CHAPTER 20

DEFENDING AGAINST OWNER CLAIMS

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§ 20.01 Introduction

§ 20.02 Owner's Warranty of the Plans and Specifications

§ 20.03 Damages

§ 20.04 Substantial Performance/Economic Waste

§ 20.05 Impossibility/Impracticability of Performance

§ 20.06 Warranties and Their Limitations

§ 20.07 Delay Claims
- [A] Excusable Delay
- [B] Owner-Caused Delay
- [C] Critical and Non-Critical Delay

§ 20.08 Liquidated Damages

§ 20.09 Arbitration

§ 20.10 Statutes of Limitation and Repose

§ 20.11 Waiver

§ 20.12 Accord and Satisfaction

§ 20.13 Termination

§ 20.14 Other Contractual Remedy Limitations

§ 20.15 Miscellaneous Claims and Defenses
- [A] Claims for Mental Anguish and Emotional Distress
- [B] Punitive Damages
- [C] Prejudgment Interest
- [D] Attorneys' Fees
- [E] Statutory Penalties or Enhanced Damages

[F] Joint and Severally Liable Defendants
[G] Specific Performance or Equitable Relief

Appendix 20-1 Appendix to *Kelly v. Marx*

§ 20.01 INTRODUCTION

Owners and contractors often have different (and sometimes mutually inconsistent) goals with respect to a construction project, creating an environment that is ripe for disputes. As one court has noted:

> Disputes are inherent in the construction of public works projects. A tension exists between the state and the contractor who agrees to build a project. Each party is oriented to the contract price, which is a fixed amount reached on the basis of competitive sealed bidding. Not only is the contract price fixed, but it is fixed as the lowest amount offered by any responsible contractor who competitively bid for the project. . . . As a practical matter, awarding the contract to the lowest responsible bidder forces both the contractor and the state to search intensively for means to protect, if not improve, their positions once the contract price is fixed and performance is begun.
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> The parties' abilities to improve their respective positions largely depend upon the contractual language that allocates cost risks associated with performance. The contractor, who has underbid his competitors to win the contract, wants to minimize his performance costs. Thus, the contractor interprets the contract language in a manner that enables him to render the minimum performance — at the lowest cost — that complies with the terms of the contract. The state, however, like any owner who hires a contractor, is inclined to demand the maximum possible performance.[1]

Owner claims against contractors are typically based on an alleged breach of the contract for construction[2] rather than tort law,[3] and generally fall into one of two categories: First, that the contractor failed to complete the work within the time period provided by the contract; and, second, that the contractor failed to prosecute

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[1] P.T.&L. Constr. Co., Inc. v. State of N.J., Dept. of Transp., 531 A.2d 1330 (N.J. 1987), quoting Livingston, *Fair Treatment for Contractors Doing Business With the State of Maryland*, 15 U. Balt. L. Rev. 215, 226-27 (1986).

[2] A contract is "[a] promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Williston, *A Treatise on the Law of Contracts* § 1 (3d ed. 1961) (hereinafter "Williston").

[3] A tort is defined as a "[a] civil wrong, other than a breach of contract, for which the courts will provide a remedy in the form of an action for damages." Prosser, Law of Torts, 4th ed. (1971), § 1. The chief distinction between a tort and a breach of contract is that the former involves the breach of a duty or obligation that a person owes to society at large, while the latter involves the breach of a duty or obligation that a person has voluntarily assumed to another. In limited circumstances, such as where a developer contracts for construction of a project that is then transferred to the owner upon completion, a contractor may be exposed to tort liability to the ultimate owner. State law differs on whether such claims are barred by the economic loss rule. *Compare* Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206, 212 (Ohio 1990) ("[W]e conclude that recovery for economic loss is strictly a subject for contract negotiation and assignment. Consequently, in the absence of privity of contract no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications."), *with* Forte Bros. v. National Amusements, Inc., 525 A.2d 1301 (R.I. 1987) (permitting contractor to recover from engineer). Tort claims and defenses are beyond the scope of this chapter.

the work in a good, workmanlike manner, free from defects in either materials or workmanship.

Many of the topics covered in this chapter warrant, and have been the subject of, complete works in their own right.[4] Accordingly, it is not the purpose of this chapter to provide a detailed analysis of all available defenses. Rather, the aim is to provide a general overview of the defenses a contractor may raise when confronted with common owner claims, and provide the reader a starting point from which to further research and evaluate its position. Obviously, the availability of the defenses outlined below in any particular case will turn on the factual circumstances, the language of the applicable contract(s), and the law governing the dispute at hand.

§ 20.02 OWNER'S WARRANTY OF THE PLANS AND SPECIFICATIONS

It is well-established that construction contracts impose on the contractor the implied duty to perform the work skillfully, carefully, and in a workmanlike manner, free from defects in either materials or workmanship.[5] It is equally well-established that if a contractor builds in a workmanlike manner according to plans or specifications furnished by the owner, the contractor will not be responsible for damages resulting solely from defects in the plans or specifications, assuming, of course, that the contractor has not otherwise contractually assumed responsibility for design. In other words, an owner who, directly or indirectly, furnishes the plans and specifications for the work, impliedly warrants to the contractor that they will be sufficient for their particular purpose. As the United States Supreme Court held in *United States v. Spearin,* "[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."[6] This rule, known as the "*Spearin* doctrine," has been adopted by most, if not all, jurisdictions.[7]

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[4] *See, e.g.*, Bramble & Callahan, Construction Delay Claims, 3d ed. (Aspen Law & Business 1999).

[5] Reliable Elec. Co. v. Clinton Campbell Contractor, Inc., 459 P.2d 98 (Ariz. App. 1969); Manuel v. Campbell, 3 Ark. 324 (1841); Shiffers v. Cunningham Shepherd Builders Co., 470 P.2d 593 (Colo. App. 1970); White Constr. Co., Inc. v. Sauter Constr. Co., Inc., 731 P.2d 784 (Colo. App. 1986); Shaw v. Petersen, 350 S.E.2d 831 (Ga. App. 1986); Smith v. Bristol, 33 Iowa 24 (1871); McQuiston v. Simon, 457 So. 2d 271 (La. Ct. App. 1984); Hattin v. Chase, 33 A. 989 (Me. 1895); Houston v. York, 755 So. 2d 495 (Miss. App. 1999); Structural Sys., Inc. v. Hereford, 564 S.W.2d 62 (Mo. App. 1978); Davco Realty Co. v. Picnic Foods, Inc., 252 N.W.2d 142 (Neb. 1977); Floyd v. United Home Imp. Ctr., Inc., 696 N.E.2d 254 (Ohio. App. 1997); Baker-Crow Constr. Co. v. Hames Elec., Inc., 566 P.2d 153 (Okla. App. 1976); Pychinka v. Keystone Home Imp. Co., 4 Pa. D.&C.2d 492 (Pa. Com. Pl. 1956); H. M. R. Constr. Co. v. Wolco of Houston, Inc., 422 S.W.2d 214 (Tex. App. 1967); Hall v. MacLeod, 62 S.E.2d 42 (Va. 1950). This implied duty is now something of an anachronism inasmuch as virtually every standard form construction contract expressly imposes this duty on contractors. *See, e.g.*, AIA Document 201 (1997), *General Conditions of the Contract of Construction,* ¶ 3.5.1.

[6] 248 U.S. 132, 136 (1918). *See also* 13 Am. Jur. 2d Building and Construction Contracts § 28 (1964); Annotation, *Construction Contractor's Liability to Contractee for Defects or Insufficiency of Work Attributable to the Latter's Plans and Specifications*, 6 A.L.R.3d 1389 (1966).

[7] *E.g.*, State Dept. of Natural Resources v. Transamerica Premier Ins. Co., 856 P.2d 766 (Alaska 1993); Housing Auth. of City of Texarkana v. E. W. Johnson Constr. Co., Inc., 573 S.W.2d 316 (Ark.

To successfully assert this defense, at a minimum, the contractor must establish that: (1) its obligations went no further than to conform with the plans and specifications prescribed by the owner as part of the contract; and (2) it prosecuted the work in exact accordance with those plans and specifications.[8] The most clear cut cases are those in which the plans and specifications call for the installation of a particular product. The contractor is deemed in compliance with the contract if he supplies the specified product even though it turns out to be defective. For example, in *City of Covington v. Heard*,[9] the appellate court upheld the grant of summary judgment in favor of a sewer contractor where the undisputed evidence established that the contractor used the type of pipe called for in the specifications, and installed the pipe in accordance with the plans and specifications:

> Flextran was an allowable material under the City's own specifications. The City cannot avoid responsibility for its own specifications by allowing the contractor such an option. The law is clear that where specifications call for installation of a material by brand name, and the contractor complies with the specifications by supplying and installing such brand name material, the contractor is immune from defects therein.[10]

One situation in which a contractor may be held liable for damages caused by defects in the owner's plans and specifications occurs when the contractor deviates from the plans and specifications without the owner's consent.[11] The contractor will not be responsible for deviating from plans, however, if he does so with the owner's knowledge and the owner does not object.[12] In one case, a contractor that deviated

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1978); Gates v. Pickett & Nelson Constr. Co., 432 P.2d 780 (Idaho 1967); Bates & Rogers Constr. Corp. v. North Shore Sanitary Dist., 414 N.E.2d 1274 (Ill. App. 1980); Alpert v. Commonwealth, 357 Mass. 306, 258 N.E.2d 755 (1970); McCree & Co. v. State, 91 N.W.2d 713 (Minn. 1958); Employers Ins. of Wausau v. Mississippi State Highway Comm'n, 575 So. 2d 999 (Miss. 1990); Lutey Construction-The Craftsman v. State, 851 P.2d 1037 (Mont. 1993); Sasso Contracting Co., Inc. v. State of N.J., 173 N.J. Super. 486 (App. Div. 1980); Design Plus Store Fixtures, Inc. v. Citro Corp., 508 S.E.2d 825 (N.C. App. 1998); Fuchs v. Parsons Constr. Co., 88 N.W.2d 648 (Neb. 1958); S & D Mech. Contrs., Inc. v. Enting Water Conditioning Sys., Inc., 593 N.E.2d 354 (Ohio App. 2 Dist. 1991); Miller v. Guy H. James Constr. Co., 653 P.2d 221 (Okla. Civ. App. 1982); A. H. Barbour & Son, Inc. v. State Highway Comm'n, 433 P.2d 817 (Or. 1967); Hill v. Polar Pantries, 64 S.E.2d 885 (S.C. 1951); Shintech Inc. v. Group Constructors, Inc., 688 S.W.2d 144 (Tex. App. 1985); Armstrong Const. Co. v. Thomson, 390 P.2d 976 (Wash.1964); Reiman Constr. Co. v. Jerry Hiller Co., 709 P.2d 1271 (Wyo. 1985).

[8] At least one court has held that this defense also requires proof that the plans and specifications were defective and that the defects were the proximate cause of the deficiency in the completed work. Design Plus Store Fixtures, Inc. v. Citro Corp., 508 S.E.2d 825 (N.C. App. 1998).

[9] 428 So. 2d 1135 (La. Ct. App. 1983).

[10] *Id.* at 1135.

[11] Drummond v. Hughes, 104 A. 137 (N.J. 1918); Otto Misch Co. v. E.E. Davis Co., 217 N.W. 38 (Mich. 1928); Filbert v. Philadelphia, 37 A. 545 (Pa. 1897); 13 Am. Jur. 2d Building and Construction Contracts § 28 (1964).

[12] Mann v. Clowser, 59 S.E.2d 78 (Va. 1950). *See also* Sisters of the Good Shepherd v. Quinn Constr. Co., 225 So. 2d 225 (La. Ct. App. 1969) (contractor held not responsible for defects in substitute tiles approved by architect). The contractor will remain liable, however, if the consequences of the deviation are so well-known that the contractor should have been aware of the danger.

from the plans, but made corrections pursuant to directions from the owner's architect, was found not liable.[13] In another case, when the contractor deviated from plans and failed to correct deviations despite the owner's protest, the contractor was found liable.[14]

The second situation in which a contractor may be held liable for damages caused by defects in plans furnished by the owner occurs when the defect in the plans and specifications is patent and should have been brought to the owner's attention by the contractor.[15]

Finally, a contractor cannot rely on this defense if he expressly or by implication warrants the sufficiency of the owner's plans or clearly contracts to erect a building free of defects.[16] In this regard, perhaps the single largest impediment to asserting this defense is the increasing use of so-called performance specifications, which impose design responsibilities on the contractor. As one court has explained:

> If a specification provides explicit instructions that tell the contractor exactly how the contract is to be performed and no deviation from the instructions is permissible, then the specification is design in nature. If, on the other hand, the specification seeks an end result and leaves the determination as to how the result is to be obtained to the contractor, then the specification is performance in nature. If a contract contains a design specification, responsibility for deficiencies rests with the party who prepared the specification because that party impliedly warrants that the specification is adequate to produce the result. If the contract calls for a performance specification, which only indicates the desired end result, then responsibility for deficiencies lies with the contractor who designs the mechanism by which the result is to be achieved because the contractor then impliedly warrants his design's sufficiency.[17]

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[13] Fuchs v. Parsons Constr. Co., 111 N.W.2d 727 (Neb. 1961).

[14] Otto Misch Co. v. E.E. Davis Co., 217 N.W. 38 (Mich. 1928).

[15] Miller v. Guy H. James Const. Co., 653 P.2d 221 (Okla. Civ. App. 1982) ("Absent open and obvious design defects that should be apparent to a prudent contractor and called to prime contractor's attention, party who furnishes plans and specifications impliedly warrants them to be fit for their intended use."); Don Seibarth Pontiac, Inc. v. Asphalt Rd Bldg & Resurfacing, Inc., 407 So. 2d 42 (La. Ct. App. 1981) (contractor responsible for defects in parking lot caused by subgrade failures due to failure to warn owner that base was unsuitable notwithstanding fact that contract did not require any subsurface work by contractor). *See also* AIA Document A201 (1997), ¶ 3.2.2 (requiring contractor to "promptly" report any design errors or omissions noted during Contractor's review of the Contract Documents, and any nonconformity of the Contract Documents with applicable laws, statutes, ordinances, building codes, and rules and regulations).

[16] 13 Am. Jur. 2d Building and Construction Contracts § 28 (1964); Cameron-Hawn Realty Co. v. Albany, 101 N.E. 162 (N.Y. 1913); Miller v. City of Broken Arrow, 660 F.2d 450 (10th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Southern New England Contracting Co. v. State, 345 A.2d 550 (Conn. 1974); Mayville-Portland Sch. Dist. v. CT Linfoot Co., 261 N.W.2d 907 (N.D. 1978); City of Orlando v. H. L. Coble Constr. Co., 282 So. 2d 25 (Fla. Dist. Ct. App. 1973). *See* AIA Document A201 (1997), ¶ 3.5.1 (contractor's warranty to owner).

[17] S & D Mech. Contrs., Inc. v. Enting Water Conditioning Sys., Inc., 593 N.E.2d 354 (Ohio App. 1991) (citations omitted).

In short, the availability of the implied warranty defense will depend on the facts and circumstances of the particular case, and more particularly on the language of the construction contract and the documents incorporated by reference, such as the plans and specifications.[18]

§ 20.03 DAMAGES

Although the methodology for calculating damages differs in construction defect cases and delay cases, the objective of an award of damages remains the same: to place the non-breaching party in the position he would have occupied had the breach not occurred.[19] Specific performance is rarely a remedy in construction cases. If a contractor fails to perform or renders defective performance, it is unlikely that the owner wants that same contractor to further prosecute the work pursuant to a court order. Moreover, an owner wants his project built without delay, and is probably required to construct it with a replacement contractor by his duty to mitigate. Thus damages are the primary remedy in construction cases.[20]

In construction cases, the measure of damages depends largely on the level of the contractor's performance at the time of the breach. Where the contractor refuses to perform the work as bid, the measure of damages is the difference between the bid and the actual amount paid to perform the same work, together with reasonable compensation for any delay of the project.[21]

Where the contractor has actually begun work, the measure of damages turns on whether the contractor has substantially performed his contract. Generally, "[t]here is substantial performance of a contract where all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed are performed with such approximation to complete performance that the Owner obtains substantially what is called for by the Contract."[22] If the

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[18] *See, e.g.*, Quedding v. Arisumi Bros., Inc., 661 P.2d 706 (Hawaii 1983), involving the collapse of a wall caused by the failure to install steel reinforcing bars. Although the bars were not shown in the plans, the court found them to be required by Maui's uniform building code.

[19] *See, e.g.*, 525 Main St. Corp. v. Eagle Roofing Co., 168 A.2d 33 (N.J. 1961); Gibbs Constr. Co. v. Thomas, 500 So. 2d 764 (La. 1987). Owners, however, generally are not entitled to recover damages that would place them in a better position than they would have been had the contractor carried out the contract. Fortier v. Sessum, 441 So. 2d 1238 (La. Ct. App. 1984). Thus, in Louise Caroline Nursing Home, Inc. v. Dix Constr. Corp., 285 N.E.2d 904 (Mass. 1972), the owner was denied recovery for additional damages because the owner had completed the building with a substitute contractor at a cost that was less than the original contract price.

[20] For a more detailed discussion of construction damages, *see* Schwartzkopf & McNamara, Calculating Construction Damages, 2d ed. (Aspen Law & Business 2001) (hereinafter "Calculating Damages"). *See also* Annotation, *Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structure Is Proper Measure of Damages for Breach of Construction Contract*, 41 A.L.R.4th 110 (1985); Bruner, *Construction Claim Recovery Measures*, 20 Forum 278 (1985); Reinert, *Limitations on Recoverable Damages*, The Constr. Law. Vol. 18, No. 2 (April 1998).

[21] Ross v. Danter Assocs., Inc., 242 N.E.2d 330 (Ill. App. 1968); White v. Boutte, 392 So. 2d 124 (La. Ct. App. 1980).

