# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>About the Editor</td>
<td>ix</td>
</tr>
<tr>
<td>About the Authors</td>
<td>xi</td>
</tr>
<tr>
<td>Foreword</td>
<td>xv</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>xix</td>
</tr>
<tr>
<td><strong>Chapter 1  THEORIES OF RECOVERY</strong></td>
<td>1</td>
</tr>
<tr>
<td><em>Douglas S. Oles</em></td>
<td></td>
</tr>
<tr>
<td>I. Historical Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II. Compensatory Damages</td>
<td>3</td>
</tr>
<tr>
<td>III. Foreseeability</td>
<td>4</td>
</tr>
<tr>
<td>IV. Reliance Damages</td>
<td>5</td>
</tr>
<tr>
<td>V. Expectation Damages</td>
<td>8</td>
</tr>
<tr>
<td>VI. Equitable Theories</td>
<td>13</td>
</tr>
<tr>
<td>A. Rescission</td>
<td>13</td>
</tr>
<tr>
<td>B. Reformation</td>
<td>16</td>
</tr>
<tr>
<td>C. Restitution</td>
<td>17</td>
</tr>
<tr>
<td>D. Implied Contracts and Quantum Meruit</td>
<td>19</td>
</tr>
<tr>
<td>VII. Exemplary Damages</td>
<td>24</td>
</tr>
<tr>
<td><strong>Chapter 2  ELEMENTS OF DAMAGES</strong></td>
<td>27</td>
</tr>
<tr>
<td><em>Douglas S. Oles</em></td>
<td></td>
</tr>
<tr>
<td>I. Direct versus Indirect Costs</td>
<td>27</td>
</tr>
<tr>
<td>II. Allowable Costs</td>
<td>29</td>
</tr>
<tr>
<td>III. Direct Labor</td>
<td>30</td>
</tr>
<tr>
<td>IV. Direct Materials</td>
<td>33</td>
</tr>
<tr>
<td>V. Direct Equipment</td>
<td>34</td>
</tr>
<tr>
<td>VI. Site Overhead</td>
<td>41</td>
</tr>
<tr>
<td>VII. Home Office General and Administrative Expenses</td>
<td>42</td>
</tr>
<tr>
<td>VIII. Markups for Bond Premiums, Insurance Premiums, and Taxes</td>
<td>49</td>
</tr>
<tr>
<td>IX. Profit</td>
<td>50</td>
</tr>
</tbody>
</table>
X. Attorney’s Fees and Costs 53
XI. Consultant Fees 55
XII. Interest 56
XIII. Federal Cost Accounting Standards 58

CHAPTER 3 STATUTORY SOURCES OF REMEDIES AND DAMAGES 59
Leslie O’Neal-Coble and Bradley Smith
I. Implied Warranties 59
II. Statutes 64
  A. Federal Statutes 65
  B. State Statutes 73
III. Conclusion 85

APPENDIX A STATUTES CONCERNING WARRANTIES ON NEW RESIDENCES 87

APPENDIX B STATE OPPORTUNITY TO CURE/RIGHT TO REPAIR STATUTES 89

APPENDIX C TABLES 91

CHAPTER 4 REMEDIES AND DAMAGES RELATED TO BIDDING 105
Leslie O’Neal-Coble and W. Alexander Moseley
I. Owners’ Remedies 105
  A. Bid Bond Forfeiture 106
  B. Recovery of Payments Made Under Contract Violating Competitive Bidding Statute 109
II. Contractors’ and Subcontractors’ Bidding Disputes 110
  A. Bid Protests 110
  B. Damage Claims 113
  C. Injunctive or Other Relief 116
  D. Statutory Relief 119
III. Contractors’ Remedies to Enforce Subcontractors’ Bids 120
IV. Subcontractors’ Rights Related to Bid Shopping 123

CHAPTER 5 REMEDIES AND DAMAGES AVAILABLE TO OWNERS 127
Leslie O’Neal-Coble, C. Allen Gibson Jr., and Mike Switzer
I. Introduction 127
II. Owner Damages for Defective or Incomplete Work 128
  A. Standing 128
  B. Measure of Damages 129
C. Economic Waste 131
D. Exceptions to Application of the Economic Waste Doctrine 134
E. Proof of Cost of Repair 135
F. Loss of Use 136
G. Diminution in Value 136
H. Direct and Consequential Damages 138
I. Lost Profits 141
J. Foreseeability 142
K. Calculation of Owner Delay Damages 143
L. Time of Damages Calculation 144
III. Mitigation of Damages 146
IV. Liquidated Damages 147
A. Owner’s Damages Recoverable from Performance Bond Surety 152
B. Punitive and Enhanced Damages 156
C. Emotional Distress 158
V. Conclusion 159

