

DAMAGES IN CONSTRUCTION DISPUTES

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Construction disputes usually involve claims for money. The amounts claimed are typically either specific sums due and owing for goods supplied or services rendered, or damages for breach of contract and/or negligence.

Even in a clear case of breach of contract or negligence, a claimant's entitlement to damages is limited. The general measure of recoverable damages for breach of contract is the amount required to put the aggrieved party in the position which it would have been in had there been no breach. Similarly, damages for negligence are based on the principle of compensation for proven loss.

A plaintiff in a civil action must prove both the liability of the Defendant and the resulting damages in satisfaction of the same evidentiary test - on the balance of probabilities. The law of damages applies various rules and concepts to set reasonable boundaries of entitlement and to avoid duplicate recovery.

The following are the most significant limits of damages:

1. Actual Loss -

Even when clear liability for breach of contract or negligence exists, there may be no recoverable damages. Loss must be real and actually, or inevitably to be, incurred as the result of the breach of contract or negligence, not notional or hypothetical. For example, as could be the case in a rising real estate market, unjustified delay by a general contractor in the completion of construction might actually benefit an owner who always intended to flip the project property. Similarly, it is lost profit and not simply lower revenue which is the actual measure of loss suffered by a business.

Further, a claimant must prove both the casual connection between the alleged wrongdoing and the loss and the absence of a concurrent cause or causes which are not the responsibility of the

Defendant. Thus, additional construction cost is generally not recoverable as an item of damages for valid extra work, if the extra was added in the owner's discretion and was therefore an amount which the owner would have incurred in any event and regardless of breach of contract or negligence by a design professional or contractor.

2. Proximity/Remoteness and Foreseeability -

Not every loss or expense which can be traced to the wrongful act or omission of a Defendant is necessarily recoverable at law. For example, while it can reasonably be anticipated that an owner might suffer lost business profit from delayed completion of construction of a commercial project, it would not likely be foreseen that stress from the delay might result in a medical crisis for the president of the business which gave rise to additional lost business. Such additional lost profit would likely be considered too remote to be recovered as damages. The general rule as to the limit of recoverable damages for breach of contract is whether the loss could reasonably have been foreseen by the parties at the time the contract was entered into as being likely to result from a future breach of contract.

3. Betterment -

A claimant is not entitled to recover damages which would place it in a better position than it otherwise would have occupied had there been no wrongdoing by the Defendant. This is the classic "Cadillac in place of a Chevrolet" loss/benefit issue. For example, an owner who insists on value engineering to save money cannot later claim as damages the inevitable result of deleted components of construction, and thereby try to use its design professional or contractor to fund the improvement which it was not prepared to pay for in the first place.

4. Mitigation -

Every claimant has a duty to mitigate its damages. In practice, this means that a claimant must take reasonable and timely measures to avoid increasing its own loss. Examples of necessary mitigation are obtaining competitive quotations for completion or deficiency repair work by replacement contractors and proceeding with such work within a reasonable time, so as to avoid unnecessary price escalation.

Depending on the parties and on the extent and nature of the additional costs or other loss suffered in a construction situation, damages can be multifaceted and extensive. However, the above summary demonstrates that every component of a damages claim must be validated and justified as a loss suffered in fact and relatively directly as the result of a wrongful act or omission by a Defendant.