[22] 13 Am. Jur. 2d Building and Construction Contracts § 43 (1964); Jardine Estates, Inc. v. Donna

contractor has substantially performed its contract, it is entitled to the contract price, less the cost of remedying defects or omissions (assuming there is no undue economic waste).[23] In other words, the appropriate measure of damages is the cost of repairing any defects or of completing the work. Such cost would include the charges paid to the completing contractor, additional costs paid to the architects and engineers, and any other additional costs that the owner directly sustained as a result of having to re-procure the project and familiarize a new contractor with the project.[24] The burden of proving substantial performance generally rests with the contractor. Once substantial performance is demonstrated, the burden of proof normally shifts to the owner to establish the costs of completion or repair.[25]

Where the contractor has failed to substantially perform, however, the contractor may be required to refund contract sums received and pay the cost of removing the defective work and restoring the premises to their pre-contract condition.[26]

Brook Corp., 42 N.J. Super. 332, 126 A.2d 372 (App. Div. 1956); Foeller v. Heintz, 118 N.W. 543 (Wis. 1908). Substantial performance is largely a question of fact. In Salard v. Jim Walter Homes, Inc., 563 So. 2d 1327 (La. Ct. App. 1990), the court found the contract substantially performed where the home at issue was not totally unfit for its intended purpose as a residence dwelling (plaintiffs lived in the house through the date of trial), and plaintiffs' expert testified that the defects could be repaired in four to six weeks at a cost of $15,000.00.

[23] Economic waste is discussed in **§ 20.04**, *infra*. Courts have employed various formulations for awarding damages. In some cases, courts award the actual costs to repair or complete, *e.g.*, Kirkpatrick v. Temme, 654 P.2d 1011 (Nev. 1983). Other courts characterize the damages in terms of reasonable completion costs, *e.g.*, Marshall v. Karl F. Schultz, Inc., 428 So. 2d 533 (Fla. Dist. Ct. App. 1983). Another formulation, most commonly employed when repairs would constitute economic waste, is diminution of the value of the property (the amount by which market value is reduced by the nonconforming work), *e.g.*, A&F Properties, LLC v. Lake Caroline, Inc., 2000 Miss. App. LEXIS 473, 2000 WL 1578483 (Oct. 24, 2000); Dubinsky v. U.S. Elevator Corp., 22 S.W.3d 747 (Mo. App. 2000). *See* Calculating Damages § 12.03.

[24] *See* Calculating Damages § 12.02. When calculating the cost of completing the work, it is important to include only the cost of completing work that was within the scope of the defaulting contractor's contract. Stowers v. Hall, 283 S.E.2d 714 (Ga. App. 1981).

[25] Jackson v. Spurlock, 424 So. 2d 1088 (La. Ct. App. 1983). When an owner sues to recover those costs, the burden of proving the amount due is normally on the owner. Barile Excavating & Pipeline Co. v. Kendall Properties, Inc., 462 So. 2d 11 (Fla. Dist. Ct. App. 1984). More commonly, the issue arises in a contractor's suit for recovery of the contract price. A few states apply the substantial performance doctrine so as to place the burden of proving repair costs on the contractor, *e.g.*, Shaddock v. Storm King Window Co., 696 S.W.2d 271 (Tex. Ct. App. 1985).

[26] 13 Am. Jur. 2d Building and Construction Contracts § 41 (1964); Tolstoy Constr. Co. v. Minter, 143 Cal. Rptr. 570 (Ct. App. 1978); Hallmark of Farmington, Inc. v. Roy, 471 A.2d 651 (Conn. App. 1984) (contractor required to refund to owner when swimming pool built by contractor was unusable); Bourgeois v. Arrow Fence Co., 592 So. 2d 445 (La. Ct. App. 1992) (where defective patio enclosure could not be remedied, contractor required to refund entire amount paid for construction of the defective structure, and pay the cost of demolishing the structure); Yurchak v. Jack Boiman Constr. Co., 443 N.E.2d 526 (Ohio App. 1983) (money refunded when basement continued to leak after waterproofing contractor completed work). *See also* Ed Hackstaff Concrete, Inc. v. Power Ridge Condo. "A" Owners Ass'n, Inc., 679 P.2d 1112 (Colo. Ct. App. 1984). Cases that forgive owners the duty to make final payment to the contractor without requiring them to prove the costs to complete,

When the contractor completes its performance, but is late, the owner can claim damages for the loss incurred by not being able to use the property on the contractually scheduled completion date. To assess delay damages against a contractor, an owner must first prove not only that the project was late, but that the contractor was responsible for the late completion and that there were no concurrent owner-caused delays. Once the delay has been determined and contractor responsibility has been established, the owner can assert one of two delay damages. The owner may assert liquidated damages if such damages are provided for in the contract, or the owner may assert actual damages. The assessment of both liquidated and actual damages for delay normally is not permitted.[27] From the contractor's standpoint, liquidated damages can be preferable to actual damages because the latter can be substantial. Actual damages recovered by owners for delay can include: increased financing costs; lost revenues and profits from the project; personnel costs; additional or extended architect and engineer fees; storage or delayed shipment charges for equipment; additional or extended insurance premiums; utility costs; equipment cost escalation; rental of substitute facilities; and diminished market value.[28]

A contractor has several potential defenses to owner damage claims. As a general rule, damages may not be recovered for breach of contract unless the damages were known or reasonably foreseeable at the time the contract was executed.[29] Thus, damage claims can be attacked on the basis of foreseeability. Second, damages may not be recovered unless they are certain in nature and not speculative.[30] Most courts do not require strict proof of damages, requiring only "reasonable certainty":

> The proof of damages because of breach of a contract must be made with a reasonable degree of certainty. The damages, to be recoverable in such a case, must

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such as Jackson v. Spurlock, 424 So. 2d 1088 (La. Ct. App. 1983), represent a partial application of this restitution principle.

[27] Recovery of liquidated damages does not prevent an owner from recovering actual damages for other breaches of the contract, such as the cost of rectifying defective work.

[28] *See* Calculating Damages § 12.04. *See also* Strogatz, Taylor & Craig, *Pricing the Delay: Whom Do I Sue And What Do I Get?*, The Constr. Law., Vol. 17, No. 4 (Oct. 1997).

[29] Restatement (Second) of Contracts § 351. As one court has stated:

> Recoverable special damages must meet the orthodox test laid down in the celebrated English case Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). They must be "such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it." [Citation omitted]. The burden is upon the party claiming special damages to show that the injury was reasonably within the contemplation of the parties . . . The question of whether or not the defendant did in fact foresee the injury that the plaintiff has suffered is a question of fact for the jury, subject to the usual supervisory power of the court.

Bumann v. Maurer, 203 N.W.2d 434 (N.D. 1972).

[30] Restatement (Second) of Contracts § 352. *See also* Tessmar v. Grosner, 23 N.J. 193, 203, 128 A.2d 467 (1957); LeGare, Inc. v. Brookhaven Residential Sales, 337 Pa. Super. 478, 487 A.2d 360 (1985).

> not be remote or speculative. There must be sufficient data produced by the claimant to permit a determination with reasonable certainty of the loss occasioned by the breach relied upon . . . damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.[31]

Third, an owner confronted with a breach by a contractor is under a duty to mitigate damages by reasonable efforts.[32] The evaluation of that duty is measured by whether or not the plaintiff acted reasonably under the circumstances.[33] The burden of proof, however, is on the defendant/contractor to show actual or potential mitigation and the amount of damages for which the owner itself must account.[34]

§ 20.04 SUBSTANTIAL PERFORMANCE/ECONOMIC WASTE

As discussed above, a contractor that renders substantial, but defective, performance is generally entitled to the full contract amount, less the cost of remedying the defective work. An important exception to this rule exists if the cost of remedying the work is too great and would result in "economic waste."[35] Economic waste occurs if the cost to remedy the defect is disproportionate to the owner's loss.[36] The burden of proof is on the contractor to demonstrate that the cost of repair is an inappropriate measure of the owner's damages and provide the trial court with evidence supporting an alternative award.[37]

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[31] Bitler v. Terri Lee, Inc., 81 N.W.2d 318 (Neb. 1957).

[32] McGraw v. Johnson, 42 N.J. Super. 267, 273, 126 A.2d 203 (App. Div. 1956); Leto v. Cypress Builders, Inc., 428 So. 2d 819 (La. Ct. App. 1983). An interesting Iowa case recently considered whether, in such an action for negligence, the defense of contributory negligence should be permitted. The court held that the owner's failure to repair the defects promptly (which repairs might have averted the financial failure of the apartment complex in question) would not constitute contributory negligence inasmuch as it did not occur prior to or at the time of the contractor's improper work. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416 (Iowa 1983). Presumably, proof of that sort would operate — if not to bar an owner's claim, at least to reduce it — on the theory that even victims of negligence are obliged to mitigate their damages.

[33] McDonald v. Mianecki, 398 A.2d 1283 (N.J. App. Div. 1979).

[34] Sandler v. Lawn-A-Mat, 358 A.2d 805 (N.J. App. Div. 1976).

[35] 13 Am. Jur. 2d Building and Construction Contracts §§ 42, 81 (1964); Williston § 805.

[36] *See, e.g.*, Pennington v. Rhodes, 929 S.W.2d 169 (Ark. App. 1996); Service Unlimited, Inc. v. Elder, 542 N.W.2d 855 (Iowa App. 1995); Hall v. Lovell Regency Homes Ltd. Partnership, 708 A.2d 344 (Md. App. 1998); Dubinsky v. U.S. Elevator Corp., 22 S.W.3d 747 (Mo. App. 2000); Fink v. Denbeck, 293 N.W.2d 398 (Neb. 1980); Camino Real Mobile Home Park Partnership v. Wolfe, 891 P.2d 1190 (N.M. 1995); Schneberger v. Apache Corp., 890 P.2d 847 (Okla. 1994); Douglass v. Licciardi Constr. Co., Inc., 562 A.2d 913 (Pa. Super. 1989); Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 10 P.3d 417 (Wash. App. 2000), and cases cited therein.

[37] *See, e.g.*, Pennington v. Rhodes, 929 S.W.2d 169 (Ark. App. 1996); General Ins. Co. of Am. v. City of Colorado Springs, 638 P.2d 752, 759 (Colo. 1981); *cf.* Andrulis v. Levin Constr. Corp., 331 Md. 354, 375-76, 628 A.2d 197 (1993); Dubinsky v. U.S. Elevator Corp., 22 S.W.3d 747 (Mo. App. 2000); Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 10 P.3d 417 (Wash. App. 2000); Laska v. Steinpreis, 231 N.W.2d 196 (Wis. 1975), and cases cited therein.

The rule of payment to the contractor upon substantial performance is based upon *Quantum Meruit* principles: If the owner has received something of value, he must pay for it according to its value, even though it may not be precisely the work for which the owner contracted.[38] Nonetheless, substantial completion does not apply if the deviations from the contract are such that an allowance out of the contract price would not give the other party essentially what it contracted for.[39]

In the seminal case of *Jacob & Youngs v. Kent*,[40] a contractor was obligated to build a house using a certain brand of pipe. The contractor built the house exactly according to specifications, except that he used a different brand of pipe that was essentially equal in quality to the brand specified in the contract. The court held that the doctrine of substantial performance limited the owner's possible recovery to the difference in value of the two kinds of pipe, rather than the full cost of tearing out the old pipe and putting in new pipe:

> It is true that in most cases the cost of replacement is the measure. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. 'There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable.' The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

Another court held that a slight deviation in the color of brick siding on a house did not amount to a failure to comply with the substantial provisions of a contract to apply the siding.[41] Even if there are significant deviations from plans, the courts have found substantial performance when the plans or other circumstances indicated that such deviations were of a nonessential character.[42]

Notwithstanding this, one court has held that a failure to install a roof of uniform color under a roofing contract rendered performance not substantial.[43] It has also been said that in construction contracts there can be no substantial perfor-

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[38] 13 Am. Jur. 2d Building and Construction Contracts § 41 (1964); Williston § 805.

[39] Williston § 805.

[40] 129 N.E. 889 (N.Y. 1921).

[41] S.D. & D.L. Cota Plastering Co. v. Moore, 247 Iowa 972, 77 N.W.2d 475 (1956).

[42] Plante v. Jacobs, 10 Wis. 2d 567, 103 N.W.2d 296 (1960); Dixon v. Nelson, 79 S.D. 44, 107 N.W.2d 505 (1961).

[43] D.W. Grun Roofing & Constr. Co. v. Lope, 529 S.W.2d 258 (Tex. Civ. App. 1975).

mance if the defect is "structural," in the sense that it affects the soundness of the building.[44]

Sometimes the courts measure substantial performance in terms of the cost required to remedy the defect relative to the entire contract price: If the cost of remedy is great compared to the contract price, the courts are hesitant to find that there has been substantial performance.[45] More recently, however, one court noted that "the question whether the building contract has been substantially performed is not to be decided upon a percentage basis. . . ."[46] In the end, as Justice Cardoza said, "the question is one of degree, to be answered, if there is doubt, by the triers of fact."[47]

§ 20.05 IMPOSSIBILITY/IMPRACTICABILITY OF PERFORMANCE

It is a basic principle of contract law that a contractor is bound to perform the agreement with the owner according to its terms, or respond in damages for the breach of the contract if he unjustifiably fails to perform.[48] Nonperformance may be justified, however, where unforeseen fortuitous events render the contractor's performance physically impossible or commercially impracticable. Once known as "impossibility of performance," this defense is now more commonly referred to as "impracticability of performance," and is defined as follows:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged unless the language or the circumstances indicate the contrary.[49]

This defense is not favored in the law, and courts generally limit their application so as to preserve the certainty of contracts.[50] The situations where this defense is

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[44] Spence v. Harm, 163 N.Y. 220, 57 N.E. 412 (1900).

[45] Nees v. Weaver, 222 Wis. 492, 269 N.W. 266 (1936); Manthey v. Stock, 133 Wis. 197, 113 N.W. 443 (1907).

[46] Jardine Estates, Inc. v. Donna Brook Corp., 42 N.J. Super. 332, 126 A.2d 372 (App. Div. 1956); *accord* Plante v. Jacobs, 10 Wis. 2d 567, 103 N.W.2d 296 (1960).

[47] Jacob & Youngs v. Kent, 230 N.Y. 239, 243, 129 N.E. 889 (1921).

[48] Mortenson v. Scheer, 957 P.2d 1302 (Wyo. 1998) (citing cases); *see generally,* Restatement (Second) of Contracts (1981) Chapter 11, Intro. Note.

[49] Restatement (Second) of Contracts (1981) § 261. The Restatement rationale for this defense is that such events alter the basic assumptions upon which the contract was made. *Id.*, Chapter 11, Intro. Note. Another rationale underlying the defense, rejected by the Restatement, is that an implied term of the contract is that extraordinary events affecting the parties' bargain will not occur. *Id.* The doctrine of commercial impracticability decides whether "the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance." Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966).

[50] It should be noted that the inquiry into whether performance should be excused is extremely fact intensive, and it is not uncommon to find cases where similar facts have yielded diametrically opposed results.

successfully invoked usually involve so-called Acts of God,[51] changes in laws or regulations that make performance illegal or frustrate the commercial objectives of the contract,[52] the death of a party,[53] or destruction of the property that is the subject of the contract.[54]

The elements of the impossibility/impracticability of performance defense are: (1) a contract that is partially executory; (2) the occurrence of a supervening event after the contract is made; (3) the nonoccurrence of this event was a basic assumption on which the contract was made; (4) the occurrence of the event frustrated the parties' principal purpose for the contract; and (5) the frustration was substantial.[55] If all these elements are present, a contractor is not liable for his failure to perform when a fortuitous event makes performance impossible.[56] The contractor, however, is not relieved of his failure to perform merely because performance has become more difficult or more onerous than originally anticipated, or economically unfeasible or unattractive.[57]

In *Iannuccillo v. Material Sand & Stone Corp.*,[58] the Rhode Island Supreme Court applied these principles to a dispute over excavation work to be performed on property owned by Iannuccillo. Under the parties' agreement, Material Sand & Stone, through the subcontractor Pezza, was to excavate 50,000 to 60,000 cubic yards of gravel and "existing rock now exposed," with the parties each contributing $5,000 toward the cost of blasting. The parties agreed that 10,000 cubic yards of excavated material would be delivered to another site owned by Iannuccillo, with the remainder to be delivered to Material Sand & Stone for processing and sale on its own account.

In early 1986, excavation was halted by the town government due to the owner's failure to secure permits for removal of gravel from the site and plan for the impact of the excavation on neighboring properties. While the work was suspended, a 10,000 cubic foot rock ledge was discovered on the property. Even though the regulatory issues were eventually resolved, Pezza did not resume

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[51] Lake Dev. Enters., Inc. v. Kojetinsky, 410 S.W.2d 361 (Mo. App. 1966) (freezing temperatures); Davis v. Tillman, 370 So. 2d 1323 (La. Ct. App. 1979) (extraordinarily heavy rainfall); *see generally,* Restatement (Second) of Contracts § 261 (1981).

[52] West Los Angeles Inst. for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir.1966) (change in the law due to IRS revenue ruling); *see generally,* Restatement (Second) of Contracts § 264 (1981).

[53] Stein v. Bruce, 366 S.W.2d 732 (Mo. App. 1963); *see generally,* Restatement (Second) of Contracts § 262 (1981).

[54] Dudley v. St. Regis Corp., 635 F. Supp. 1468 (E.D. Mo. 1986); Schenck v. Capri Constr. Co., 194 So. 2d 378 (La. Ct. App. 1967) (impossibility defense not available where home to which addition was to be added remained in sound condition following hurricane); *see generally,* Restatement (Second) of Contracts § 263 (1981).

[55] Iannuccillo v. Material Sand & Stone Corp., 713 A.2d 1234 (R.I. 1998), citing Downing v. Stiles, 635 P.2d 808 (Wyo. 1981).

[56] Werner v. Ashcraft Bloomquist, Inc., 10 S.W.2d 575 (Mo. App. 2000).

[57] United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966); Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); Martin Forest Prods. v. Grant Adams, 616 So. 2d 251 (La. Ct. App. 1993).

[58] 713 A.2d 1234 (R.I. 1998).

excavation due to a dispute over responsibility for the cost of removing the ledge. Iannuccillo eventually paid another contractor, DiCenzo, $80,000 to complete the excavation.