Chapter 6 DESIGN PROFESSIONAL LIABILITY TO CLIENTS 161
A. Holt Gwyn and C. Allen Gibson Jr.
I. Introduction 161
II. Liability for Cost Estimates 165
A. Loss of the Design Professional’s Fee 167
B. Other Damages 168
III. Costs of Correcting Defective Design 169
IV. Liability for Errors, Omissions, or Delays during Contract Administration 172

Chapter 7 CONTRACTOR AND SUBCONTRACTOR REMEDIES FOR BREACH 181
C. Allen Gibson Jr.
I. Implied Warranty of Plans and Specifications 182
II. Unforeseen Site Conditions 184
III. Delay and Acceleration 190
IV. Failure to Make Payments 193
V. Changes within the Scope of the Contract 195
VI. Changes beyond the Scope of the Contract 197
VII. Wrongful Termination 201
VIII. Impossibility or Impracticability 204
CHAPTER 8  TORT DAMAGES 207
A. Holt Gwyn

I. Introduction 207
II. Negligent Misrepresentation by Owners: Economic Damages 214
III. Negligent Misrepresentation by Design Professionals and Other Project Participants: Economic Damages 218
IV. Negligent Design: Economic, Personal Injury, and Property Damages 224
V. Negligent Construction: Economic Damages 231
   A. Negligence Claims Brought by Project Owner: Economic Damages 232
   B. Negligence Claims Brought by Third Parties: Economic Damages 235
VI. Negligence and Strict Liability in the Manufacture or Sale of Goods: Bodily Injuries and Property Damages 236
VII. Strict Liability of Owners, Design Professionals, Contractors, and Subcontractors, and Liability in Negligence for Site Safety 238
   A. Statutory Safety Obligations 240
   B. Independent Contractor Rule 241
   C. Insurance 247
VIII. Fraud 249
   A. Actual Fraud 250
   B. Constructive Fraud 253
IX. Punitive Damages 256
X. Trespass and Nuisance: Economic and Property Damages 257
XI. Tortious Interference with Contractual Relationship 259
XII. Bad Faith Claims against Sureties 261

CHAPTER 9  THE ECONOMIC LOSS RULE 267
A. Holt Gwyn

I. Introduction 267
II. The Economic Loss Rule—History and Development 269
III. The Economic Loss Rule Relating to Defective Construction Products 275
IV. The Economic Loss Rule as Applied to the Work of Contractors 285
V. The Economic Loss Rule as Applied to Professional Construction Services 292
VI. The Economic Loss Rule as Applied to the Tort of Negligent Misrepresentation 299

CHAPTER 10  CONTRACTUAL AND NEGOTIATED LIMITATIONS ON REMEDIES OR DAMAGES 305
Charles M. Sink and Jeffrey A. Sykes

I. Introduction 305
II. No-Damage-for-Delay Clauses 306
III. Waivers Due to Failure to Comply with Notice of Claim and Claim Submission Provisions 311
CONTENTS

IV. Waivers of Consequential Damages 314
V. Contractually Capped Damages Clauses 319
VI. Liquidated Damages Clauses 320
VII. Site Investigation Clauses and Unforeseen Conditions 323
VIII. Disclaimers of Warranties 329
IX. Waivers of Lien Rights 335
X. Releases 338
XI. Pay-If-Paid and Pay-When-Paid Clauses 340
XII. Integrated Project Delivery 343
XIII. Conclusion 346

Chapter 11  STATUTORY, COMMON LAW, AND CONSTITUTIONAL LIMITATIONS ON REMEDIES OR DAMAGES 347
Charles M. Sink and Jeffrey A. Sykes

I. Limits Imposed by Statutes 347
   A. Damages Limited to Appropriated Funds 347
   B. Legislative Restrictions on Damages Amounts 349
   C. Sovereign Immunity 350
   D. Legislative Restrictions on Indemnity Remedies 353
   E. Legislation Limiting Recovery for Residential Construction Defects 354

II. Common Law Limitations on Recoverable Damages 356
   A. Restrictions on Recovery of Consequential Damages 356
   B. Mitigation of Damages 357
   C. Betterment 359
   D. Economic Waste 360
   E. Reduction by Collateral Source Recovery 361
   F. Contributory Negligence or Comparative Fault 363

III. Constitutional Limits on Damages 364

Chapter 12  PROOF OF DAMAGES 367
Douglas S. Oles and Leslie O’Neal-Coble

I. Equitable Compensation 367
II. Proving the Fact and Amount of Damages 368
III. Actual Segregated Costs versus Total Cost Claims 370
IV. Allocating Delay Damages in Cases of Mixed Causation 376
V. Introducing Damages Evidence at Trial 379
VI. Expert and Lay Opinion Testimony 380

Index 391
Table of Cases 409