Chapter Eighteen

Damages

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CHAPTER 18: DAMAGES

18.01 Introduction

The instructions contained in Chapter Eighteen address damages, the final piece of the litigation puzzle. These instructions begin with an explanation of the traditional concept of compensatory damages, including standards of proof and the requirements of causation and foreseeability. Instructions related to lost profits, liquidated damages, cost of completion or correction of defective work, and interest are also included. The total-cost theory of recovery, which is often invoked by the contractor when it cannot link its damages to a specific breach of contract, is also addressed. Finally, the instructions address the distribution of responsibility among the various parties to the construction dispute, including allocation of delays between the owner and contractor and apportionment of damages among multiple defendants.

18.02 Explanation of Damages

If you find that the plaintiff has proved by a preponderance of the evidence that defendant has breached the contract, then you may consider what damages, if any, are due the plaintiff.

Of course, the fact that I give you instructions on damages should not be taken as an indication that I think damages should be, or should not be, awarded. That is a determination that is left entirely to you, the jury. I am instructing you on principles governing damage awards so that, in the event you should find the defendant liable, you will know on what basis to consider any award of damages.
18.03 Compensatory Damages—Breach of Contract

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, arising from the defendant’s breach of the parties’ contract. In this case, if you find that the defendant breached the contract, then you must award sufficient damages to compensate the plaintiff for any damages proximately caused by the defendant. These damages are known as **compensatory damages**. Compensatory damages seek to make the injured party whole—that is, to compensate the party for the damages that it suffered.

Compensatory damages represent a sum of money that will fairly, adequately, and reasonably compensate a party for harm caused by another’s conduct. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize a defendant. Compensatory damages for breach of contract are designed under the law to place the injured party in as good a monetary position as it would have enjoyed if performance of the contract had been rendered as promised. You should not award damages that would place the plaintiff in a better position than it would have been if the defendant had not breached the contract.

**Comment**

A court is entitled to determine the appropriate measure of damages based on the non-breaching party’s expectation, restitutionary, or reliance interests. *Restatement (Second) of Contracts* § 344 cmt. a (1981). The measure of damages articulated here is drawn from the *Restatement (Second) of Contracts* § 347. The jury should also understand that the principles set forth in this instruction are subject to other limitation in this part and otherwise such as the duty to mitigate damages as explained in Chapter Nine, the limitations on damages based on unforeseen circumstances as explained in this chapter, and the limitations on damages arising from uncertainty, as explained in this chapter. Recoverable damages in a breach of contract action must be a natural and ordinary result of the breach and reasonably foreseeable and within the contemplation of the parties at the time they made the contract. *Taylor v. Kaufhold*, 84 A.2d 347 (Pa. 1951).
The general understanding of the purpose and limitations of compensatory damages is almost universally accepted. See California Civil Jury Instruction (BAJI) § 10.90; Chattin v. Cape May Greene Inc., 581 A.2d 91 (N.J. Super. Ct. 1990), aff’d, 591 A.2d 943 (N.J. 1991); Midland Hotel Corp. v. Reuben H. Donnelley Corp., 515 N.E.2d 61 (Ill. 1987); Kravitz v. Pressman, Frohlich & Frost Inc., 447 F. Supp. 203, 216 (D. Mass. 1978); see also Restatement (Second) of Contracts §§ 344–345 (purposes of remedies and judicial remedies available). As a general rule, damages for breach of contract are limited to compensation for pecuniary loss sustained. Kamlar Corp. v. Haley, 299 S.E.2d 514, 517 (Va. 1983); A&E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 671 (4th Cir. 1986), cert. denied, 479 U.S. 1091 (1987). The purpose of an award of damages is to make the injured party whole—that is, to put it in as good a position, to the extent possible, as it would have been if the contract had been performed. United States v. Algernon Blair Inc., 479 F.2d 638, 641 (4th Cir. 1973); Restatement (Second) of Contracts § 347. Although the law presumes nominal damages for a breach of a valid contract, it does not presume compensatory damages. Orebaugh v. Antonious, 58 S.E.2d 873, 875 (Va. 1950). Instead, the non-breaching party must prove it sustained compensatory damages based on competent evidence. Id. The non-breaching party must also prove that the amount claimed is a reasonable summation of compensatory damages. Minn. Lawyers Mut. Ins. Co. v. Batzli, 442 F. App’x 40, 52 (4th Cir. 2011).