The Rhode Island Supreme Court held that Iannuccillo's claim for the cost of completion was barred by the doctrine of impracticability of performance:

> The trial justice's findings support defendants' assertion of impracticability. First, he found that the contract was executory, providing for removal of gravel and sand until the desired grade was achieved, which never occurred because of the discovery of the ledge. Second, the trial justice found that the discovery of the ledge was a "condition not anticipated by the parties to this contract." Third, the nonexistence of the ledge was a basic assumption of the parties. This fact is borne out by the parties' contemplation of sharing the incidental costs of blasting, estimated in their written agreement to be approximately $10,000. As it turned out, the total cost of blasting alone was closer to $40,000 (the $5,604 expended by Pezza combined with the $32,000 DiCenzo paid to have the ledge blasted). Moreover, the express terms of the contract only obligated Pezza to remove "existing rock now exposed." Fourth, the essential purpose of the contract — to remove sand and gravel from the lot and achieve an even grade in anticipation of building — was frustrated by the discovery of the ledge. Finally, it can be fairly said that the frustration was substantial — Iannuccillo eventually paid DiCenzo $80,000 to complete the excavation work, $32,000 of which went to the cost of blasting the ledge. In addition, DiCenzo testified that 60 percent of his labor entailed the removal of the ledge material. Sixty percent of the $48,000 DiCenzo realized from the excavation of the site amounted to $28,800. Therefore, approximately $60,800 ($32,000 plus $28,800) was the additional cost the ledge imposed upon the excavation of plaintiff's property.[59]

A supervening event does not excuse nonperformance where the contractor assumes the risk of the event in his agreement with the owner.[60] Thus, reasonably foreseeable events, the risk of which could have been allocated by contract, generally will not excuse performance.[61]

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[59] *Id.* at 1238-39.

[60] Werner v. Ashcraft Bloomquist, Inc., 10 S.W.2d 575, 577 (Mo. App. 2000) ("the ultimate question is whether or not the nature of the contract and the surrounding circumstances show that the risk of the subsequent whether or not foreseen, was assumed by the promisor."); Mortenson v. Scheer, 957 P.2d 1302 (Wyo. 1998) ("impracticability of performance is not invoked when, under the contract, one party assumes the risk that fulfillment of a condition precedent will be prevented"). *Cf.* Iannuccillo v. Material Sand & Stone Corp., 713 A.2d 1234 (R.I. 1998) (while existence of subsurface rock ledge was foreseeable, contract limiting contractor's obligation to removal of "existing rock now exposed" also limited his liability).

[61] Werner v. Ashcraft Bloomquist, Inc., 10 S.W.2d 575, 577 (Mo. App. 2000) (issuance of change orders by owner not a supervening event excusing performance); Mortenson v. Scheer, 957 P.2d 1302 (Wyo. 1998) (failure of Bureau of Land Management to issue necessary permits was a foreseeable risk and did not excuse nonperformance); Harper v. Home Indem. Co., 140 So. 2d 653 (La. Ct. App. 1962) (likelihood of high water was so probable that such events ought to have entered into the calculations of the subcontractor when entering into the contract).

Related to the impracticability defense is the defense of commercial frustration:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.[62]

Both the doctrine of commercial frustration and doctrine of impracticability of performance address the effect of supervening events upon the rights and duties of the contracting parties. In the case of commercial frustration, however, performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by the fortuitous event essentially resulting in a literal, if not actual, failure of consideration.[63] Like impracticability or performance, this defense is limited in its application by the courts to preserve the certainty of contracts.[64] Moreover, the frustration defense is not available when the risk of which could have been allocated by contract, but was not.[65]

§ 20.06 WARRANTIES AND THEIR LIMITATIONS

In general, UCC provisions governing warranties and warranty limitations do not apply to construction contracts. This is especially true where the construction contract can be interpreted to deal exclusively with supplying labor, design, or other services on the construction project. Courts have held that a contract for the waterproofing of a basement is not a sale of goods.[66] Likewise, contracts to build a house[67] or to construct an in-ground swimming pool[68] have also been found to be outside the UCC.

However, when construction, design, or installation services are merely incidental to the materials provided, the provisions of the UCC relating to express warranties,[69] implied warranties,[70] and the limitations thereof[71] will apply. Thus, a

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[62] Restatement (Second) of Contracts (1981) § 265.

[63] Werner v. Ashcraft Bloomquist, Inc., 10 S.W.2d 575, 577 (Mo. App. 2000); Conlon Group v. City of St. Louis, 980 S.W.2d 37 (Mo. App. 1998), *cert. denied*, 19 S. Ct. 1786 (1999).

[64] It should be noted that the inquiry into whether performance should be excused is extremely fact intensive, and it is not uncommon to find cases where similar facts have yielded diametrically opposed results.

[65] Werner v. Ashcraft Bloomquist, Inc., 10 S.W.2d 575 (Mo. App. 2000).

[66] Peltz Constr. Co. v. Dunham, 436 N.E.2d 892 (Ind. Ct. App. 1982).

[67] G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982).

[68] Chlan v. K.D.I. Sylvan Pools, Inc., 53 Md. App. 236, 452 A.2d 1259 (1982).

[69] UCC § 2-313 (1983) (an affirmation of fact or, any promise, constitutes an express warranty).

[70] UCC § 2-314 (1983) (implied warranty of merchantability); UCC § 2-315 (implied warranty of fitness for the intended purpose).

[71] UCC § 2-316 (implied warranties may be excluded or modified, but only if the exclusion is conspicuous and all rules are complied with strictly). UCC § 2-319 (limitation of remedies). UCC § 2-207 (the "battle of the forms").

subcontract for the supply and installation of an air conditioning unit has been held to be a sale of goods.[72] Other construction contracts that have been held to constitute sales of goods include: a contract to supply and pour concrete;[73] a grain silo;[74] a diving board installed with a built-in pool;[75] the sale of prefabricated modular buildings;[76] the sale and installation of an electrical floor;[77] the sale and construction of a one-million-gallon water tank;[78] the design, construction, and delivery of a sewage processing plant;[79] and the installation of a pulp mill boiler and equipment.[80] In each case, whether the end product involves a sale of goods under the UCC is a question of fact.[81]

Building contractors also may impliedly warrant that work will be done in a skillful manner and in accordance with good usage and accepted practices in the community in which the work is done.[82] Virtually all jurisdictions recognize the existence of implied warranties of skillful performance and of habitability made by builders/vendors of new residential homes.[83] While most jurisdictions imply these

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[72] Howard Dodge & Sons, Inc. v. Finn, 391 N.E.2d 638 (Ind. Ct. App. 1979).

[73] S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524 (3d Cir. 1978).

[74] Clevenger & Wright Co. v. A.O. Smith Harverstore Prods., Inc., 625 S.W.2d 906 (Mo. Ct. App. 1981).

[75] Anthony Pools v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983).

[76] Cates v. Morgan Portable Bldg. Corp., 591 F.2d 17 (7th Cir. 1979).

[77] Aluminum Co. of Am. v. Electro-Flo Corp., 451 F.2d 1115 (10th Cir. 1971).

[78] Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976).

[79] Omaha Pollution Control Corp. v. Carver-Greenfield Corp., 413 F. Supp. 1069 (D. Neb. 1976).

[80] Lincoln Pump & Paper Co. v. Dravo Corp., 436 F. Supp. 262 (D. Me. 1977).

[81] *See* UCC § 2-105 (1983). *See also* Space Leasing Assocs. v. Atlantic Bldg. Sys., Inc., 144 Ga. App. 320, 241 S.E.2d 438 (1977). *See generally,* Annotation, *What Constitutes "Goods" Within the Scope of UCC Article 2*, 4 A.L.R.4th 912 (1981).

[82] 13 Am. Jur. 2d Building and Construction Contracts § 27 (1964). *See also* Henggler v. Gindra, 191 Neb. 317, 214 N.W.2d 925 (1974); Hodgson v. Chin, 168 N.J. Super. 549, 403 A.2d 942 (App. Div. 1979); Caceci v. DiCanio Constr. Corp., 72 N.Y. 2d 52; 526 N.E.2d 266, 530 N.Y. S.2d 771(1988).

[83] Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383, 413 (1969). *See generally*, Spragens, *Builders' New Home Warranties*, Construction Briefings No. 81-3 (1981). Modern cases involving this warranty obligation include: Gadbois v. Leb-Co Builders, Inc., 312 Pa. Super. 144, 458 A.2d 555 (1983) (septic tank backups justify damage verdict of $18,000 based on evidence that problem lowered value of home by that amount); George v. Veach, 67 N.C. App. 674, 313 S.E.2d 920 (1984) (warranty covers defective septic system); Dillig v. Fisher, 142 Ariz. 47, 688 P.2d 693 (1984) (warranty applies to roof leaks even though home in question was not initially built for resale). For discussion of a related issue, *see* Annotation, *Real Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold*, 46 A.L.R.4th 546 (1986).

The warranty of habitability will extend in many cases to purchasers from the initial owner. *See* Redarowicz v. Ohlendorf, 92 Ill. App. 2d 171, 441 N.E.2d 324 (1982) (chimney separation, wall cracks, and leakage); Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. Ct. App. 1983) (wall and driveway cracks); Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983) (cracks); Degnan v. Executive Homes, Inc., 215 Mont. 162, 696 P.2d 431 (1985). *But see* Clark v. Landelco, Inc., 657 S.W.2d 634 (Mo. Ct. App. 1984) (holding warranty extends to initial purchaser only); San Francisco Real Estate Investors v. J.A. Jones Constr. Co., 703 F.2d 976 (6th Cir. 1983) (applying Ohio law to bar warranty claim by subsequent purchaser of commercial as opposed to residential property).

warranties as a matter of common law, some have enacted special legislation.[84] Depending upon the law of the jurisdiction, this warranty may only apply to the original purchaser of the residential home,[85] or may be limited to new residential construction.[86]

Although the implied warranty of skillful performance applies to building contracts in most jurisdictions,[87] the warranty does not guarantee that work will be perfect forever. Rather, the builder by implication warrants that what it builds will be constructed in a reasonably skillful manner.[88] The warranty does not expire after a set time but, as time goes on, it becomes more likely that defects that arise are not due to the builder's breach of the implied warranty of skillful performance.[89] Many jurisdictions hold that implied warranties extend from the builder to all subsequent purchasers, subject to the limitations imposed by time and other defenses, such as waiver. However, it has been held that the reasonable time limitation on bringing a suit for implied breach of warranty is tolled when builders fraudulently conceal defects.[90]

The primary limitations on implied warranties available to construction contractors as defenses, other than the reasonable time limitation described above, are contractual. The contractor may, by contract, limit or exclude the implied warranties of skillful performance or habitability. To do so, though, the exclusion must not have the appearance of a contract of adhesion. Although the contractor may express a limit or exclude such warranties, it must do so clearly. Clauses excluding implied warranties will be strictly construed against the drafter.[91] When express warranties

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Doing minimal rehabilitative work in the course of converting an existing apartment building into a condominium, however, does not give rise to a habitability warranty. *See* Kelley v. Astor Investors, Inc., 123 Ill. App. 3d 593, 462 N.E.2d 996 (1984). Although the warranty may not be disclaimable in a consumer context, the result may be otherwise when the project is commercial. *See* Frickil v. Sunnyside Enters., Inc., 106 Wash. 2d 714, 725 P.2d 422 (1986) (disclaimer valid against owner of apartment complex). It is not breached by the builder's mere failure to obtain or deliver a certificate of occupancy (which has the effect of barring the owner from renting out the premises). *See* Dann v. Perrotti & Hauptman Dev. Co., 670 P.2d 448 (Colo. Ct. App. 1983). Also, the warranty may be deemed to have been given only by commercial builders. *See* Siders v. School, 188 Cal. App. 3d 1217, 233 Cal. Rptr. 906 (1986) (rejecting homebuyer's warranty claim for house built by and purchased from a do-it-yourself owner). *See also* Levinson & Silver, *Do Commercial Property Tenants Possess Warranties of Habitability?*, 14 Real Est. L.J. 59 (1985); McKie, *Liability of Construction Professionals Under Implied Warranty of Habitability*, 5 Miss. C.L. Rev. 135 (1986).

[84] *See* D.C. Code Ann. § 45-1801 (1981) (especially § 45-1847(b)); La. Civ. Code Ann. art. 2762 (West 1952); Md. Real Prop. Code Ann. § 10-201(c)-203 (1981).

[85] *See, e.g.*, Sousa v. Albino, 120 R.I. 461, 388 A.2d 804 (1978).

[86] Groover v. Magnavox, 71 F.R.D. 638 (D. Pa. 1976).

[87] *See* cases cited in Note 5, *supra*.

[88] Parsons v. Beaulieu, 429 A.2d 214 (Me. 1981). *See also* Lempke v. Dagenais, 130 N.H. 782, 547 A.2d 290 (1988) (privity of contract was not required to maintain action for implied warranty of workmanlike quality; purely economic harm could be recovered under such a theory).

[89] Parsons v. Beaulieu, 429 A.2d 214 (Me. 1981).

[90] Reichelet v. Urban. Inv. & Dev. Co., 577 F. Supp. 971 (N.D. Ill. 1984).

[91] Cavasant v. Campopiano, 114 R.I. 24, 327 A.2d 831 (1974). Dewberry v. Maddox, 755 S.W.2d 50 (Tenn. Ct. App. 1988).

touch upon a matter usually covered by implied warranties (the quality of work or habitability of the building), the express warranties control.

Express warranties are common in construction contracts, usually representing an agreement by the parties as to the quality of the work the contractor is to perform.[92] Such warranties are given effect as they are written. For example, a warranty by a builder that its work would be free of defects in labor and materials for one year has been given effect.[93]

Express warranties may be a part of a written contract, or may even be made subsequent to the making of the original contract. One court held that "certification" of steelwork in a building constituted a warranty that the building was designed to carry the required loads.[94] Also, oral assurances made by a contractor subsequent to the written agreement between the parties that defects would be cured or warranties supplied was given effect by the court.[95]

§ 20.07 DELAY CLAIMS

"Delay" generally refers to the late completion of a construction project, i.e., completion after the original agreed upon completion date (as modified by any change orders), due to unanticipated circumstances. Delay may result from the action or inaction by one or more of the participants in the construction project, including the owner, the designer, other prime contractors, subcontractors, suppliers, labor unions, nature, and even the contractor himself.[96] To assess delay damages against a contractor, an owner must prove that: (1) the project was late; and (2) the contractor was responsible for the late completion. Once a delay for which the contractor bears responsibility has been established, the owner can assert a claim for either liquidated damages (if provided for in the contract or construction), or actual damages attributable to the delay. Actual damage claims include both direct costs incurred as a result of the delayed construction (e.g., additional engineering expense), as well as indirect costs (e.g., lost profits). A contractor who is late in

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[92] AIA Document A201, General Conditions of the Contract for Construction, Art. 3.5 (1997), contains such a warranty.

[93] Austin Co. v. Vaughn Bldg. Corp., 643 S.W.2d 113 (Tex. 1982); Fidelity & Cas. Co. v. J.A. Jones Constr. Co., 200 F. Supp. 264 (D. Ark. 1961), *aff'd*, 325 F.2d 605 (8th Cir. 1963).

[94] Industrial Dev. Bd. v. Fequa Indus., Inc., 523 F.2d 1226 (5th Cir. 1975). *See also* Herman v. Bonanza Bldgs., Inc., 233 Neb. 474, 390 N.W.2d 536 (1986) (holding that by furnishing manufacturer's brochure, contractor gave express warranty).

[95] 109 Salem Towne Apts., Inc. v. McDaniel & Sons Roofing Co., 330 F. Supp. 906 (E.D.N.C. 1970). *Accord* S.S. Steele & Co. v. Pugh, 473 S.E.2d 978 (Ala. 1985), in which the owner claimed he had refrained from rejecting a slab on the contractor's assurance that it was sound and that he would guarantee it for 25 years. When the slab subsequently failed, the owner prevailed on a warranty theory as well as on the theory that the contractor had misrepresented the true condition of the slab. *See generally*, Annotation, *Affirmations or Representations Made After the Sale Is Closed as Basis of Warranty Under UCC § 2-313(1)(a)*, 47 A.L.R.4th 200 (1986).

[96] *See generally*, Bramble & Callahan, Construction Delay Claims, 3d Ed. (Aspen Law & Business 1999), Chapter 3.

completing a project will generally be liable for the owner's reasonably foreseeable damages resulting from the late completion unless he can show that the late completion was due to an event the risk of which he did not assume in his contract.

[A] Excusable Delay

Construction delays fall into two major categories: excusable and nonexcusable. An excusable delay is one that justifies an extension of the contract performance time and excuses the party who cannot meet his contractual deadline from his breach of contract. Common excusable delays for a contractor include unanticipated weather,[97] unknown or differing site conditions,[98] labor disputes,[99] and acts of God.[100] It is generally held that a contractor will not be entitled to a time extension for an excusable delay event unless the delay extends the overall project completion.[101]

Many standard construction contracts contain excusable delay clauses specifying the events that will excuse a contractor's delayed performance. These clauses typically set forth a list of delay events and the circumstances under which these events will excuse delayed performance. For example, AIA Document A201 (1997) provides:

> If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.[102]

The presence of an excusable delay clause or excusable delay language in the default termination clause of a contract may entitle a contractor to a time extension for certain delays. In addition, excusable delay provisions can protect contractors from

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[97] *See generally,* Construction Delay Claims § 3.06[A].

[98] *See generally,* Construction Delay Claims § 2.12.

[99] *See generally,* Construction Delay Claims § 3.06[C].

[100] *See generally,* Construction Delay Claims § 3.06[B].

[101] *See* discussion in § **20.07[C]**, *infra.*

[102] AIA Document A201, General Conditions of the Contract for Construction (1997), ¶ 8.3.1. Significantly, the AIA clause excuses delays attributable to actions or inactions of the owner, the architect, contractors in privity with the owner, change, casualties, and other such events beyond the contractor's control. Note also that the clause does not excuse delays resulting from labor shortages not caused by labor disputes, from failure of the contractor's subcontractors or suppliers to perform on time, from the necessity to correct defective work or replace defective materials, or from severe, though not unusual, weather conditions. Of course, other contracts can have other provisions, but the point is that a contractor can be responsible to an owner not only for delays caused by his actions (and those for whom he is responsible), but also for delays caused by other parties.

being held in default or breach of contract for what would otherwise be considered late performance or a failure to perform and from liquidated or actual damages.

Even if a delay is excusable, a contractor may nonetheless be responsible for resulting damages if he fails to give the owner written notice of the delay as required by most contracts. If a contractor fails to give a required notice, and if he cannot show that this formality has been otherwise satisfied or waived by the owner, he may lose his entitlement to a time extension for the delay and thus be liable for any resulting late completion.

