

CONTENTS

ABOUT THE EDITOR	IX
ABOUT THE AUTHORS	XI
FOREWORD	XV
ACKNOWLEDGMENTS	XIX
CHAPTER 1 THEORIES OF RECOVERY	1
<i>Douglas S. Oles</i>	
I. Historical Introduction	1
II. Compensatory Damages	3
III. Foreseeability	4
IV. Reliance Damages	5
V. Expectation Damages	8
VI. Equitable Theories	13
A. Rescission	13
B. Reformation	16
C. Restitution	17
D. Implied Contracts and <i>Quantum Meruit</i>	19
VII. Exemplary Damages	24
CHAPTER 2 ELEMENTS OF DAMAGES	27
<i>Douglas S. Oles</i>	
I. Direct versus Indirect Costs	27
II. Allowable Costs	29
III. Direct Labor	30
IV. Direct Materials	33
V. Direct Equipment	34
VI. Site Overhead	41
VII. Home Office General and Administrative Expenses	42
VIII. Markups for Bond Premiums, Insurance Premiums, and Taxes	49
IX. Profit	50

IV CONTENTS

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
<i>Leslie O'Neal-Coble and Bradley Smith</i>	
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
<i>Leslie O'Neal-Coble and W. Alexander Moseley</i>	
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
<i>Leslie O'Neal-Coble, C. Allen Gibson Jr., and Mike Switzer</i>	
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
<i>A. Holt Gwyn and C. Allen Gibson Jr.</i>	
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
<i>C. Allen Gibson Jr.</i>	
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
<i>A. Holt Gwyn</i>	
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
<i>A. Holt Gwyn</i>	
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
<i>Charles M. Sink and Jeffrey A. Sykes</i>	
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

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
<i>Charles M. Sink and Jeffrey A. Sykes</i>	
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
<i>Douglas S. Oles and Leslie O'Neal-Coble</i>	
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