



The Soto Law Group, P.A.

CONSTRUCTION PRACTICE GROUP

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TOP TEN CONSTRUCTION CLAUSES PART 2-CLAIMS FOR CONSEQUENTIAL DAMAGES

This article is the second of a ten-part series analyzing ten critical construction clauses. In this installment, we analyze the “mutual waiver of consequential damages.” The first article, which addressed indemnification clauses, can be found at <http://sotolawgroup.blogspot.com/2015/02/top-ten-construction-clauses-part-i.html>

Before analyzing the significance of this provision, however, you must understand the difference between “direct” or “general” damages, and “indirect” or “consequential” damages. Direct or general damages are those damages that the law presumes follow from the type of wrong complained of. Examples include an owner’s cost to correct or complete a contractor’s work after a breach. Indirect or consequential damages are losses that do not flow directly and immediately from an injurious act, but that resulted indirectly from the act. Examples include lost profits suffered by the owner caused by the delayed completion of a store or lost rents from the owner of an apartment complex building.

Absent language to the contrary in the contract, consequential damages are recoverable in Florida. As a Florida court has recently held, a homeowner is entitled to “loss of use” damages (in other words, consequential damages) under Florida law. *See Gonzalez v. Barrenechea*, 40 Fla. L. Weekly D 258 (Fla. 3d DCA 2015). Whether a construction contract addresses the risk of consequential damages is a serious consideration for property owners and contractors alike because consequential damages often greatly exceed direct damages. In one oft-cited example, a contractor on a \$24 million hotel-casino renovation substantially completed the project on time, with the exception of a non-functional, ornamental facade designed to attract passersby from the boardwalk. *See Perini Corp. v. Grete Bay Hotel & Casino, Inc.*, 610 A.2d 364 (1992), *overruled on other grounds by Tretina Printing, Inc. v. Fitzpatrick & Associates*, 640 A.2d 788 (N.J. 1994). Despite the fact that the contractor’s total compensation on the project was only \$600,000 plus reimbursement for actual expenses, the appellate court upheld an arbitration award in the amount of \$14.5 million for damages resulting from the delay of the facade! *See id.* It is clear, therefore, that whether consequential damages are recoverable after a breach of a construction agreement is of paramount importance.

In order to level the playing field between project owners and contractors, in 1997, the American Institute of Architects introduced a mutual waiver of consequential damages into its General Conditions of the Contract for Construction (AIA A201). The provision, as most recently revised in 2007, currently provides:

§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES (AIA A201-2007, General Conditions of the Contract for Construction)

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This 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 service of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stated 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 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the contract documents.

The AIA also provided the following commentary to its Mutual Waiver of Consequential Damages Clause:

By waiving claims for consequential damages, the owner and contractor limit themselves to direct damages. This eliminates some of the incentive to escalate claims and may encourage settlement. Other contracts on the project (such as the owner-architect agreement and the subcontracts) should include similar provisions so that other parties are not targeted for receipt of claims waived between the owner and contractor. The items identified as consequential damages in .1 and .2 are not intended to be a complete listing of all such items. State law may include many other items of cost.

It's clear from the AIA's Commentary that the Mutual Waiver of Consequential Damages can be a powerful tool to limit a contractor's potential damages on a construction project. The provision, however, is not bullet-proof and is often criticized because the AIA did not specify within the provision whether such list is intended to be merely illustrative or an exclusive list (although the Commentary indicates it's the former). ConsensusDocs, another leading provider of standard contracts developed by a coalition of more than 40 construction industry associations, also includes a "Limited Mutual Waiver of Consequential Damages at 6.6 of its Standard Agreement and General Conditions Between Owner and Contractor (ConsensusDocs 200).

Consult with an attorney knowledgeable in construction so that together you can decide whether it is advisable to include such a Mutual Waiver of Consequential Damages in your contracts. Understand the value of a consequential damages clause, the existence or absence of the cause in a contract and the risk/reward if there is no waiver of consequential damages.

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