[B] Owner-Caused Delays

Implied in every contract is an obligation of good faith and fair dealing in the performance of one's own contractual obligations and noninterference in the other party's performance. Obviously, an owner breaches this duty if he delays his contractor's performance of the work by interfering with the contractor.[103] Owner-caused delay events include, but are not limited to, the failure to give the contractor appropriate access to the worksite; failing to secure necessary property ownership or rights of way; failing to relocate utilities; imposing work area restrictions; using the site in a way that impedes the contractor's work; allowing other contractors to work on the project site in a way that interferes with the contractor's work; failing to demolish existing structures; failing to relocate tenants; the failure to timely obtain approvals from governing authorities; problems in obtaining project financing; defective plans and specifications; late processing and approval of shop drawings and other submittals; delays in conducting required inspections; delayed notice to proceed/contract award; inappropriate stop work orders; delays in procuring owner-furnished equipment and materials; and excessive change orders.[104] This non-exhaustive list of possible owner interferences with a contractor's timely performance highlights the importance of the applicable contract language and adequate investigation of the facts and circumstances underlying the delay event.[105]

[C] Critical and Non-Critical Delay

The happening of a delay event does not inexorably lead to a delay in project completion. For example, delays in approving a submittal for carpeting will not

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[103] *See, e.g.,* R.S. Noonan, Inc. v. Morrison-Knudsen Co., 522 F. Supp. 1186 (E.D. La. 1981) (owner held responsible for project delays attributable to oversights, miscalculations, and other omissions of owner and its construction manager relative to the administration of site, and interference with the contractor through providing inadequate drainage and allowing other contractors to use Noonan's work area as emergency relief for their on-site drainage problems).

[104] *See generally,* Construction Delay Claims § 3.02.

[105] Owner-caused delay is also important from the standpoint of establishing concurrent delay, i.e., overlapping delays caused by the contractor on one hand and the owner on the other. Concurrent delay can reduce, and in some jurisdictions eliminate, a contractor's exposure for contractor caused delays. *See* Construction Delay Claims, § 1.01[D]. *See also* Kotil & Ness, *Concurrent Delay: The Challenge to Unravel Competing Causes of Delay,* The Constr. Law., Vol. 17, No. 4 (Oct. 1997).

delay the completion of the project provided that there is sufficient time to order and install the carpet once the delayed approval is received. On the other hand, a change in the type, size, or shape of structural steel members after the foundation is prepared will likely delay the completion of the project given the lead time for designing, procuring, and erecting the new steel, and the fact that other work, such as the curtainwall, cannot proceed until the structural steel is in place. In other words, a delay event delays the project only if it results in a delay along the "critical path" to overall project completion.[106]

To recover extended project performance costs or a time extension, the effect of delays on the overall project completion must be demonstrated.[107] As one court has explained:

> The reason that the determination of the critical path is critical to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed. If work on the critical path was delayed, then the eventual completion date of the project was delayed. Delay involving work not on the critical path generally [does not affect the] completion date of the project.[108]

It is generally held that a contractor will not be entitled to a time extension for an excusable delay event unless the delay extends the overall project completion.[109]

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[106] Critical path delay claim analysis finds its genesis in the near universal use of Critical Path Method (CPM) scheduling techniques for project management in the construction industry. In Continental Consol. Corp., ENGBCA 2743, 67-2 B.C.A. (CCH) ¶ 6624; 68-1 B.C.A. (CCH) ¶ 7003, CPM scheduling was described as follows:

> The CPM scheduling technique is one which requires a breakdown of the entire work into individual tasks and an analysis of the number of days required to perform each task. The analysis is then programmed into a computer which produces a chart showing the tasks and a line which controls the completion of the overall work. The line through the nodes, the junction points for completion of essential tasks, is known as the critical path. In addition there are numerous side paths for subordinate tasks which normally can be performed without affecting the critical paths. However, these subordinate tasks if improperly scheduled or unduly delayed in performance, can on occasions become critical and thus change the critical path for the entire work.

The use of only a bar chart schedule may prove fatal to a contractor's attempt to demonstrate owner-caused delay to the project. Because bar charts do not demonstrate the interdependence of work activities or the effect of delays to the overall project completion, a court may deny the contractor recovery for alleged owner delay. Mega Constr. Co. v. United States, 29 Fed. Cl. 396 (1993).

[107] One court defined a critical activity as "one that, if allowed to grow in duration at all, will cause the overall time required to complete the project to increase." Weaver-Bailey v. United States, 19 Cl. Ct. 471 (1990).

[108] Fortec Constructors v. United States, 8 Cl. Ct. 490, 505 (1985).

[109] *E.g.*, Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987); CCM Corp. v. United States, 20 Cl. Ct. 649 (1990); Tectronics Inc. v. United States, 10 Cl. Ct. 296 (1986); Continental Heller Corp., GSBCA No. 7494, 89-1 B.C.A. (CCH) ¶ 21,537 (1989); Polote Corp., PSBCA No. 1297, 87-1 B.C.A. (CCH) ¶ 19,490 (1986); Allied Contractors, Inc., IBCA No. 265, 1962 B.C.A. (CCH) ¶ 3591 (1962); Dawson Constr. Co., VABCA No. 3306, 93-3 B.C.A. (CCH) ¶ 26.177

In some instances the contractor must show that it was completely delayed in its work.[110]

If the contractor cannot show that the owner delay affected critical activities, no additional performance time may be due. For example, in *B. Kelso II v. Kirk Brothers Mechanical Contractors,*[111] the contractor alleged delay to the project because government-furnished equipment was not delivered in a timely fashion. Although the equipment was scheduled to be delivered early in the project according to the schedule, the court found that it was not actually needed until the final stages of the project. In essence, the court found that the scheduled delivery date was not on the critical path and denied recovery to the contractor. A contractor may also be required to demonstrate that it was ready and able to begin work despite the owner's delays. For example, in *Smith v. United States,*[112] the contractor claimed that it could not begin work because the government had not resolved design issues. After examining the contractor's "state of readiness" at the time of the alleged design delays, however, the court concluded that even if the design issues had been clarified, problems unrelated to the design would have prevented the contractor from proceeding.

Contractors frequently fail to recover for alleged delay damages or requested time extensions because they fail to prove that the delayed activity was critical. Typically, that failure involves the inability to establish a causal link between an event and the overall project delay.[113] Identification of construction activities considered critical and the impact of delays on these critical activities, as well as on the overall project completion, requires a thorough analysis of the contractor's intended manner and sequence of performance, the nature of the affected construction activities, the conditions of the site, the extent of performance, and the nature of the alleged delays.[114]

Even if a contractor receives a time extension from the owner, the contractor should not assume that this will be adequate proof that the delays were critical. The owner, in defending a subsequent claim for extended performance costs associated with the time extension, may argue that despite the time extension, the delays claimed by the contractor were not critical. As with most delay claims, the claimant also must prove the duration of the actual delay and the cost impact of the delay.[115]

(1993). Although the alleged delay may relate to crucial activities, the contractor may be able to complete the activities in less time than originally scheduled and hence experience no critical completion date. In such a case, the contractor may not be entitled to either a time extension or delay damages. D.E.W., Inc., ASBCA No. 35173, 93-2 B.C.A. (CCH) ¶ 25,706 (1992).

[110] Dennis Constr. Co., ASBCA No. 36739, 88-1 B.C.A. (CCH) ¶ 20,486 (1990).

[111] 16 F.3d 1173 (Fed. Cir. 1994).

[112] 34 Fed. Cl. 313 (1995), *appeal dismissed,* 91 F.3d 165 (1996).

[113] Rivera Constr. Co., ASBCA No. 29391, 88-2 B.C.A. (CCH) ¶ 20,750 (1988); Roberts Constr. Co., ASBCA No. 34062, 87-3 B.C.A. (CCH) ¶ 20,117 (1987); Huntington Builders, ASBCA No. 33945, 87-2 B.C.A. (CCH) ¶ 19,898 (1987).

[114] *See* Construction Delay Claims, Chapter 11.

[115] Pathman Constr. Co. v. United States, 227 Ct. Cl. 670 (1981); Groves-Black JV, ENGBCA No. 4557, 85-3 B.C.A. (CCH) ¶ 18,398 (1985).

Finally, delay events that do not extend the overall contract performance time may give rise to an affirmative claim for extra costs. For example, on a contract for the construction of a multi-building wastewater treatment facility, a two-year suspension to the construction of a maintenance garage may not delay the overall completion of the operating plant but may increase the contractor's cost of building the maintenance garage because of productivity losses. Authority for recovering these types of costs may be found under the federal contract suspensions clause, which provides that the delay need only affect the contractor's cost of performance,[116] or under many change order clauses, in which the owner may be obligated to pay the cost associated with performing the changed work.[117] The contractor also may be entitled to its additional performance costs related to the loss of productivity despite the fact that it completed the overall project within the required contract performance period.[118]

§ 20.08 LIQUIDATED DAMAGES

As a general rule, an owner and a contractor may stipulate a liquidated sum in the contract for construction as the damages to be recovered for the late completion of the project. These "liquidated damages" may not be a penalty, and must be intended to compensate the owner for the delay.[119] Thus, the stipulated amount must represent a reasonable estimate of the anticipated or actual loss resulting from untimely completion at the time the contract was executed.[120] In virtually every jurisdiction, two factors are assessed in combination to determine whether an amount fixed as liquidated damages is reasonable and, therefore, enforceable. First, the stipulated amount must approximate actual loss or loss anticipated at the time

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[116] 48 C.F.R. § 52.212-12 (1990).

[117] It has been argued by contractors that the changes affect the cost of unchanged work without delaying the overall project completion. Many contract change order clauses do not specifically recognize these types of costs in the delineation of change-related costs. *See* AIA Document A201, ¶ 7.3.6.

[118] *See* Construction Delay Claims § 12.07[C].

[119] Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16 (1st Cir. 1991) ("Liquidated damages must compensate for loss rather than punish for breach. . . ."). Liquidated damages are viewed as beneficial both to the owner, who is relieved of the difficult, if not in some cases impossible, calculation of actual damages, and to the contractor, who is insulated against a limitless and potentially devastating claim for actual damages in the event of a delay.

[120] Restatement (Second) of Contracts § 356 (1981); Williston § 775A; Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16 (1st Cir. 1991) (applying Massachusetts law); Leasing Serv. Corp. v. Justice, 673 F.2d 70 (2d Cir. 1982) (applying New York law); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061 (5th Cir. 1990) (applying Texas law); Ray Sumlin Constr. Co. v. City of Mobile, 519 So. 2d 511 (Ala. 1988); Rohlin Constr. Co. v. City of Hinton, 476 N.W.2d 78 (Iowa 1991); Dairy Farm Leasing Co. v. Hartley, 395 A.2d 1135 (Me. 1978). *Accord*, PYCA Indus., Inc. v. Harrison County Waste Water Management Dist., 177 F.3d 351 (5th Cir. 1999) (under Mississippi law, liquidated damages clauses are unenforceable penalties only when the actual damage resulting from a breach may be readily ascertained, or the contract discloses no intention to fix the sum as liquidated damages or leaves the intention in this regard in doubt).

the contract was executed.[121] If the amount fixed as liquidated damages is unrelated to anticipated actual damages or imposed solely as an incentive or inducement for timely completion of a project, the liquidated damages provision likely will be deemed an unenforceable penalty.[122] On the other hand, if the provision is the result of arm-length negotiations or a pre-contract estimate of damages that would be sustained due to delay, it will be enforced.[123] Indeed, when courts find a bona fide attempt to estimate potential damages, they generally enforce the liquidated damages provision even if actual damages are absent or less than the stipulated amount.[124]

The second factor is whether, at the time of contracting, actual damages are difficult or impossible to establish with certainty. "The greater the difficulty either

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[121] Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16 (1st Cir. 1991) (citing cases); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061 (5th Cir. 1990).

[122] Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16 (1st Cir. 1991) (summary judgment could not be granted on enforceability of liquidated damages provision where genuine issues of material fact existed as to whether the City intended the provision to provide reasonable compensation for delayed performance or to impose a penalty in the event of breach); San Ore-Gardner v. Missouri Pac. R.R., 65 F.2d 562 (8th Cir. 1981) (applying Arkansas law; liquidated damages provision found to be an unenforceable penalty where clause was inserted without negotiation and without any attempt to reasonably forecast damages that might result from delay); Kingston Constructors, Inc. v. Washington Metro. Area Transit Auth., 930 F. Supp. 651 (D.D.C. 1996) (liquidated damages struck down because underlying calculation included environmental penalties that owner had been advised were unlikely to be assessed); Rohlin Constr. Co. v. City of Hinton, 476 N.W.2d 78 (Iowa 1991) (liquidated damage held an unenforceable penalty where no valid justification for the amount was presented and county engineer testified that the liquidated damage amount was set at a level "to make the contractor aware that we need that project completed"); Appeal of D.E.W., Inc., ASBCA No. 38392 (1992) (liquidated damages not enforced where based on loss of use of a different facility that was not comparable to the facility under construction); Appeal of Fred A. Arnold, ASBCA No. 26867 (1986) (liquidated damages provision held an unenforceable penalty because Navy had not attempted to estimate its actual off-base living expenses in the event of a late completion). *See also* Rye v. Public Serv. Mut. Ins. Co., 315 N.E.2d 458 (N.Y. 1974); Muller v. Lights, 538 S.W.2d 487 (Tex. App. 1976).

[123] Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061 (5th Cir. 1990) (applying Texas law, liquidated damages of costs plus a 10 percent profit upheld where a "ten percent profit was reasonable and customary in regard to contract work."); Fortune Bridge Co. v. Department of Transp., 250 S.E.2d 401 (Ga. 1978) (liquidated damages upheld where contract provided that "[t]hese fixed liquidated damages are not established as a penalty but are calculated and agreed upon in advance by the Department and the contractor due to the uncertainty and impossibility of making a determination as to the actual and consequential damages incurred by the Department, the State and the general public as a result of the failure on the part of the Contractor to complete the work on time."); Fidelity & Deposit Co. v. Stool, 607 S.W.2d 17 (Tex. Civ. App. 1980) (liquidated damages upheld where the product of negotiation and a reasonable forecast of just compensation for the harm caused by delay); Reliance Ins. Co. v. Utah Dept. of Transp., 858 P.2d 1363 (Utah 1993) (liquidated damages upheld where DOT made a reasonable forecast of additional costs for salaried personnel and vehicle expenses based on historical field overhead expenses on projects of a similar magnitude).

[124] PYCA Indus., Inc. v. Harrison County Waste Water Management Dist. 177 F.3d 351 (5th Cir. 1999) (applying Mississippi law); Vrgora v. Los Angeles Unified Sch. Dist., 200 Cal. Rptr. 130 (Ct. App. 1984); Hall Constr. Co. v. Beynon, 507 So. 2d 1225 (Fla. Dist. Ct. App. 1987); X.L.O. Concrete Corp. v. Brady, 482 N.Y.S.2d 476 (App. Div. 1984); Pick Fisheries, Inc. v. Burns Elec. Sec. Serv., 342 N.E.2d 105 (Ill. App. Ct. 1976).

of proving that loss has occurred or of establishing its amount with the requisite certainty . . . the easier it is to show that the amount fixed is reasonable."[125] In the area of public contracting, for example, courts generally find that damages for "public inconvenience" arising from untimely completion are difficult, if not impossible, to quantify and thus liquidated damages are valid under this second factor.[126]

In some jurisdictions, courts will apply a third factor in evaluating the enforceability of liquidated damages. These courts take a so-called "second look" at the liquidated damages being assessed and evaluate, as of the time of the breach, "if the sum stipulated as liquidated damages is 'unreasonably and grossly disproportionate to the real damages from a breach, or is unconscionably excessive.' "[127] If the amount fixed as liquidated damages is unreasonably large in light of the anticipated or actual damages, the liquidated damages provision may be deemed an unenforceable penalty.[128] Jurisdictions that embrace the "second look" approach assert that allowing recovery of liquidated damages when the claimant has suffered little or no actual damage results in a windfall recovery that can only be deemed a penalty. In other words, there are no damages to liquidate.[129] Courts that have rejected the "second look" approach reason that the "single look" approach "most accurately matches the expectations of the parties, who negotiated a liquidated damage amount that was fair to each side based on their unique concerns and circumstances surrounding the agreement, and their individual estimate of damages

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[125] Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16 (1st Cir. 1991) (citing Restatement (Second) of Contracts § 356, comment b) (City's damages — the compromising of its educational program and reduced morale among teachers, students, and administrators suffered due to the late delivery of temporary classrooms — found difficult to quantify in monetary terms); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061 (5th Cir. 1990) (liquidated damages of costs plus a 10 percent profit upheld where "proof of actual lost profits would be difficult and would rely on a number of contingencies, none of which can be demonstrated objectively."); PYCA Indus., Inc. v. Harrison County Waste Water Management Dist., 177 F.3d 351 (5th Cir. 1999) (liquidated damages upheld; "given the nature and circumstances prevailing at the time of the contractual agreement, the amount of damages was not clearly foreseeable, and thus the parties' use of the liquidated damages clause was appropriate.").

[126] Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16 (1st Cir. 1991); PYCA Indus., Inc. v. Harrison County Waste Water Management Dist., 177 F.3d 351 (5th Cir. 1999); Six Cos. of Cal. v. Joint Highway Dist. No. 13 of Cal., 110 F.2d 620 (9th Cir.), *rev'd on other grounds,* 61 S. Ct. 186 (1940), *reh'g denied,* 61 S. Ct. 438 (1941); Fortune Bridge Co. v. Department of Transp., 250 S.E.2d 401 (Ga. 1978); Falter Constr. Corp. v. City of Binghamton, 684 N.Y.S.2d 86 (App. Div. 1999); Gustafson & Co. v. State of S.D., 156 N.W.2d 185 (S.D. 1968).

[127] Kelly v. Marx, 694 N.E.2d 869 (Mass. App. 1998) (quoting Shapiro v. Grinspoon, 541 N.E.2d 359 (Mass. App. 1989), *rev'd,* Kelly v. Marx, 705 N.E.2d 1114 (Mass. 1999). The appendix to the Massachusetts appellate court decision, categorizing the states as "single look" or "second look" jurisdictions is reprinted at the end of this chapter.