The court in *Eastlake Construction Co. v. Hess*, 686 P.2d 465 (Wash. 1984), held that the measure of damages depends on whether there has been “substantial performance” of the contract applicable only when the project is substantially complete. Substantial completion requires a high percentage of completion and the availability of the project for its intended use. *See supra* Chapter Six, Part Six. Where there is such performance, the measure of damages was the cost of completing the structure as contemplated by the contract. *Ballou v. Basic Constr. Co.*, 407 F.2d 1135, 1140 (4th Cir. 1969).

The doctrine of substantial performance is not a complete defense to liability for breach of contract but is designed rather to prevent total forfeiture by a contracting party that is guilty of only trivial breaches of contract. In application, the doctrine is a rule of damages, which operates only to ensure payment by a party that has obtained substantially what it bargained for. *See supra* Chapter Six, Part Six.

### 18.04 Expectation Damages

Expectation damages are the damages necessary to place the plaintiff in the position it would have been if the defendant had performed the contract.

**Comment**

Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the “expectation interest.” It is sometimes said to give the injured party the “benefit of the bargain.” This is not, however, the only interest that may be protected. *Restatement (Second) of Contracts* § 344(a).

The *Restatement (Second) of Contracts* § 347 provides:

(subject to the limitations stated in §§ 350–53), the injured party has a right to damages based on his expectation interest as measured by
(a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach, less
(c) any cost or other loss that he has avoided by not having to perform.

In the context of a construction contract in which the builder is precluded from completing its performance by a material breach of the owner, this means that the builder is entitled to receive the “contract price (or so much as remains unpaid) less the amount it would cost the builder to complete the job.” CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 164 (1935). In a breach of contract claim, expectation damages—that is, the amount of a party’s expectancy had the contract been fulfilled—are recoverable, if proven. Metro. Prop. & Cas. v. Harper, 168 Or. App. 358, 369 (2000).

18.05 Reliance Damages

Reliance damages attempt to restore the plaintiff to the position it would have occupied if the breached contract or promise had never been made. If you find that the plaintiff was damaged by relying on a contract, you may award the plaintiff the amount of damages to restore the plaintiff to its position prior to contracting.

Comment

A court may utilize a reliance measure where a party changes its position in reliance on a contract. RESTATEMENT (SECOND) OF CONTRACTS § 344. Reliance damages attempt to restore the plaintiff to the position it would have occupied if the breached contract or promise had never been made. See id. § 344(b). The promisee may have changed its position in reliance on the contract by, for example, incurring expenses in preparing to perform, in performing, or in foregoing opportunities to make other contracts. In that case, the court may recognize a claim based on the promisee’s reliance rather than on its expectation. This happens by attempting to put the
promisee back in the position in which it would have been had the contract not been made. The interest protected in this way is called “reliance interest.” Although it may be equal to the expectation interest, it is ordinarily smaller because it does not include the injured party’s lost profit.

Courts may allow plaintiffs to pursue reliance damages as an alternative to the recovery of lost profits. Reliance damages are generally representative of the plaintiff’s cost of performance portion of expectation damages. Crown Coal & Coke Co. v. Powhatan Mid-Vol Coal Sales LLC, 929 F. Supp. 2d 460, 472 (W.D. Pa. 2013) (citing Nat’l Controls Corp. v. Nat’l Semiconductor Corp., 833 F.2d 491 (3rd Cir. 1997)).

