



## CONSTRUCTION LAW ALERT

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### Construction Claims and Damages

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This Construction Law Alert provides an overview of the types of claims that may arise on a construction project and the damages that are associated with those claims.

The contract documents (the contract, conditions, schedule, drawings and specifications) define the relationship between or among the parties to a construction project and form the basis of all claims. The contract documents are the starting point to determine the claims and damages of the various construction participants on a project.

#### The Contractor's Claims and Damages

##### Scope Claims

Changes in the scope of work may result from a change in the construction drawings, a change in building materials, value engineering, design error and unexpected field conditions. Scope changes often lead to disputes.

Formal, written change orders made pursuant to a construction contract resolve certain cost issues if scope changes occur. However, if a party makes a change in the work so drastic that it effectively requires the performance of duties materially different from those originally bargained for, a cardinal

change occurs. A cardinal change is so profound that a contractor is not limited to the provisions of the contract in recovering costs and damages.

##### Delay, Acceleration and Disruption Claims

Claims for delay, acceleration and disruption on a construction project either involve a change in the anticipated time for performance of the contract or a change in the manner of performance.

Delay involves an increase in the time needed to complete a project beyond that which was contemplated at the time the contract was executed. If a delay is not excusable and is the result of an act of the owner (e.g., providing defective plans and specifications, not allowing the contractor proper access to the site, failing to approve shop drawings in a timely fashion), the owner may be liable to the contractor. Claims for delay can result in damages for extended home and field office overhead, equipment rental and financing, and escalated labor, material and equipment costs. Many jurisdictions, such as Florida, recognize clauses in construction contracts providing for "no damages for delay", except in the case of fraud, bad faith or active interference on the part of the owner.

Acceleration involves a speeding up of the work so that the project is completed in less time than was originally anticipated. If an owner orders the contractor to accelerate the work, the owner is liable to the contractor for the acceleration costs (e.g., overtime for workers, hiring of additional workers, increased equipment and supervision costs).

Finally, disruption involves events which preclude the contractor from completing the work in the manner in which the work was bid. Disruptions caused by owners can result from incorrect or incomplete drawings, changes in the work, failure to approve shop drawings in a timely manner, or the failure to respond to questions or requests for information in a timely manner. Owner-caused disruptions are compensable to the contractor. The contractor's damages for a disruption claim may include higher labor and equipment costs, additional labor and equipment costs and mobilization and demobilization costs.

##### Payment Claims

When payments are not made by the owner or are not made in a timely manner, the contractor may have a claim against the owner, particularly if there is an applicable prompt payment law in the jurisdiction. Prompt payment laws typically provide for penalties, interest and recover of

attorneys' fees.

## Termination Claims

If an owner wrongfully terminates a construction contract, such as terminating a contract for a nonmaterial breach, the contractor may have a termination claim against the owner. If the termination occurs before the contractor has performed any work, the contractor may be entitled to recover its anticipated profit on the project and preparatory costs, such as the cost of preparing the bid and scheduling crews and equipment. If the termination occurs after the work has started, the contractor may be entitled to recover its unpaid cost of performance (i.e., the total contract price less the cost to complete less progress payments made), and the contractor's expected profit on the project. In addition, the contractor may recover indirect costs, such as unabsorbed home office overhead.

## The Owner's Claims and Damages

### Delay Claims

A owner may sustain damages if a construction project is not completed on time due to the acts or omissions of the contractors. These damages may include loss of use of the project, financing penalties and other losses. It is common for contracts to contain a liquidated damage provision designed to reasonably approximate the losses that an owner may suffer in the event of a delay. The liquidated damage sum must be reasonable in relation to the anticipated losses

that an owner may sustain. When a contract does not contain a liquidated damage clause, the owner may recover the actual damages suffered as a result of the delay. Such damages may include lost profits, the lost rental value of the property, increased material and labor costs, storage costs, interest on the construction and overhead.

### Cost of Corrective Work

An owner may be able to recover the costs associated with correcting a contractor's defective work. This can occur after a contractor has left the project or during construction or if the contractor does not want to or is incapable of correcting the insufficient or incomplete work.

### Termination Claims

An owner may have a termination claim against a contractor if the termination of the contractor is properly done. The owner must be careful to exercise the right to terminate when the contractor has materially breached the contract, the owner is free of fault, and the owner has fully complied with the termination procedure in the contract. If the termination occurs before the contractor begins work, the owner's measure of damages is the total cost to complete the project reduced by the value of the contract. If the termination occurs during the project, the owner's measure of damages is its cost to complete the project. If the termination occurs at the end of the project, the measure

of damages is the owner's cost to complete the project, if any, or its cost to repair defects, reduced by any unpaid amounts on the contract. In addition to recovering the cost to complete or the cost to correct defects, an owner may be able to recover additional overhead and supervisory costs, the loss rental value of the property, increased borrowing costs, the cost of renting another facility, lost profits relating to the delay, or liquidated damages.

### Tort Claims

Under certain circumstances, an owner may assert tort claims (as opposed to contract claims) against the contractor. These tort claims include tortious interference with a contractual or advantageous business relationship, fraud, misrepresentation, and negligence. Many jurisdictions, such as Florida, bar the recovery of economic damages if the losses arise from a contractual relationship.

## Conclusion

If you are involved in the construction industry, your success will depend upon the ability to effectively handle construction disputes and claims. A critical part of handling disputes and claims is understanding the different types of construction claims and damages. This knowledge can help you evaluate the legal and contractual rights to recover losses on a project.

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