[128] Restatement (Second) of Contracts § 356(1) (1981); Williston § 776; Rohlin Constr. Co. v. City of Hinton, 476 N.W.2d 78 (Iowa 1991).

[129] Kelly v. Marx, 694 N.E.2d 869 (Mass. App. 1998), *rev'd,* 705 N.E.2d 1114 (Mass. 1999), citing Restatement (Second) of Contracts § 356 cmt. b (1981).

in event of a breach."[130] In their view, the "second look" approach undermines the "peace of mind and certainty of result" the parties sought by agreeing to liquidated damages,[131] and increases the potential for litigation by inviting the aggrieved party to "fully litigate (at great expense and delay) that which they sought not to litigate."[132]

Whether an amount fixed by a contract as damages is a valid liquidated damages clause or an invalid penalty is a question of law.[133] Reasonableness of the amount fixed as damages is determined as of the time of the contract, not at the time of breach or completion.[134] The owner bears the burden of proving that the liquidated damages clause is valid, and the extent of the delay.[135] If this showing is made, the burden then falls on the contractor to demonstrate a basis for nonenforcement.

As a general rule, a party that recovers liquidated damages for delay may not seek to recover actual damages for that same delay.[136]

With regard to particular liquidated damages clauses, it has been held that a contract's liquidated damages clause is not to be considered a penalty simply because the amount of damages assessed by the contract escalates with the period of delay.[137]

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[130] Kelly v. Marx, 705 N.E.2d 1114 (Mass. 1999). The *Kelly* case involved a real estate purchase contract. The court's observations regarding freely bargained for liquidated damages provisions ring somewhat hollow in the public contracting arena where liquidated damages provisions are included as a matter of course in agreements that are rarely, if ever, the product of arm-length negotiations.

[131] *Id.*

[132] *Id.*, quoting Watson v. Ingram, 881 P.2d 247 (Wash. 1994) (quoting, in turn, Note, *Keep the Change!: A Critique of the No Actual Injury Defense to Liquidated Damages*, 65 Wash. L. Rev. 977, 991 (1990)).

[133] Williston § 778; Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061 (5th Cir. 1990) (applying Texas law); Miami Valley Contractors, Inc. v. Town of Sunman, Ind., 960 F. Supp. 1366 (S.D. Ind. 1997); Public Health Trust of Dade County v. Romart Constr., Inc., 577 So. 2d 636 (Fla. Ct. App. 1991); Hall Constr. Co. v. Beynon, 507 So. 2d 1225 (Fla. Dist. Ct. App. 1987); Rohlin Constr. Co. v. City of Hinton, 476 N.W.2d 78 (Iowa 1991); X.L.O. Concrete Corp. v. Brady, 482 N.Y.S.2d 476 (App. Div. 1984); Dave Gustafson & Co. v. State, 156 N.W.2d 185 (S.D. 1968).

[134] Williston § 777; E.C. Ernst, Ins. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977); United Order of Am. Bricklayers & Stone Masons Union No. 21 v. Thorlief Larsen & Son, Ins., 519 F.2d 331 (7th Cir. 1975); Osceola County v. Bumble Bee Constr. Ins., 479 So. 2d 310 (Fla. Dist. Ct. App. 1985).

[135] *E.g.*, Buckley & Co. v. State, 356 A.2d 56 (N.J. Super. 1975); Utica Mut. Co. v. DiDonato, 453 A.2d 559 (App. Div. 1982); Vines v. Orchard Hills, Inc., 435 A.2d 1022 (Conn. 1980); Dairy Farm Leasing Co., Inc. v. Hartley, 395 A.2d 1135 (Me. 1978); Wilson v. Clarke, 470 F.2d 1218 (1st Cir. 1972); General Ins. Co. of Am. v. Commerce Hyatt House, 5 Cal. App. 3d 460, 85 Cal. Rptr. 317 (1970).

[136] American Fire & Safety, Inc. v. City of North Las Vegas, 849 P.2d 352 (Nev. 1993). *But see* International Fidelity Ins. Co. v. County of Chautauqua, 667 N.Y.S.2d 172 (App. Div. 1997) (permitting actual and liquidated damages against surety under bond providing that surety would be responsible for damages). *See also* 41 N.J. Prac. Constr. Law § 6.14 (noting that state government general conditions provide for liquidated damages that are in addition to other consequential damages that the state may incur by reason of delay).

[137] Grenier v. Compratt Constr. Co., 189 Conn. 144, 454 A.2d 1289 (1983).

Courts generally hold that liquidated damages cease to accrue upon achieving substantial completion, although this rule may be modified by contract.[138]

Applying these principles, a contractor faced with an assessment of liquidated damages may defend against the claim on one or more of the following bases:

1. **The Liquidated Damages Are Unreasonable in Light of Actual Damages.** *See* discussion of "single look" and "second look" jurisdictions, *supra.*
2. **The Liquidated Damages Are Unreasonable Due to the Failure to Reasonably Estimate Damages Pre-contract.** *See* cases cited in footnote 122, *supra.*
3. **Liquidated Damages Are Barred by Owner-Caused Delays.** Some courts have held that owner claims for liquidated damages are barred completely where the owner plays a role in causing the delay.[139] The majority view, however, would appear to be that owner and contractor fault should be apportioned to reduce, rather than bar, the owner's recovery of liquidated

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[138] *Compare* Appeal of Int'l Fidelity Ins. Co., ASBCA No. 44256 (1998) (liquidated damages ceased once government took beneficial occupancy); Appeal of Riveria Constr. Co., ASBCA No. 30207 (1988) (substantial completion subject to punch list stopped assessment of liquidated damages); Appeal of Wickham Contracting Co., IBCA No. 1301-8-79 (1986) (contractor found to have substantially completed project, stopping assessment of liquidated damages, where building was occupied), *with* Appeal of Formal Management Sys., Inc., EBCA No. PCC-145 (1998) (post-substantial completion liquidated damages awarded where specifically provided for in the contract); Ledbetter Bros., Inc. v. North Carolina Dept. of Transp., 314 S.E.2d 761 (N.C. Ct. App. 1984) (liquidated damages assessed notwithstanding fact that highway was open where contract stated that liquidated damages could be assessed until final inspection); O&M Constr., Inc. v. State, 576 So. 2d 1030 (La. Ct. App. 1991) (liquidated damages could be assessed until issuance of certificate of occupancy for the building).

[139] Buckley & Co. v. State, 356 A.2d 56 (N.J. Super. 1975); Utica Mut. Ins. Co. v. DiDonato, 453 A.2d 559 (N.J. Super. 1982) (the correct rule is that where such delays are occasioned by the mutual fault of the parties the court will not attempt to apportion them but will refuse to enforce the provision for liquidated damages); Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N.Y. 479, 93 N.E. 81 (1910) ("While such an agreement [liquidated damages] has not the harshness of a penalty, it is, nevertheless, in its nature, such that its enforcement, where the party claiming the right to enforce has, in part, been the cause of delay, would be unjust."). *But see* X.L.O. Concrete Corp. v. Brady, 482 N.Y.S.2d 476 (App. Div. 1984) (distinguishing *Mosler* on the basis that it involved an owner seeking liquidated damages in excess of actual damages and allowing owner recovery of liquidated damages that were less than actual damages notwithstanding owner fault); Peabody N.E., Inc. v. Town of Marshfield, 689 N.E.2d 774 (Mass. 1998) (refusing apportionment, denying liquidated damages, and permitting contractor to recover only quantum meruit damages, not the contract amount). *See also* Acme Process Equip. Co. v. United States, 347 F.2d 509 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1965); United States v. Kanter, 137 F.2d 828 (8th Cir. 1943); Jefferson Hotel Co. v. Brumbaugh, 168 F. 867 (4th Cir. 1909); Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc., 371 F. Supp. 1154 (D. Md. 1974); White Hall v. Southern Mechanical Contracting, Inc., 599 S.W.2d 430 (Ark. Ct. App. 1980); State v. Jack B. Parson Constr., 456 P.2d 762 (Idaho 1959); Gillioz v. State Highway Comm'n, 153 S.W.2d 18 (Mo. 1941); Haggerty v. Selsco, 534 P.2d 874 (Mont. 1974); L.A. Reynolds Co. v. State Highway Comm'n, 155 S.E.2d 473 (N.C. 1967); Lee Turzillo Contracting Co. v. Frank Messer & Sons, Inc., 261 N.E.2d 675, 679 (Ohio Ct. App. 1969); Psaty & Fuhrman, Inc. v. Housing Auth., 68 A.2d 32 (R.I. 1949).

damages.[140] When delays are concurrent, i.e., caused by both the owner and the contractor, courts have held that neither party may recover for delays caused by the other.[141]

4. **Liquidated Damages May Not Be Recovered Because the Delay Was Excusable.** As a general rule, liquidated damages may not be assessed if the late completion resulted from an excusable delay.[142] Contractors must be careful, however, to comply with the notice provisions of the contract of construction or else risk the imposition of liquidated damages notwithstanding the excusable delay.[143]

§ 20.09 ARBITRATION

It may seem something of a misnomer to characterize arbitration as a defense to an owner's lawsuit for damages, but contract clauses providing for the arbitration of disputes are now the rule rather than the exception in construction industry contracts. For example, the widely used American Institute of Architects (AIA) General Conditions of the Contract for Construction, AIA Document A201, provides that "[a]ny Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration" in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (AAA) currently in effect.[144] International construction contracts are frequently governed by arbitration rules promulgated by the International Chamber of Commerce (ICC). Accordingly, when confronted with a suit in a court of law, it is advisable for the contractor to review the contract for construction to determine whether it contains an arbitration

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[140] E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977) (applying Alabama law); United States ex rel. Thorleif Larsen & Sons, Inc. v. B.R. Abbott Constr. Co., 466 F.2d 712 (7th Cir. 1972) (applying Illinois law); Dallas-Fort Worth Reg'l Airport Bd. v. Combustion Equip. Ass'n, Inc., 623 F.2d 1032 (5th Cir. 1980) (applying Texas law); Aetna Cas. & Sur. Co. v. Butte-Meade Sanitary Water Dist., 500 F. Supp. 193 (D.S.D.1980); Grenier v. Compratt Constr. Co., 454 A.2d 1289 (Conn. 1983).

[141] J.A. Jones Constr. Co. v. Greenbrier Shipping Ctr., 332 F. Supp. 1336 (N.D. Ga. 1971), *aff'd*, 461 F.2d 1269 (5th Cir. 1972); G.G. Norton Co., ENGBCA No. 5182, 88-1 B.C.A. (CCH) ¶ 20,462 (1988).

[142] Davis v. Tillman, 370 So. 2d 1326 (La. Ct. App. 1979) (where heavy rains excused contractor's failure to timely complete project, he was likewise excused from liquidated damages); KoKo Contracting, Inc. v. State, 626 N.Y.S.2d 88 (App. Div. 1995) (winter shutdown that resulted in a time extension due to excusable delay prevented assessment of liquidated damages).

[143] For example, AIA Document A201 (1997), ¶ 8.3.1, provides for time extensions for a variety of reasons upon the giving of notice. The failure to give required notice can be fatal to a request for a time extension. *E.g.*, Cove Creek Dev. Corp. v. APA-Alabama, Inc., 588 So. 2d 458 (Ala. 1991). The failure to give notice may be excused, however, if the owner has actual knowledge of the delay. Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987); New Pueblo Constructors v. State of Az., 696 P.2d 185 (Ariz. 1985); Stone v. City of Arcola, 536 N.E.2d 1329 (Ill. App. 1989).

[144] *See* AIA Document A201 (1997), ¶¶ 4.6.1, 4.6.2. The AAA Construction Industry Arbitration Rules are available on the Association's website (*www.adr.org*).

clause,[145] and, if so, evaluate whether it is to his/her advantage to seek enforcement of this clause as a "defense" to the suit.[146]

As arbitration provisions in construction contracts have become increasingly commonplace, so too have state arbitration laws become the norm. All fifty states, the District of Columbia, and Puerto Rico have enacted arbitration laws.[147] Over half of these state laws are based on the Uniform Arbitration Act adopted by the National Conference of Commissioners on Uniform State Laws in 1955.[148]

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[145] A contract or a subcontract may not contain an express arbitration clause but nonetheless be subject to arbitration due to incorporation by reference. An extreme example of this can be found in the case Russellville Steel Co., Inc. v. A&R Excavating, 624 So. 2d 11 (La. Ct. App. 1993). In Russellville Steel the owner/contractor agreement provided for the arbitration of disputes. That agreement was attached to, and incorporated by reference in a subcontract between the contractor and Russellville Steel. Russellville, in turn, subcontracted certain of its work to A&R Excavating through a purchase order to which Russellville attached a copy of its subcontract. When a dispute arose between Russellville and A&R, the latter attempted to refer the dispute to arbitration, and Russellville objected. The court held that the incorporation by reference provision of the subcontract, coupled with attachment of that subcontract to the purchase order, was sufficient to create a valid arbitration agreement between Russellville and A&R.

[146] For example, it may not be to the contractor's advantage to pursue arbitration with the owner if he has third-party claims against the designer with whom he does not have an arbitration agreement.

[147] The states that have enacted arbitration laws are: Alabama (Ala. Code §§ 6-6-1 *et seq.*); Alaska (Alaska Stat. §§ 09.43.010 *et seq.*); Arizona (Ariz. Rev. Stat. Ann. §§ 12-1501 *et seq.*); Arkansas (Ark. Stat. Ann. §§ 16-108-101 *et seq.*); California (Cal. Civ. Proc. Code §§ 1280 *et seq.*); Colorado (Col. Rev. Stat. §§ 13-22-201 *et seq.*); Connecticut (Conn. Gen. Stat. Ann. §§ 52-408 *et seq.*); Delaware (Del. Code Ann. tit. 10, §§ 5701 *et seq.*); District of Columbia (D.C. Code Ann. §§ 16-4301 *et seq.*); Florida (Fla. Stat. Ann. §§ 682.01 *et seq.*); Georgia (Ga. Code §§ 9-9-1 *et seq.*); Hawaii (Haw. Rev. Stat. §§ 658-1 *et seq.*); Idaho (Idaho Code §§ 7-901 *et seq.*); Illinois (710 Ill. Comp. Stat. 5/1 *et seq.*); Indiana (Ind. Code Ann. §§ 34-4-2-1 *et seq.*); Iowa (Iowa Code §§ 679A.1 et seq.); Kansas (Kan. Stat. Ann. §§ 5-401 *et seq.*); Kentucky (Ky. Rev. Stat. Ann. §§ 417.045 *et seq.*); Louisiana (La. Rev. Stat. Ann. §§ 9:4201 *et seq.*); Maine (Me. Rev. Stat. Ann. tit. 14, §§ 5927 *et seq.*); Maryland (Md. Cts. & Jud. Proc. Code Ann. §§ 3-201 *et seq.*); Massachusetts (Mass. Ann. Laws ch. 251, §§ 1 *et seq.*); Michigan (Mich. Comp. Laws §§ 600.5001 *et seq.*); Minnesota (Minn. Stat. Ann. §§ 572.08 *et seq.*); Mississippi (Miss. Code Ann. §§ 11-15-1 *et seq.*); Missouri (Mo. Ann. Stat. §§ 435.350 *et seq.*); Montana (Mont. Code Ann. §§ 27-5-111 *et seq.*); Nebraska (Neb. Rev. Stat. §§ 25-2601 *et seq.*); Nevada (Nev. Rev. Stat. §§ 38.015 *et seq.*); New Hampshire (N.H. Rev. Stat. Ann. §§ 542:1 *et seq.*); New Jersey (N.J. Stat. Ann. §§ 2A:24-1 *et seq.*); New Mexico (N.M. Stat. Ann. §§ 44-7-1 *et seq.*); New York (N.Y. Civ. Prac. Law §§ 7501 *et seq.*); North Carolina (N.C. Gen. Stat. §§ 1-567.1 *et seq.*); North Dakota (N.D. Cent. Code §§ 32-29.2-01 *et seq.*); Ohio (Ohio Rev. Code Ann. §§ 2711.01 *et seq.*); Oklahoma (Okla. Stat. Ann. tit. 15, §§ 801 *et seq.*); Oregon (Or. Rev. Stat. §§ 36.300 *et seq.*); Pennsylvania (Pa. Stat. Ann. tit. 42, §§ 7301 *et seq.*); Puerto Rico (P.R. Laws Ann., tit. 32, §§ 3201 *et seq.*); Rhode Island (R.I. Gen. Laws §§ 10-3-1 *et seq.*); South Carolina (S.C. Code Ann. §§ 15-48-10 *et seq.*); South Dakota (S.D. Codified Laws Ann. §§ 21-25A-1 *et seq.*); Tennessee (Tenn. Code Ann. §§ 29-5-301 *et seq.*); Texas (Tex. Rev. Civ. Stat. Ann. art. 224 *et seq.*); Utah (Utah Code Ann. §§ 78-31a-1 *et seq.*); Vermont (Vt. Stat. Ann. tit. 12, §§ 5651 *et seq.*); Virginia (Va. Code §§ 8.01-577 *et seq.*); Washington (Wash. Rev. Code Ann. §§ 7.04.010 *et seq.*); West Virginia (W. Va. Code §§ 55-10-1 *et seq.*); Wisconsin (Wis. Stat. Ann. §§ 788.01 *et seq.*); Wyoming (Wyo. Stat. §§ 1-36-101 *et seq.*).

