent to subject these claims to the allowable maximum recovery for the costs to build the concrete trench system. We hold the State should be allowed to prove and, if proved, to recover these additional claims as will make the State whole.”)

48. See *Tenn. Gas Pipeline Co. v. Technip USA Corp.*, No. 01-06-00535, 2008 WL 3876141, at *8 (Tex. 1st D.C.A. 2008) (based on contract provision setting forth “Owner’s Responsibilities,” parties clearly contemplated owner would incur these costs, and delay naturally and necessarily would cause these costs to increase).

49. *Id.* at *9.

50. See, e.g., *Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 739 F. Supp. 692, 703 (D. Mass. 1990) (additional interest carrying charges paid by developer due to delayed installation of elevator by subcontractor a direct damage, and thus, not barred by contract’s consequential damages disclaimer); *Elar Invest., Inc. v. Swt. Culvert Co., Inc.*, 676 P.2d 659, 665 (Ariz. Ct. App. 1984); *Roanoke Hosp. Ass’n v. Doyle & Russell, Inc.*, 214 S.E.2d 155, 160–61 (Va. 1975) (portion of additional interest costs incurred by project owner during period of contractor’s unexcused delay were compensable direct damages, but added costs attributable to higher interest rates were consequential damages, and thus unrecoverable unless the special circumstances of “supply and demand in the money market” were within the parties’ contemplation at the time of contracting).

51. See, e.g., *Ambrogio v. Beaver Rd. Assocs.*, 836 A.2d 1183, 1185, 1187 (Conn. 2003) (oral surgeon entitled to lost profits from loss of use due to contractor’s defective installation of flooring and, in doing so, court rejected contractor’s contention that “[l]ost business and loss of business opportunities are not included in the measure of damages for the breach of a construction contract”); cf. *Tenn. Gas*, 2008 WL 3876141, at *11 (expectation of profit from sale of gas to customers “incidental” to performance of contract to improve a gas pipeline; thus “the loss of that expectancy is consequential,” and was barred by contractual consequential damages waiver).

52. See, e.g., *Miami Heart Inst., Inc. v. Henry Architects & Engrs, Inc.*, 765 F. Supp. 1083, 1085 (S.D. Fla. 1991) (architect and engineer liable for delay damages for failure to draw plans and specifications for hospital in accordance with applicable codes); *Fisher Island Holdings, LLC v. Cohen*, 983 So. 2d 1203, 2008 WL 2116585, at *1 (Fla. 3d D.C.A. 2008).

53. See, e.g., *New Amsterdam Cas. Co. v. Mitchell*, 325 F.2d 474, 476 (5th Cir. 1964) (developer not entitled to loss of rental income during delay period due to contractor’s breach of contract where parties contemplated that homes would be sold, not rented upon completion).

54. See, e.g., *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 412 (Cal. 1999).

55. See *Elar Invest.*, 676 P.2d, at 665 (Ariz. Ct. App. 1984) (denying developer’s “loss of investment” based on inability to sell townhomes following supplier’s delayed material shipment since souring of real estate market “was not within the contemplation of the parties”).

56. *Brooks v. Bankson*, 248 Va. 197, 207, 445 S.E.2d 473 (1994); *Rohlin Constr. Co. v. Hinton*, 476 N.W.2d 78 (Iowa 1991); *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, No. 03-949-2006 WL 38953, at *5 (E.D. Cal.) (E.D. Cal. 2006).

57. *DF Mfr. Corp. v. U.S.*, 86 F.3d 1130, 1133 (Fed. Cir. 1996).

58. See, e.g., *City of Rochester v. E&L Piping, Inc.*, 764 N.Y.S.2d 514 (N.Y. Sup. Ct. 2003) (liquidated damages an unenforceable penalty clause against prime contractor on public works project); *Reliance Ins. Co. v. Utah Dep’t of Transp.*, 858 P.2d 1363, 1367 (Utah 1993) (if “the liquidated damages are disproportionate to the actual compensatory damages sustained, this may be evidence of an unreasonable forecast and the provision may be

deemed a penalty”); *Bankson*, 248 Va., at 207 (use of terms such as “forfeited” is not determinative).

59. See, e.g., *Metro. Dade County v. Frank J. Rooney, Inc.*, 627 So. 2d 1248 (Fla. 3d D.C.A. 1993); *Pub. Health Trust of Dade County v. Romart Constr., Inc.*, 577 So. 2d 636 (Fla. 3d D.C.A. 1991).

60. *Safeco Credit v. U.S.*, 44 Fed. Cl. 406 (Fed. Cl. 1999) (contractor did not meet its burden in challenging enforceability of liquidated damages provision); cf. *John Jay Esthetic Salon, Inc. v. Woods*, 377 So. 2d 1363, 1367 (La. Ct. App. 1979) (“No matter how clearly such penalty clauses are written, courts as a matter of public policy should decline to enforce an agreement which clearly is not one for true liquidated damages.”).

61. *El Dorado Irrigation Dist.*, 2006 WL 38953, at *6 (“While the court recognizes that EID may have lost a significant amount of funding due to TBI’s alleged error, it has not provided sufficient additional evidence or reasoning to show why the court should read outside of the lines of the contract and find the plainly bargained for liquidated damages clause does not apply”); see also *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 21–22 (2005) (ordering new trial due to overlap between actual and liquidated damages recovery).

62. *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1272 (11th Cir. 1999); *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991).

63. *N. Petrochemical Co. v. Thomsen*, 211 N.W.2d 159 (Minn. 1973); see, e.g., *Hillsborough County Aviation Auth. v. Cone Bros. Contracting Co.*, 285 So. 2d 619, 621–22 (Fla. 2d D.C.A. 1973) (owner suing contractor could seek both liquidated damages for delayed completion of entire project and actual damages paid to subcontractors due to delayed completion of certain phases of the work).

64. See, e.g., *Nat’l Papaya Co. v. Domain Indus.*, 592 F.2d 813 (5th Cir. 1979) (permitting recovery of lost profits).

65. *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d 364 (N.J. 1992).

66. For another trade industry form of mutual waiver, see *ConsensusDOCS 200, Standard Agreement and General Conditions Between Owner and Contractor (where the Contract Price is a Lump Sum)* at § 6.6.

67. The A201 is incorporated by reference into various AIA Owner-Contractor agreements.

68. The AIA’s seminal mutual waiver of consequential damages was introduced in 1997 in the AIA’s A201-1997 edition, in section 4.3.10. The mutual waiver of consequential damages found in the A201-2007 edition, section 15.1.6, is essentially a renumbered version of former section 4.3.10, with one minor edit. See, e.g., CHARLES M. SINK ET AL., *THE 2007 A201 DESKBOOK*, at 6, 108, 109 (Forum on the Constr. Indus., Am. Bar Ass’n 2008).

69. See, e.g., Lynn R. Axelroth, *Mutual Waiver of Consequential Damages—The Owner’s Perspective*, *CONSTR. LAW.*, January 1998, at 11 (referring to the AIA’s first version of the mutual waiver of consequential damages, as published in section 4.3.10 of the A201-1997 edition: “Is the list intended as illustrative only, with all other provable damages acceptable? Or, is the list intended as examples only, providing a general idea of the specific damages that are waived?”).

70. See, e.g., A101-2007, section 3.3 (where the “Substantial Completion” is identified, the following instruction: “(insert provisions, if any, for liquidated damages relating to failure to achieve Substantial Completion on time or for bonus payments for early completion of the work’).”

71. See also CHARLES SINK & MARK PETERSON, *THE [1997] A201 DESKBOOK UNDERSTANDING THE REVISED GENERAL CONDITIONS*, at 75 (ABA Forum on the Constr. Indus. 1998).

72. *Commw. Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, No. 046-10-101, 2006 WL 2567916, at *4 (Del. Super. 2006).

73. *See, e.g.*, DEAN T. KASHIWAGI, A REVOLUTIONARY APPROACH TO PROJECT MANAGEMENT AND RISK MINIMIZATION, ch. 9 (Arizona State University, Performance Based Studies Research Group 2009).

74. For a selection of specific potential modifications to trade association form waivers, *see* THE CONSTRUCTION CONTRACTS BOOK (Daniel S. Brennan et al. eds., ABA Forum on the Constr. Indus. 2d ed. 2008).

75. *See, e.g.*, *Swt. Eng'g, Inc. v. Yeomans Chicago Corp.*, No. 3:2009cv00110, 2009 WL 3720374, at *6 (S.D. Cal. 2009) (dismissing plaintiff's claim for consequential damages without prejudice based on consequential damages waiver, because complaint failed to plead facts stating a plausible entitlement to a finding of procedural and substantive unconscionability so as to make the waiver unenforceable); *Pac. Am. Leasing Corp. v. S.P.E. Bldg. Sys., Inc.*, 152 Ariz. 96, 102, 730 P.2d 273, 279 (App. 1986) ("although a commercial purchaser is not doomed to failure in pressing an unconscionability claim, . . . findings of unconscionability in a commercial setting are rare"); *Mistry Prabhudas Manji Eng'g Pvt. Ltd v. Raytheon Eng'rs & Constructors, Inc.*, 213 F. Supp. 2d 20, 27 (D. Mass. 2002) ("In commercial settings, a limitation of damages clause will rarely be found unconscionable.").

76. *See, e.g.*, *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025-27 (4th D.C.A. 2005) ("There is no doubt that AT&T had almost unilateral bargaining power. Notwithstanding, there is an absence of procedural unconscionability . . . if Fonte was unsatisfied with the terms, she did not have to sign the contract").

77. *See, e.g.*, *Shepherd v. Weather Shield Mfg., Inc.*, No. W1999-00508-COA-R3-CV, 2000 WL 34411064, at *5 (Tenn. Ct. App. 2000) ("inequality of the bargain . . . so manifest as to shock the judgment of a person of common sense"); *Garrett v. Janiewski*, 480 So. 2d 1324, 1326 (Fla. D.C.A. 1985) (synonym for substantive unconscionability is "monstrously harsh"); *but see Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995) ("Under Pennsylvania law, a limitation of liability clause in a commercial contract is enforceable "as long as the limitation established is reasonable and not so drastic as to remove the incentive to perform with due care.").

78. *See, e.g.*, *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 965 (5th Cir. 1998) (affirming subcontractor's judgment for damages against contractor, notwithstanding a "no damages for delay" clause, where record contained "some evidence" that the contractor's actions "constituted active interference with [subcontractor's] performance").

79. *See Blue Water Envl., Inc. v. Inc. Vill. of Bayville, N.Y.*, 2006 WL 1642691, at *4 (N.Y. Sup. 2006) ("Generally, even with such an exculpatory clause, the contractor may recover damages for (1) delays caused by the owner's bad faith or its willful, malicious, or grossly negligent conduct; (2) unanticipated delays; (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the owner; and (4) delays resulting from the owner's breach of a fundamental obligation of the contract.").