[148] The following jurisdictions have adopted the Uniform Arbitration Act in whole or in part: Alaska; Arizona; Arkansas; Colorado; Delaware; District of Columbia; Idaho; Illinois; Indiana; Iowa;

Under the Uniform Act and most state arbitration laws, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[149] In this regard, it is the public policy of most states to favor arbitration,[150] and where there is doubt about the arbitration provisions of a contract, the general rule is that the contract should be resolved in favor of, and not against, arbitration.[151] As a general rule, only if grounds exist to revoke the underlying contract can an arbitration provision be avoided.[152]

With few exceptions, the question of whether a dispute is required by the contract to be arbitrated is itself an arbitrable issue. For example, in *Willis-Knighton Medical Center v. Southern Builders, Inc.*,[153] a contractor made additional repairs to plaintiff's office building after accepting final payment for the building. When the owner failed to pay the contractor for the additional work, the contractor sought arbitration under the provisions of the contract. The owner sought to enjoin the arbitration, arguing that the contract of construction had been terminated by the contractor's acceptance of final payment. The court of appeal rejected this argument as follows:

> Defendant's claim for arbitration seeks to recover money expended in correcting work which was not in compliance with contract specifications. Plaintiff seeks to enjoin the proceedings by contending the contract does not require it to arbitrate. This is certainly a dispute arising out of the contract. Having concluded that the parties agreed to arbitrate such disputes, and that plaintiff is refusing to do so, we hold the district court was correct in its judgment denying the preliminary injunction.[154]

The appellate court refused to consider plaintiff's contention that defendant waived its right to arbitration because "such issues of procedural arbitrability should not be decided by the court without first having been submitted by the arbitrator."[155]

Kansas; Kentucky; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Montana; Nebraska; Nevada; New Mexico; North Carolina; North Dakota; Oklahoma; Pennsylvania; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; and Wyoming.

[149] Uniform Arbitration Act § 1.

[150] *E.g.*, May Constr. Co., Inc. v. Thompson, 20 S.W.3d 345 (Ark. 2000); Huizar v. Allstate Ins. Co., 952 P.2d 342 (Colo. 1998); Hill v. Cloud, 648 So. 2d 1383 (La. Ct. App. 1995); Bureau of Special Investigations v. Coalition of Pub. Safety, 722 N.E.2d 441 (Mass. 2000); Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884 (N.Y. 1997).

[151] Cajun Elec. Power Co-op, Inc. v. Louisiana Power & Light Co., 324 So. 2d 475 (La. Ct. App. 1975).

[152] The Uniform Arbitration Act § 1, provides that arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Many of the states adopting arbitration laws have adopted this or similar language. *See, e.g.*, La. Rev. Stat. § 9:4201 ("save upon such grounds"); N.J. Stat. Ann. § 2A:24-1 ("except upon such grounds").

[153] 392 So. 2d 505 (La. Ct. App. 1980).

[154] *Id.* at 507-08.

[155] *Id.* at 508.

The question of the arbitrability of a particular dispute will turn on the applicable arbitration statute, and the language of the arbitration provision in the contract. Generally speaking, disputes about the existence or validity of an agreement to arbitrate are determined by the courts; in other words, if the contract is invalid or extinguished, so too is the arbitration provision.[156] If the arbitration provision is narrowly drafted, for example, limiting the arbitrators to resolution of disputes concerning the work performed under the contract, then matters relating to procedural arbitrability of the claim will be a matter for the courts.[157] On the other hand, if the contract provides that all claims arising out of the contract are to be resolved by arbitration, any dispute that rationally relates to the contract, including issues of interpretation and procedure, will be deemed subject to determination by the arbitrator. Among the issues that courts have held are within the purview of the arbitrators are: claim preclusion;[158] whether parties have satisfied the procedural prerequisites to arbitration;[159] the conduct of the arbitration proceeding;[160] the interpretation of the contract, including the arbitration agreement;[161] whether the arbitration is barred by procedural defenses such as laches[162] or *res judicata*;[163] the determination of who are proper parties to the arbitration;[164] the payment of

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[156] *See* Cohen v. Audubon Constr. Corp., 404 So. 2d 528 (La. 1981) (the question of prescription on a contract must first be resolved by court before arbitration can take place because if the contract has prescribed, the arbitration agreement no longer exists).

[157] *But see* SBC Interactive, Inc. v. Corporate Media Partners, 714 A.2d 758 (Del. Supr. 1998) (procedural defenses to arbitration to be decided by arbitrator, rather than court, where they were enmeshed in merits of arbitrable claims).

[158] Port Auth. of N.Y. & N.J. v. Office of Contract Arbitrator, 680 N.Y.S.2d 4 (App. Div. 1998).

[159] City of Cottonwood v. James L. Fann Contracting, Inc., 877 P.2d 284 (Ariz. App. 1994); Pettinaro Constr. Co., Inc. v. Harry C. Partridge, Jr. & Sons, Inc., 408 A.2d 957 (Del. Ch. 1979); Executive Life Ins. Co. v. John Hammer & Assocs., Inc., 569 So. 2d 855 (Fla. Dist. Ct. App. 1990); Amalgamated Transit Union, Local 900 v. Suburban Bus Div. of Reg'l Transp. Auth., 634 N.E.2d 469 (Ill. App. 1994); City of Morris v. Duininck Bros., Inc., 531 N.W.2d 208 (Minn. App. 1995); Commerce Bank, N.A. v. DiMaria Constr., Inc., 692 A.2d 54 (N.J. Super. App. 1997); Exber, Inc. v. Sletten Constr. Co., 558 P.2d 517 (Nev. 1976); Board of Library Trustees v. Ozanne Constr. Co., Inc., 651 N.E.2d 1356 (Ohio App. 1995); In re Weekley Homes, 985 S.W.2d 111 (Tex. App. 1998).

[160] Fleming Cos., Inc. v. Tru Discount Foods, 977 P.2d 367 (Okla. App. 1998) (party not entitled to court relief from arbitrators' refusal to grant continuance); Titan/Value Equities Group, Inc. v. Superior Court of San Diego County, 35 Cal. Rptr. 2d 4 (Ct. App. 1994) (arbitrator, not court, is to decide questions of procedure in discovery); Jewelcor Inc. v. Pre-Fab Panelwall, Inc., 579 A.2d 940 (Pa. Super. 1990) (admissibility of evidence within exclusive jurisdiction of arbitration panel).

[161] Town of Stratford v. International Ass'n of Firefighters, AFL-CIO, Local 998, 728 A.2d 1063 (Conn. 1999) (interpretation of arbitration provision is itself a proper subject of arbitration); Hokama v. University of Hawaii, 990 P.2d 1150 (Haw. 1999) (interpretation of the agreement usually reserved to arbitrator).

[162] City of Morris v. Duininck Bros., Inc., 531 N.W.2d 208 (Minn. App. 1995) (courts defer to arbitrator on issue of laches because procedural issues are often intertwined with substantive dispute intended for arbitration).

[163] Port Auth. of N.Y. & N.J. v. Port Auth. Police Sergeants Benevolent Ass'n, 639 N.Y.S.2d 808 (App. Div. 1996) (*res judicata* effect of earlier administrative proceeding on arbitration was matter for arbitrator).

[164] Montesino v. Advent Techs., Inc., 676 So. 2d 32 (Fla. Dist. Ct. App. 1996).

arbitration fees;[165] the "procedural unconscionability" of the arbitration agreement;[166] whether the arbitration was initiated timely under the applicable agreement;[167] waiver of arbitration;[168] and venue.[169] Other courts, however, have held that issues such as compliance with conditions precedent to arbitration, whether claims are time-barred by applicable statutes of limitation, and whether arbitration rights have been waived are matters for resolution by the courts, not arbitrators.[170]

If a party to a contract files suit on any matter that is referable to arbitration under that contract, then:

> (a) On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the Court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to

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[165] Abels v. Safeway Ins. Co., 669 N.E.2d 633 (Ill. App. 1996); Munsey v. Walla Walla College, 906 P.2d 988 (Wash. App. 1995).

[166] *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571 (Tex. 1999) (question of whether the terms and conditions of an arbitration agreement are unconscionable must be submitted to arbitrator; claims of unconscionability arising out of the making of the agreement are subject to court review).

[167] City of Cottonwood v. James L. Fann Contracting, Inc., 877 P.2d 284 (Ariz. App. 1994); City of Lenexa v. C.L. Fairley Constr. Co., Inc., 805 P.2d 507 (Kan. App. 1991); SBC Interactive, Inc. v. Corporate Media Partners, 714 A.2d 758 (Del. Supr. 1998); Amtower v. William C. Roney & Co., 590 N.W.2d 580 (Mich. App. 1998); Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund, 579 N.W.2d 518 (Neb. 1998); Thomas v. Farmers Ins. Exch., 857 P.2d 532 (Colo. App. 1993); Pembroke Indus. Park Partnership v. Jazayri Constr., Inc., 682 So. 2d 226 (Fla. Dist. Ct. App. 1996); ADC Constr. Co. v. McDaniel Grading, Inc., 338 S.E.2d 733 (Ga. App. 1985); Des Moines Asphalt & Paving Co. v. Colcon Indus. Corp., 500 N.W.2d 70 (Iowa 1993); Beyt, Rish, Robbins Group, Architects v. Appalachian Reg'l Healthcare, Inc., 854 S.W.2d 784 (Ky. App. 1993); Carpenter v. Pomerantz, 634 N.E.2d 587 (Mass. App. 1994); Iron County v. Sundberg, Carlson & Assocs., Inc., 564 N.W.2d 78 (Mich. App. 1997); Commerce Bank, N.A. v. DiMaria Constr., Inc., 692 A.2d 54 (N.J. Super. App. 1997); Matter of Andy Floors, Inc. (Tyler Constr. Corp.), 609 N.Y.S.2d 692 (App. Div. 1994); Exber, Inc. v. Sletten Constr. Co., 558 P.2d 517 (Nev. 1976); Muhlenberg Township Sch. Dist. v. Pennsylvania Fortunato Constr. Co., 333 A.2d 184 (Pa. 1975).

[168] Dean Witter Reynolds, Inc. v. McDonald, 758 So. 2d 539 (Ala. 1999); SBC Interactive, Inc. v. Corporate Media Partners, 714 A.2d 758 (Del. Supr. 1998); School Bd., St. Lucie County v. Hilson, 737 So. 2d 612 (Fla. Dist. Ct. App. 1999); Charles Ragusa & Son, Inc. v. St. John the Baptist Parish Sch. Bd., 629 So. 2d 1302 (La. Ct. App. 1993); City of Morris v. Duininck Bros., Inc., 531 N.W.2d 208 (Minn. App. 1995); *In re* Weekley Homes, 985 S.W.2d 111 (Tex. App. 1998).

[169] Stevens v. Coudert Bros., 662 N.Y.S.2d 42 (App. Div. 1997); Santiago v. State Farm Ins. Co., 683 A.2d 1216 (Pa. Super. App. 1996).

[170] **Fulfillment of conditions precedent to arbitration properly determined by courts:** Matter of Calvin Klein, Inc. (G.P. Winter Assocs., Inc.), 611 N.Y.S.2d 549 (App. Div. 1994); McKinney v. Allstate Ins. Co., 216 N.E.2d 887 (Ohio App. 1966); Moresi v. Nationwide, 771 P.2d 301 (Or. App. 1989); D. Wilson Constr. Co. v. Cris Equip. Co., Inc., 988 S.W.2d 388 (Tex. App. 1999).

Preclusion of claim by statute of limitations to be determined by court: Capitol Place I Assocs. L.P. v. George Hyman Constr. Co., 673 A.2d 194 (D.C. App. 1996); Smith Barney, Harris Upham & Co., Inc. v. Luckie, 647 N.E.2d 1308 (N.Y. 1995); Pioneer Water & Sewer Dist. v. Civil Eng'g Prof'ls, Inc., 905 P.2d 1245 (Wyo. 1995).

Waiver of arbitration rights determined by court, not arbitrators: Butchers Union Local 532 v. Farmers Markets, 136 Cal. Rptr. 894 (Cal. App. 1977); O'Brien v. Hanover Ins. Co., 692 N.E.2d 39 (Mass. 1998); Tothill v. Richey Ins. Agency, Inc., 374 A.2d 656 (N.H. 1977).

> arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
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> * * *
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> (d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.[171]

The use of the verb "shall" makes the entry of a stay order mandatory once a valid arbitration agreement is found. Indeed, one court has held that a trial court is without subject matter jurisdiction to hear a dispute that is subject to arbitration.[172] Obviously, the primary grounds for opposing the stay would be waiver, or the nullity of the underlying agreement, which, in turn, would render the arbitration provisions void.[173] Generally, neither the act of filing suit nor the answering of a suit operates as a waiver of a contractual agreement to arbitrate.[174] Whether waiver has occurred depends on the circumstances of each case.

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[171] Uniform Arbitration Act § 2.

[172] Woodson Constr. Co. v. R.L. Abshire Constr. Co., 459 So. 2d 566 (La. Ct. App. 1984).

[173] Careful attention must be paid to the law governing the contract of construction, because of the myriad differences in state law. California law, for example, provides that "where a party to the arbitration agreement is also a party to a pending court action with a third party, arising out of the same transaction and there is the possibility of conflicting rulings on a common issue of law or fact, the court may stay arbitration pending the outcome of the court action." Cal. Code Civ. Proc. § 1281.2(c); *see also* Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ., 109 S. Ct. 1248 (1989) (arbitration stayed pending outcome of lawsuit); Pioneer Take Out Corp. v. Bhvaser, 209 Cal. App. 3d 1353, 1358 (4th App. Dist. 1989) (court stayed arbitration due to the possibility of "inconsistent or conflicting rulings"); Henry v. Alcove Investment, Inc., 233 Cal. App. 3d 94, 101 (2d App. Dist. 1991) (arbitration stayed in favor of court based on the "possibility of conflicting rulings on a common issue of law or fact.").

[174] Musso's Corner, Inc. v. A&R Underwriters, Inc., 539 So. 2d 915 (La. Ct. App. 1989) (insured's filing of suit on some claims did not constitute a waiver of right to arbitrate other claims); Franzone v. Merchants Trust & Savs. Bank, 437 So. 2d 1192 (La. Ct. App. 1983) (bank did not waive arbitration of dispute by answering petition). The exception to this general rule is an inordinate delay in invoking the arbitration. *Compare* B & S Equip. Co. v. Carl E. Woodward, Inc., 620 So. 2d 347 (La. Ct. App. 1993) (defendant waited eight months following the filing of suit to demand arbitration, but court found no waiver of the right to arbitrate given that the contract did not specify a time period for demanding arbitration, discovery was not yet complete, and no prejudice was demonstrated by party opposing arbitration), *writ denied*, 629 So. 2d 394 (La. 1993); Big River Constr. & Remodeling Co. v. University Club I Apts., L.P., 598 So. 2d 542 (La. Ct. App. 1992) (plaintiff's waiting two months following the filing of its suit to demand arbitration is not a waiver of the right to arbitrate); Matthews-McCracken Rutland Corp. v. Plaquemine, 414 So. 2d 756 (La. 1982) (waiting 88 days after answer to demand arbitration does not constitute a waiver of the right to arbitrate); IDC, Inc. v. McCain-Winkler Partnership, 396 So. 2d 590 (La. Ct. App. 1981) (defendants' waiting 17 months until the morning the case was set for trial to demand arbitration held to constitute waiver); Sim v. Beauregard Elect. Co-op., 322 So. 2d 410 (La. Ct. App. 1975) (plaintiff's waiting until 33 months after filing suit to demand arbitration held to constitute waiver).

Under most, if not all arbitration acts, an adverse arbitration award may not be appealed. The Uniform Arbitration Act and most state laws do provide for vacating arbitration awards on certain narrowly prescribed grounds:[175]

1. The award was procured by corruption, fraud or other undue means;
2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
3. The arbitrators exceeded their powers;
4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party; or
5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection.[176]

Because of the strong public policy favoring arbitration, courts generally presume arbitration awards to be valid.[177] Moreover, courts typically hold that unless one of the statutory grounds for vacating, modifying, or correcting an award is present, the arbitrator's award must be affirmed.[178] The fact that the relief awarded by the arbitrators could not or would not be granted by a court of law or equity is not grounds for vacating the award.[179]

One area of possible attack on an arbitration award may be "manifest disregard of the law" by the arbitrators. Manifest disregard of the law was explained in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*,[180] as follows:

> "Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 187-88, 98 L. Ed. 168 (1953). It is not to be found in the federal arbitration law. 9 U.S.C. § 10. Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and

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[175] For a more detailed discussion of these bases for challenging an arbitration award, *see* Senter & Chapin, *Statutory Grounds for Challenging Arbitration Awards*, The Constr. Law., Vol. 19, No. 4 (Oct. 1999).

[176] Uniform Arbitration Act § 12.

[177] Hill v. Cloud, 648 So. 2d 1383 (La. Ct. App. 1995), citing National Tea Co. v. Richmond, 548 So. 2d 930 (La. 1989).

[178] Hill v. Cloud, 648 So. 2d 1383 (La. Ct. App. 1995); Sulphur v. Southern Builders, Inc., 579 So. 2d 1207 (La. Ct. App. 1991), *writ denied*, 587 So. 2d 699 (La. 1991); Charles Ragusa & Son v. St. John the Baptist Parish Sch. Bd., 629 So. 2d 1302 (La. Ct. App. 1993); Spencer v. Hoffman, 392 So. 2d 190 (La. Ct. App. 1980).

[179] Uniform Arbitration Act § 12.

[180] 808 F.2d 930 (2d Cir. 1986).

> capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.[181]

§ 20.10 STATUTES OF LIMITATION AND REPOSE

Statutes of limitation and statutes of repose require that a lawsuit be brought within a specified time after the cause of action accrues. These statutes serve several important public policy objectives. First, these statutes protect persons from having to defend stale claims where "[t]he search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise."[182] Second, public policy dictates that there should come a time when persons will no longer be burdened by the possibility of liability arising from acts occurring in the past. Finally, such statutes promote the public goal of certainty and finality in the administration of commercial transactions by terminating liability at a set point in time.[183]

Virtually every jurisdiction has adopted a statute of limitations for breach of contract actions, and several have adopted limitation periods specifically applicable to causes of action arising out of construction projects.[184] The statutory limitation period for contract actions can vary widely from state to state,[185] and are subject to differing judicial interpretations. As a general rule, the statutory limitations period for a breach of contract action runs, or "accrues," from the date the contract was breached.[186] Under this accrual rule, it is possible for the limitations period to expire before the non-breaching party knows of the breach, e.g., an installation defect covered by other work that fails many years following the final completion of the project.

Because of the perceived unfairness of claims becoming time-barred before they are known to exist, courts in some jurisdictions adopt the so-called "Discovery Rule," i.e., the limitations period begins to run when the non-breaching party first becomes aware (or should have become aware) of the breach of the contract.[187] In these jurisdictions, the Discovery Rule can leave a party open to suit for a considerable time following completion of the project.

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[181] *Id.* at 933 (citations omitted).

[182] Shea v. Keuffel & Esser, 668 F. Supp. 41 (D. Mass. 1986).

[183] Sun Valley Water Beds v. Herm Hughes & Son, Inc., 782 P.2d 188 (Utah 1989).

[184] *E.g.*, La. Civil Code art. 3500.

[185] *Compare* D.C. Code Ann. § 12-301 (three years), *with* Ala. Code § 6-2-33 (10 years). In most jurisdictions, the statutory limitation period can be shortened by the agreement of the parties.

[186] Again, in many jurisdictions an owner and contractor can, by agreement, establish the date upon which the limitation period begins to run.

[187] Hilliard and Bartko Joint Venture v. Fedco Sys., Inc., 522 A.2d 961, 969 (Md. 1987) (holding that arbitration was timely where owner found defect within one year and then filed for arbitration within three years where construction contract provided that contractor would correct defects found within one year of completion of contract).

In response, groups such as the Associated General Contractors of America, National Society of Professional Engineers, and American Institute of Architects have lobbied state legislators to pass statutes of repose. Unlike statutes of limitation, statutes of repose place an absolute time limit, from a date certain, on the bringing of claims arising out of construction projects regardless of when the claim becomes known. Once this period of time has passed, all causes of action are barred, regardless of when the defect is discovered.

Virtually every jurisdiction has adopted a statute of repose for claims arising out of construction projects.[188] Like statutes of limitation, statutes of repose vary widely from state to state[189] in terms of the parties protected,[190] the date the repose period begins to run,[191] the length of time after which claims are foreclosed,[192] and the types of claims foreclosed.[193]

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[188] *See* Ala. Code § 6-5-225; Alaska Stat. § 9.10.055; Ariz. Rev. Stat. Ann. §§ 12-551, 12-552; Ark. Stat. Ann. § 16-56-112; Cal. Civ. Proc. Code §§ 337.1, 337.15; Col. Rev. Stat. § 13-80-104; Conn. Gen. Stat. Ann. §§ 52-577, 52-584; Del. Code Ann. tit. 10, § 8127; D.C. Code Ann. § 12-310; Fla. Stat. Ann. § 95.11(3)(c); Ga. Code §§ 9-3-50 to 9-3-52; Haw. Rev. Stat. § 657-8; Idaho Code § 5-241; 735 Ill. Comp. Stat. § 5/13-214; Ind. Code Ann. § 32-15-1-2; Iowa Code § 614.1. 11.; Kan. Stat. Ann. § 60-513; Ky. Rev. Stat. Ann. § 413.135; La. Rev. Stat. Ann. § 9:2772; Me. Rev. Stat. Ann. tit. 14, § 752-A; Md. Cts. & Jud. Proc. Code Ann. § 5-108; Mass. Ann. Laws ch. 260, § 2B; Mich. Comp. Laws § 600.5839; Minn. Stat. Ann. § 541.051; Miss. Code Ann. § 15-1-41; Mo. Ann. Stat. § 516.097; Mont. Code Ann. § 27-2-208; Neb. Rev. Stat. §§ 25-223, 25-224; Nev. Rev. Stat. §§ 11.202, 11.206; N.H. Rev. Stat. Ann. § 508.4-b; N.J. Stat. Ann. § 2A:14-1.1; N.M. Stat. Ann. § 37-1-27; N.C. Gen. Stat. § 1-50; N.D. Cent. Code § 28-01-44; Ohio Rev. Code Ann. § 2305.131; Okla. Stat. Ann. tit. 12, §§ 109-110; Or. Rev. Stat. §§ 12.115, 12.135; Pa. Stat. Ann. tit. 42, § 5536; R.I. Gen. Laws § 9-1-29; S.C. Code Ann. § 15-3-640; Tenn. Code Ann. § 28-3-202; Tex. Civ. Prac. & Rem. Code §§ 16.008-16.009; Utah Code Ann. § 78-12-21.5; Vt. Stat. Ann. tit. 12, § 511; Va. Code § 8.01-250; Wash. Rev. Code Ann. §§ 4.16.300, 4.16.310; W. Va. Code § 55-2-6a; Wis. Stat. Ann. § 893.89; Wyo. Stat. §§ 1-3-110 to 1-3-112. Notably, New York has not adopted a statute of repose for construction claims.

[189] *See* State-by-State Survey of Statutes of Repose, American Bar Association, Section of Litigation, Committee on Construction Litigation (1994).

[190] *Compare* La. Rev. Stat. Ann. § 9:2772 (protecting "any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of an improvement to immovable property"), *with* Me. Rev. Stat. Ann. tit. 14, § 752-A (covering only architects and engineers).

[191] The date certain on which the repose period commences varies widely from jurisdiction. *See, e.g.*, Ark. Rev. Stat. § 16-56-112 (substantial completion); Fla. Stat. Ann. § 95.11(3)(c) (date of actual possession by owner, date of issuance of certificate of occupancy, date of abandonment of construction, or date of completion or termination of the contract, whichever is later); Idaho Code § 5-241 (final completion); La. Rev. Stat. Ann. § 9:2772 (the date owner's acceptance of the work is filed in the mortgage office, or, if no filing is made, the date owner occupies or takes possession of the improvement, in whole or in part).

[192] *Compare* Ark. Rev. Stat. § 16-56-112 (five years), *with* Fla. Stat. Ann. § 95.11(3)(c) (15 years). Some statutes provide for an extension of the repose period if injuries occur in the latter years of the period and under other circumstances. *See e.g.*, Okla. Stat. Ann. tit. 15, § 110.

[193] *Compare* La. Rev. Stat. Ann. § 9:2772 (precluding all actions "whether *ex contractu, ex delicto*, or otherwise"), *with* Mass. Ann. Laws ch. 260, § 2B (precluding only an "[a]ction of tort for damages").

§ 20.11 WAIVER

Generally, when a contract is breached in a material respect, the injured party is accorded a choice of remedies for damage incurred. However, when the injured party treats the contract as still in effect after knowledge of the breach by the other party, its conduct is incompatible with an intention to consider the contract ended. Therefore, the otherwise injured party is deemed to have elected not to assert the breach as a cause for refusing to continue the contract.[194] This is the legal doctrine of waiver. In the context of a construction project, the concept of waiver is no different in principle from dealing with a claimed defect under a contract for the sale of goods. Generally, if a defect in the work is or ought to be known, its acceptance imposes a duty to pay for it, and if no protest or complaint about the quality of work is promptly made, any right to claim damages for defects in performance is also discharged.[195] For example, it has been held that the supervision of an entire sidewalk construction project and the acceptance of the sidewalk upon completion of the project amounted to waiver.[196] Even though knowledge of the defects was not expressly found, such knowledge was imputed. Likewise, it has been held that daily inspections of a road under construction, and acceptance of the road upon completion, amounted to waiver of a claim against the contractor.[197]

The waiver rule is often invoked when the defective performance is a failure to complete construction in accordance with contract requirements, followed by acceptance of the late performance by the owner. In such cases, the defect is obvious and the only question is whether acceptance was intended by the owner. A number of cases have held that waiver as to the time of performance was an effective defense

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[194] Williston § 700. In Geier v. Hamer Enters., 226 Ill. App. 3d 372, 589 N.E.2d 711 (1992), the building owner was sued by the contractor's employee under the Structural Work Act after the employee was injured in an accident on the jobsite. The owner brought a claim against the contractor for negligence in failing to provide a safe workplace and failing to obtain the insurance required by the contract. The court affirmed the dismissal of the breach of contract claim brought by the owner, holding that the owner waived the breach by permitting the contractor to start work on the project without having supplied the certificate of insurance called for in the contract.

In Prestige Dev. Group v. Russell, 612 So. 2d 691 (Fla. Dist. Ct. App. 1993), a contractor sued for breach of contract and to foreclose on its mechanic's lien. The contractor was hired to repair and replace a leaky roof on the owner's newly constructed house. The contract provided that the contractor was to "install bituthene roofing materials according to manufacturer's specifications." The contract provided no warranties that the roofing materials would not leak. The roof leaked, but the owner failed to introduce evidence that the leak was due to the contractor's failure to install the materials consistent with the manufacturer's specifications. The court held that the owner failed to establish that its damages were attributable to the contractor. The owner also waived strict compliance with the mechanic's lien statute for service of the contractor's affidavit by answering the contractor's complaint with a general denial, as opposed to raising noncompliance as an affirmative defense.

[195] Williston § 724; 13 Am. Jur. 2d Building and Construction Contracts § 55 (1964). *See also* Johnson v. Fenestra, Inc., 305 F.2d 179 (3d Cir. 1962).

[196] Katz v. Bedford, 77 Cal. 319, 19 P. 523 (1888).

[197] City of St. Claire Shores v. L&L Constr. Co., 363 Mich. 518, 109 N.W.2d 802 (1961). *See also* K&G Constr. Co. v. Harris, 223 Md. 305, 164 A.2d 451 (1960); Kandalis v. Paul Pet Constr. Co., 210 Md. 319, 123 A.2d 345 (1956).

available to the contractor.[198] There are, however, two major exceptions in the construction contract context in which there can be no waiver by an owner of the right to remedy for defective performance. The first such situation is when the defects are latent and are thus unknown and unknowable by the owner at the time of acceptance. Acceptance by the owner in such situations has been held not to amount to waiver.[199] The other significant exception to the waiver doctrine in the construction contract context occurs when the contractee/employer is the owner of the land upon which the building or construction work is to be done. In this case, the owner may be obliged to accept the work in order to take or retain possession of his land. Accordingly, there "is no legal presumption in this type of contract that acceptance will discharge any right of damages for defects in performance, unless a length of time unreasonable under the circumstances lapses without complaint."[200]

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[198] *See, e.g.*, Phillips & Colby Constr. Co. v. Seymour, 91 U.S. 646 (1875); Smither & Co. v. Calvin Humphrey Corp., 232 F. Supp. 204 (D.D.C. 1964); Commercial Contractor, Inc. v. United States Fidelity & Guar. Co., 524 F.2d 944 (5th Cir. 1975). *See also* Marathon Oil Co. v. Hollis, 167 Ga. App. 48, 305 S.E.2d 864 (1983) (agreement to revisions in project schedules modifies contract completion date).

[199] 13 Am. Jur. 2d Building and Construction Contracts § 55 (1964). *See also* Clear v. Patterson, 80 N.M. 654, 459 P.2d 358 (1969); Salem Realty Co. v. Batson, 256 N.C. 298, 123 S.E.2d 744 (1962); Cantrell v. Woodhill Enters., Inc., 273 N.C. 490, 160 S.E.2d 476 (1968). Making final payment with knowledge of the defect may also release the contractor. Renown, Inc. v. Hensel Phelps Constr. Co., 154 Cal. App. 3d 413, 201 Cal. Rptr. 242 (1984); Kennemore v. Bennett, 740 S.W.2d 39 (Tex. Civ. App. 1987) (owner's forcible taking of possession accompanied by tender of final payment estops him from claiming that work was incomplete); All Seasons' Water Users Ass'n, Inc. v. Northern Improvement Co., 399 N.W.2d 278 (N.D. 1987) (acceptance of pipeline leaves only remedy under one-year contractual warranty for latent defects); E.G. Schafer Constr. Co. v. Gallagher Transfer & Storage Co., 495 So. 2d 348 (La. Ct. App. 1986) (owner's signing of "acceptance" supports finding that work was not defective). Merely taking occupancy with such knowledge, however, when the project is not substantially complete does not operate as an acceptance or waiver. J.R. Sinnott Carpentry, Inc. v. Phillips, 110 Ill. App. 3d 632, 66 Ill. Dec. 671, 443 N.E.2d 597 (1983); and even an architect's certification of completion will not operate to waive or bar claims for defects that were latent at the time the certification was issued. Trenton Constr. Co. v. Straub, 310 S.E.2d 496 (W. Va. 1984). Circumstances may negate a waiver claim in similar cases, however. *See, e.g.*, Perry Roofing Co. v. Olcott, 722 S.W.2d 538 (Tex. Civ. App. 1986) (homeowner's mistaken belief that cause of roof problem was hail damage did not stop him from making claim for roof defects); Bonstaff v. Jefferson United Enters., Inc., 501 So. 2d 874 (La. Ct. App. 1987) (new home buyer's failure to detect one-inch tilt in kitchen slab does not bar claim for defect; buyers of new homes should not be charged with making detailed inspections). Although most contract forms and court decisions give significant protection against inadvertent waivers or releases, it is not uncommon that when the parties dispute with each other during the course of construction, they will often compromise and settle with each other. The documentation executed by the parties, when settling interm disputes, frequently will turn out to have broadly phrased language of release, including release of all present and future claims. When later defects become apparent or complaints develop, owners find that legal actions on those accounts are barred by the previous releases. Cases illustrating this circumstance are: Grimm v. F.D. Borkholder, Inc., 454 N.E.2d 84 (Ind. Ct. App. 1983); State Distrib. Corp. v. G.E. Bobbitt & Assocs., Inc., 62 N.C. App. 530, 303 S.E.2d 349 (1983); Alabama Power Co. v. Blount Bros. Corp., 445 So. 2d 250 (Ala. 1984); Gus T. Hange & Son Painting Co. v. Tri-State Constr. Co., 662 S.W.2d 928 (Mo. Ct. App. 1984); Shaw v. Bridges Gallagher, Inc., 174 Ill. App. 3d 680, 528 N.E.2d 1349 (1988).

[200] Williston § 724. *See also* Restatement (Second) of Contracts § 246(d) illus. 6 & 7 (1981);

The question is one of fact: In some cases, acceptance and occupancy without objection, under circumstances making it clear that the owner accepts the building "as is," will amount to waiver.

The waiver doctrine has been held to apply where an owner had use of a building for a period of time sufficient to discover defects.[201] Payment, whether partial or in full, is merely one fact to be considered in determining whether an owner has accepted the building "as is" and waived his claims for defective construction. Standing alone, however, payment generally is not conclusive on the issue of waiver.[202]

§ 20.12 ACCORD AND SATISFACTION

By definition, an accord and satisfaction consists of two elements. First is the accord, or agreement, whereby the parties mutually agree to substitute a new and different obligation from that which existed before. Second is the satisfaction: The execution or performance of the accord.[203] Until performance of the accord, the original duty is suspended unless there is such a breach of the accord so as to discharge the new duty of the obligee to accept the performance in satisfaction. If a breach occurs, the obligee may enforce either the original duty or any duty under the accord.[204]

The accord entitles the obligor to a chance to render the substitute performance in satisfaction of the original duty. Under the rules set forth in the *Restatement*

Aubrey v. Helton, 276 Ala. 134, 159 So. 2d 837 (1964); Weinberg v. Wilensky, 26 N.J. Super. 301, 97 A.2d 707 (App. Div. 1953); 13 Am. Jur. 2d Building and Construction Contracts § 56 (1964). A similar situation occurs when the owner is obligated to accept the work because the owner needs the facilities constructed. In Castille v. 3-D Chem, Inc., 520 So. 2d 1002 (La. Ct. App. 1987), a farmer had storage bins constructed but realized later that defective materials were used. By that time, however, the facility was necessary to hold the farmer's harvest. The court held that the farmer did not waive his claim against the contractor by accepting the work.

[201] Steitz v. Armory Co., 15 Idaho 551, 99 P. 98 (1908). *See* 13 Am. Jur. 2d Building and Construction Contracts § 56 (1964); Restatement (Second) of Contracts § 246(d) illus. 9 (1981).

[202] 13 Am. Jur. 2d Building and Construction Contracts §§ 58-59 (1964). Claims may also be (but rarely are) barred by laches prior to the expiration of any limitation statute. *See, e.g.*, Axia, Inc. v. I.C. Harbour Constr. Co., 150 Ill. App. 3d 645, 103 Ill. Dec. 801, 501 NX:2d 1339 (1986) (10-month wait to sue after contractor ceased repair effort does not bar suit).

[203] Restatement (Second) of Contracts § 281(1) (1981); Long v. Weiler, 395 S.W.2d 234 (Mo. Ct. App. 1965); Williston § 1838.

[204] Restatement (Second) of Contracts § 281(2)(1981); W.F. Constr. Co. v. Kalik, 103 Idaho 713, 652 P.2d 661 (Ct. App. 1982). Original contract called for plaintiff to be paid 15 percent of the direct construction costs; the defendant refused to pay, claiming that the plaintiff rendered defective performance. The parties agreed that the plaintiff would remedy the defects and that the defendant would pay the plaintiff 10 percent of the direct costs. After the plaintiff performed according to the new contract, the defendant still refused to pay. The court held for the plaintiff in the amount stated in the original contract (15 percent). *See* Stinson v. Mueller, 449 A.2d 329 (D.C. 1982) (document, signed by contractor, promising repayment of money owed as refund on renovation project, did not constitute accord and satisfaction barring suit by owner against contractor for breach of original renovation contract, because contractor failed to perform fully repayment required by document).

(Second) of Contracts, the obligee's right to enforce that duty is suspended subject to the terms of the accord until the obligor has had that chance.[205]

An accord is like the making of a new contract. Generally, there is no accord and satisfaction without an offer and acceptance of substituted performance in full settlement.[206] Thus, it was held that a contractor and a homeowner did not reach accord and satisfaction regarding a damage claim for defects in a garage floor when there was evidence that the homeowners were aware of the cracks around the time they paid for the garage and no evidence indicated that they communicated this knowledge to the contractor.[207] Further, neither the original bill nor the reduced bill, which the homeowners paid, referred on its face to the claim for damages.

It is sometimes said that determining whether accord and satisfaction has been reached between the parties turns on the intent of the parties.[208] One case held that mutual assent of the parties to settlement of the dispute was a requirement for accord and satisfaction, and that the creditor must fully understand that the amount tendered was conditioned upon its being accepted as a full disposition of the underlying obligation.[209]

Accord and satisfaction is an affirmative defense upon which the defendant bears the burden of proof.[210]

§ 20.13 TERMINATION

In the absence of a provision clearly delineating procedures and conditions for terminating a contractor during the course of a construction project, an owner can only terminate a contractor for a material breach. What constitutes a material breach of the contract or a material failure varies from one situation to the next. However, a material breach is fairly characterized as a substantial failure of the agreement between the parties that justifies the other party's not performing its obligations under the agreement any further. A contractor's failure to provide labor forces for the project may amount to a material breach, depending upon several factors, including the time period that labor forces were not available to the project, the extent of the work remaining on the project, the effect of the lack of labor forces on other phases of the work, and other considerations, such as whether the owner was making timely payments under the contract for the contract work completed.

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[205] Restatement (Second) of Contracts § 281 cmt. B (1981).

[206] *Id.* § 281 cmt. A; Laganas v. Installation Specialists, Inc., 291 A.2d 187 (D.C. 1972).

[207] Parsons v. Beaulieu, 429 A.2d 214 (Me. 1981). *See also* Mahler v. Bellis, 231 Neb. 161, 435 N.W.2d 661 (1989) (accord and satisfaction is effective only as to damages known at time of accord).

[208] Publicker Indus., Inc. v. Romar Ceramics Corp., 603 F.2d 1065 (3d Cir. 1979); Tuskegee Alumni Hous. Found., Inc. v. National Homes Constr. Corp., 450 F. Supp. 714 (S.D. Ohio 1978), *aff'd*, 624 F.2d 1101 (5th Cir. 1980).

[209] Flowers v. Diamond Shamrock Corp., 693 F.2d 1146 (5th Cir. 1982).

[210] Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049 (5th Cir. 1982); Larson v. Erickson, 549 F.2d 1136 (8th Cir. 1977); Studiengesellschaft Kohle M&H v. Novamont Corp., 485 F. Supp. 471 (S.D.N.Y. 1980).

The *Restatement (Second) of Contracts* sets forth the following rule addressing the contractor's primary defense to termination by an owner — failure of an owner to satisfy a material requirement of the agreement between the parties. It provides, in pertinent part: "[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time."[211]

An illustration in the *Restatement* describes the operation of this principle when a contractor would typically have a defense to termination by the owner:

> A contracts to build a house for B for $50,000.00, progress payments to be made monthly in an amount equal to 85 percent of the price of the work performed during the preceding month, the balance to be paid on the architect's certificate of satisfactory completion of the house. Without justification, B fails to make a $5,000.00 progress payment. A thereupon stops work on the house and a week goes by. A's failure to continue the work is not a breach and B has no claim against A. B's failure to make the progress payment is an uncured material failure of performance which operates as a nonoccurrence of a condition of A's remaining duties of performance under the exchange. If B offers to make the delayed payment and in all the circumstances, it is not too late to cure the material breach, A's duties to continue the work are not discharged. A has a claim against B for damages for partial breach because of the delay.[212]

In this instance, if contractor A were terminated by owner B, the contractor would have a defense that the prior material breach by the owner excused any further performance of the contractor. If this were found to be a material breach, the contractor would have been wrongfully terminated and would not only have a defense to the termination by the owner, but also an affirmative claim against the owner. Generally, the failure of an owner to make a progress payment within the time set forth in the contract is an uncured material failure of performance excusing the contractor that stops work on the project. As can be seen from the illustration, it is critical to determine which party caused the first material breach. Obviously, if the contractor stops work and then the owner fails to make a progress payment, the contractor will not be protected by the law.

A contractor may have a separate defense after termination by an owner: The owner may be deemed to have waived a material failure on the part of the contractor. For instance, if a contractor is terminated by an owner based upon the material failure to use equipment conforming to the specifications of the owner, the contractor may claim that the owner waived this material failure. In order to claim this waiver defense properly, the contractor must show that the owner was aware of the material failure at some earlier point and that the contractor was allowed to continue despite this failure.

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[211] Restatement (Second) of Contracts § 237 (1981).

[212] Restatement (Second) of Contracts § 237, illus. 1.

Contract language often provides the contractor with relatively clear guidance as to what specific acts on its part will entitle the owner to terminate it. For example, the widely used AIA Document A201 clearly establishes conditions and procedures for termination of a contractor.

§ 20.14 OTHER CONTRACTUAL REMEDY LIMITATIONS

The parties may, of course, have further agreed in their contracts to other limitations on the assertion of claims among themselves. Owners, for example, are sometimes surprised to find that a liquidated damages clause operates as a limitation on the contractor's liability (as when the liquidated damage sum provided in the contract is vastly undercompensatory).[213] The courts will generally treat clauses providing only limited remedies as intended to be merely cumulative with whatever remedies are available. It follows that in order to bar an owner's claim effectively, the limitation clause must clearly express the intent that it be exclusive of other remedies.[214]

§ 20.15 MISCELLANEOUS CLAIMS AND DEFENSES

This section addresses additional matters of possible concern to contractors defending against construction claims. As a general rule, recovery of damages for the claims discussed below has not been allowed by the courts, although there are exceptions to the general rule.

[A] Claims for Mental Anguish and Emotional Distress

Such claims are typically asserted by homeowners seeking compensation for the disruption and unfulfilled expectations caused by the defective construction or late delivery of their home. Courts have historically been unsympathetic to such claims.[215] As the California Supreme Court recently stated:

> Here, the breach — the negligent construction of the Erlichs' house — did not cause physical injury. No one was hit by a falling beam. Although the Erlichs state they feared the house was structurally unsafe and might collapse in an earthquake, they lived in it for five years. The only physical injury alleged is Barry Erlich's heart disease, which flowed from the emotional distress and not directly from the negligent construction.
>
> The Erlichs may have hoped to build their dream home and live happily ever after, but there is a reason that tag line belongs only in fairy tales. Building a house may turn out to be a stress-free project; it is much more likely to be the stuff of

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[213] *See* Burns v. Hanover Ins. Co., 454 A.2d 325 (D.C. 1983). For a contrary interpretation, *see* East Larimer County Water Dist. v. Centric Corp., 693 P.2d 1019 (Colo. Ct. App. 1984).

[214] *See, e.g.*, City of Jacksonville v. Orr Constr. Co., 427 So. 2d 237 (Fla. Dist. Ct. App. 1983).

[215] *See, e.g.*, Caradonna v. Thorious, 169 N.W.2d 179 (Mich. App. 1969).

> urban legends — the cause of bankruptcy, marital dissolution, hypertension and fleeting fantasies ranging from homicide to suicide. As Justice Yegan noted below, "No reasonable homeowner can embark on a building project with certainty that the project will be completed to perfection. Indeed, errors are so likely to occur that few if any homeowners would be justified in resting their peace of mind on [its] timely or correct completion. . . ." The connection between the service sought and the aggravation and distress resulting from incompetence may be somewhat less tenuous than in a malpractice case, but the emotional suffering still derives from an inherently economic concern.[216]

Some courts, however, have allowed such damages to be recovered where the object of the contract was a "significant nonpecuniary purpose," such as the aesthetic or intellectual enjoyment of the owner,[217] or where such damages were reasonably foreseeable.[218]

[B] Punitive Damages

Punitive damages are not intended to compensate an injured party, but rather to punish the wrongdoer for engaging in proscribed conduct. These damages are rarely awarded except in unusual cases, such as where a party acts in wanton or reckless disregard for the rights and safety of others. The general rule is that the behavior complained of must amount to a separate tort, which itself is of the sort that would justify such relief.[219]

[C] Prejudgment Interest

In most cases, the quantum of recovery to which the owner is entitled will not be a fixed sum. The issue of quantum, like liability, will be decided by the fact finder at trial. Accordingly, claims for prejudgment interest are rarely honored.[220] When the owner's claim arises from a repudiation of the entire contract, on the other hand,

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[216] Erlich v. Menezes, 981 P.2d 978 (Cal. 1998). The court noted that allowing such damages would make the financial risks of construction agreements difficult to predict, and could increase the already prohibitively high cost of housing in California by affecting the availability of insurance for builders, and greatly diminish the supply of affordable housing. Fashioning a cause of action with such potentially broad economic consequences, the costs of which were likely to be paid by the public generally, should be left to the legislature, the court concluded.

[217] McMorris v. Marcotte Builders, L.L.C., 756 So. 2d 424 (La. Ct. App. 1999), *writ denied*, 760 So. 2d 1158 (La. 1999), citing Young v. Ford Motor Co., Inc., 595 So. 2d 1123 (La. 1992).

[218] B & M Homes, Inc. v. Hogan, 376 So. 2d 667 (Ala. 1979).

[219] *See* Quedding v. Arisumi Bros., Inc. (Hawaii 1983) (holding that an owner had failed to show the required wanton or reckless behavior). *See generally,* Annotation, *Punitive Damages for Breach of Building or Construction Contract,* 40 A.L.R.4th 110 (1985). As to whether the contractor's insurance coverage will pay any judgment for punitive damages, *see* J. Morrison, *The Insurability of Punitive Damages: A Current and Jurisdictional Analysis* (1985).

[220] *See* Adler v. Seligman, 438 So. 2d 1963 (Fla. Dist. Ct. App. 1983); *see also* Marathon Oil Co. v. Hollis, 305 S.E.2d 864 (Ga. App. 1983).

the damages are easily liquidated at the amount of the difference between the contract price and the price offered by the second lowest bidder, in which case prejudgment interest should be recoverable, computed from the dates at which the owner is actually obligated to pay out sums in excess of the original contract price.[221] Even when the damage sum can be liquidated, the owner may be holding retained sums or offset sums from the contract price, which means that the contractor has not unlawfully withheld the sums necessary to compensate for its breach. In such circumstances, prejudgment interest will not be awarded.[222] When it is the contractor or architect claiming prejudgment interest, the problem is frequently not so much the uncertainty of the amount owed, but rather the dates upon which it could be said to have been due. Construction contracts usually call for payments to be made as work is completed. Computation of prejudgment interest when the contractor has been wrongfully terminated thus requires proof of when work would have reached the stages at which the payments lost in the termination would have become due.[223]

[D] Attorneys' Fees

Attorneys' fees generally are not recoverable in the absence of a statute or contract provision authorizing their recovery. Because of the general rule against the recovery of attorneys' fees, an owner may try and characterize his claims as arising under special statutes providing for the recovery of attorneys' fees. For example, in *Cox v. Sears Roebuck & Co.*,[224] the New Jersey Supreme Court held that a homeowner could sue under that state's Consumer Fraud Act[225] for alleged unlawful practices in connection with performance of a home improvement contract. Likewise, Texas courts have allowed the recovery of attorneys' fees against contractors where owners have asserted claims under that state's Deceptive Trade Practices Act.[226] Finally, attorneys' fees may be recoverable under hold harmless clauses in construction contracts.

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221 East Larimer County Water Dist. v. Centric Corp., 693 P.2d 1019 (Colo. Ct. App. 1984).

222 Subsurfco, Inc. v. B-Y Water Dist., 369 N.W.2d 129 (S.D. 1985).

223 *See, e.g.*, Metropolitan Dade County v. Bouterse, Perez & Fabregas Architects, Planners, Inc., 463 So. 2d 526 (Fla. Dist. Ct. App. 1985).

224 647 A.2d 454 (N.J. 1994).

225 N.J. Stat. Ann. §§ 56:8-1 *et seq.* Under this Act, any person who suffers any ascertainable loss of moneys or property as a result of any method, act, or practice declared unlawful under the Act may, in addition to any legal or equitable relief, be awarded treble damages, reasonable attorneys' fees, filing fees, and reasonable costs of suit. N.J. Stat. Ann. § 56:8-19.

226 Tex. Bus. Corp. Act Ann. §§ 17.41 *et seq. See* Mathews v. Candlewood Builders, Inc. 685 S.W.2d 649 (Tex. 1985) (granting attorneys' fees as part of owner's counterclaim).

[E] Statutory Penalties or Enhanced Damages

Many of the consumer protection and unfair trade practices statutes relied on to obtain attorneys' fee awards also provide for the recovery of penalties, such as treble damages, litigation costs, and other items.[227]

[F] Joint and Severally Liable Defendants

Construction projects usually involve multiple parties. As a result, situations when two or more parties may share liability abound. Care must be taken when settling claims with less than all parties so as to not jeopardize claims against the remaining parties.[228]

[G] Specific Performance or Equitable Relief

In a limited number of circumstances; the courts will order work to be done and payments to be made on pain of contempt.[229] Likewise, when the contractor's obligations are intermeshed with a contractual requirement to convey real estate, specific performance may be available.[230]

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[227] *See* notes 224-26, *supra*; *see also*, Birds Constr., Inc. v. McKay, 657 S.W.2d 514 (Tex. Ct. App. 1983).

[228] *See, e.g.*, Perlmutter v. Harmony Homes, Inc., 677 P.2d 381 (Colo. Ct. App. 1984).

[229] *See, e.g.*, Walters v. Campeau, 668 P.2d 1054 (Mont. 1983).

[230] *See, e.g.*, Schimmer v. H.W. Freeman Constr. Co., 643 S.W.2d 621 (Mo. Ct. App. 1983).

APPENDIX 20-1

APPENDIX TO *KELLY V. MARX*

The Appendix to the Appeals Court of Massachusetts decision in *Kelly v. Marx* states as follows:

> Although differing language and context of the decisions make precise categorization difficult, our survey indicates the following:
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> 1. Twenty-two courts appear to apply the "single look" approach by limiting evaluation of the reasonableness of a liquidated damages provision to the time of contract formation: Barnett v. Sayers, 289 F. 567, 570 (D.C. Cir. 1923); Rattigan v. Commodore Intl. Ltd., 739 F. Supp. 167, 169 (S.D.N.Y. 1990) (applying New York law); Tardanico v. Murphy, 983 F. Supp. 303, 309 (D.P.R. 1997); Williwaw Lodge v. Locke, 601 P.2d 236, 239 (Alaska 1979); Alley v. Rogers, 269 Ark. 262, 264 (1980); Rohauer v. Little, 736 P.2d 403, 410 (Colo. 1987); Hanson Dev. Co. v. East Great Plains Atl. Corp. Ctr., Inc., 195 Conn. 60, 65 (1985); Brazen v. Bell Atl. Corp., 695 A.2d 43, 48 (Del. 1997); LeFemine v. Baron, 573 So. 2d 326, 328 (Fla. 1991); Fickling & Walker Co. v. Giddens Constr. Co., 258 Ga. 891, 897-898 (1989); Czeck v. Van Helsland, 143 Ind. App. 460, 463 (1968); Anne Arundel County v. Norair Engr. Corp., 275 Md. 480, 494 (1975); Roland v. Kenzie, 11 Mich. App. 604, 612 (1968); Frank v. Jansen, 303 Minn. 86, 41 (1975); Board of Trustees of State Insts. of Higher Learning v. Johnson, 507 So. 2d 887, 890 (Miss. 1987); Gruschus v. C.R. Davis Contr. Co., 75 N.M. 649, 655 (1965); Fisher v. Schmeling, 520 N.W.2d 820, 822 (N.D. 1994); Olmo v. Matos, 439 Pa. Super. 1, 8 (1994); Safari, Inc. v. Verdoorn, 446 N.W.2d 44, 46 (S.D. 1989); Woodhaven Apartments v. Washington, 942 P.2d 918, 921 (Utah 1997); Brooks v. Bankson, 248 Va. 197, 208 (1994); Watson v. Ingram, 124 Wash. 2d 845, 851-853 (1994).
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> 2. Twenty courts seem to take a "second look" under rules permitting consideration of actual damages flowing from a breach: Thanksgiving Tower Partners v. Anros Thanksgiving Partners, 64 F.3d 227, 232 (5th Cir. 1995) (applying Texas decisions); Yockey v. Horn, 880 F.2d 945, 952-953 (7th Cir. 1989) (applying Illinois law); Southpace Properties, Inc. v. Acquisition Group, 5 F.3d 500, 505 (11th Cir. 1993) (applying Alabama law); Ventura v. Grace, 3 Haw. App. 371, 374 (1982); McEnroe v. Morgan, 106 Idaho 326, 331-332 (1984); Rohlin Constr. Co. v. Hinton, 476 N.W.2d 78, 80 (Iowa 1991); Mattingly Bridge Co. v. Holloway & Son Constr. Co., 694 S.W.2d 702, 705 (Ky. 1985); Hawkins v. Foster, 897 S.W.2d 80, 85 (Mo. Ct. App. 1995); Weber v. Rivera, 255 Mont. 195, 200 (1992); Kozlik v. Emelco, Inc., 240 Neb. 525, 536-537 (1992); Mason v. Fakhimi, 109 Nev. 1153, 1156-1157 (1993); Shallow Brook Assocs. v. Dube, 135 N.H. 40, 48-49 (1991); Wasserman's Inc. v. Middletown, 137 N.J. 238, 251 (1994); Knutton v. Cofield, 273 N.C. 355, 361 (1968); Lake Ridge Academy v. Carney, 66 Ohio St. 3d 376, 382 (1993); Illingworth v. Bushong, 297 Or. 675, 693 (1984); Crews v. Dexter Rd. Partners, S.W.2d (Tenn. App. 1998); Wheeling Clinic v. Van Pelt, 192 W. Va. 620, 626 (1994); Koenings v. Joseph Schlitz Brewing Co., 126 Wis. 2d 349, 363 (1985); Jessen v. Jessen, 810 P.2d 987, 990 (Wyo. 1991).

3. The issue seems to be controlled by statutes in three jurisdictions: Weber, Lipshie & Co. v. Christian, 52 Cal. App. 4th 645, 654 (1997) (California Civil Code § 1671[b] [West 1985] states that "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made"); Philippi v. Viguerie, 606 So. 2d 577, 579 (La. Ct. App. 1992) (statute provides that parties may stipulate liquidated damages, but a court may modify those damages where they are manifestly unreasonable); 1414 Partnership v. Taveau, 815 P.2d 1228, 1230 (Okla. Ct. App. 1991) (Okla. Stat. Tit. 15, § 215[B] [1991] provides that: "A provision in a real estate sales contract, providing for the payment of an amount which shall be presumed to be the amount of damages sustained by a breach of such contract, shall be held valid and not a penalty, when such amount does not exceed five percent (5%) of the purchase price").

4. We are unable to discern from the following decisions whether they represent a single or second look position: Larson-Hegstrom & Assocs., Inc. v. Jeffries, 145 Ariz. 329 (1985); White Lakes Shopping Ctr., Inc. v. Jefferson Standard Life Ins. Co., 208 Kan. 121 (1971); Pacheco v. Scoblionko, 532 A.2d 1036 (Me. 1987); Highgate Assocs., Ltd. v. Merryfield, 157 Vt. 313 (1991).[231]

[231] 694 N.E.2d at 873-74 (footnotes omitted). Obviously, Massachusetts is no longer a "second look" jurisdiction. Kelly v. Marx, 705 N.E.2d 1114 (Mass. 1999).