Reliance damages are also appropriate when a bidder fails to perform and a contractor has to award a bid to the next subcontractor, creating a difference in price. See, e.g., John Price Assocs. Inc. v. Warner Elec. Inc., 723 F.2d 755, 756–57 (10th Cir. 1983) (appropriate measure of damages for general contractor’s promissory estoppel claim was the difference between nonperforming electrical subcontractor’s bid and the bid of the substituted subcontractor that completed the work); Preload Tech. v. A.B. & J. Constr. Co., 696 F.2d 1080, 1091, 1093 (5th Cir. 1983) (damages were properly calculated as the difference between the original subcontractor’s bid and the replacement subcontractor’s bid); Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d 772, 780 (7th Cir. 1976) (general contractor was entitled to award representing the difference between subcontractor’s quoted prices for certain construction materials and the cost of replacement materials); Double AA Builders Ltd. v. Grand State Constr. LLC, 114 P.3d 835, 837, 843 (Ariz. Ct. App. 2005) (upholding award consisting of the difference between nonperforming insulation subcontractor’s bid and the cost of a replacement subcontractor); Riley Bros. Constr. Inc. v. Shuck, 704 N.W.2d 197, 204 (Minn. Ct. App. 2005) (damages were properly computed as the difference between masonry subcontractor’s unperformed bid and the amount paid to two replacement subcontractors to complete the work); Branco Enters. v. Delta Roofing, 886 S.W.2d 157, 158, 161 (Mo. Ct. App. 1994) (award based upon the difference between roofing subcontractor’s bid and the amount a substitute subcontractor charged was necessary to prevent injustice).
18.06 Restitutionary Damages

Restitutionary damages are those damages necessary to return the benefit that the plaintiff conferred on the defendant in reliance on the contract.

Comment
See Restatement (Second) of Contracts § 344(c). Restitutionary damages are appropriate when a party has not only changed its own position in reliance on the contract but has also conferred a benefit on the other party by, for example, making a part payment or furnishing services under the contract. The court may then require the other party to disgorge the benefit that it has received by returning it to the party who conferred it. The interest of the claimant protected in this way is called the “restitution interest.” Although it may be equal to the expectation or reliance interest, it is ordinarily smaller because it includes neither the injured party’s lost profit nor that part of its expenditures in reliance that resulted in no benefit to the other party.

In some cases a party’s choice of the restitution interest is dictated by the fact that the agreement is not enforceable, perhaps because of his own breach (§ 374), as a result of impracticability of performance or frustration of purpose (§ 377(1)), under the Statute of Frauds (§ 375), or in consequence of the other party’s avoidance for some reason as misrepresentation, duress, mistake or incapacity (§ 376). Occasionally a party chooses the restitution interest even though the contract is enforceable because it will give a larger recovery than will enforcement based on either the expectation or reliance interest. These rare instances are dealt with in § 373. Sometimes the restitution interest can be protected by requiring restoration of the specific thing, such as goods or land, that has resulted in the benefit. See § 372. Where restitution in kind is not appropriate, however, a sum of money will generally be allowed based on the restitution interest. See § 371.

Restatement (Second) of Torts, Sec. 344(c).
18.07 Reasonable Certainty

In awarding compensatory damages, if you so decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork.

On the other hand, the plaintiff is not required to prove its damages with mathematical certainty; rather, it need only prove a sufficient basis for estimating the damages with reasonable certainty. The measurement of damages cannot be based on speculation because only actual, or compensatory, damages are recoverable. You must not guess or speculate about damages that the plaintiff has failed to prove. You may not award damages unless the plaintiff offered evidence to establish those damages with a reasonable certainty. You must be able, in view of the evidence offered, to arrive with a reasonable degree of certainty at some conclusion about what the plaintiff lost as a result of the defendant’s breach of the contract.

Difficulty in ascertaining the amount of damages is not to be confused with the right of recovery. If the plaintiff has produced the best evidence available and if it is sufficient to support a reasonable basis for estimating the loss, the plaintiff is not to be denied recovery because the amount of the damages is incapable of exact ascertainment. In all instances, you are to use sound discretion in fixing an award of damages, if any, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

Comment


Generally, reasonable certainty depends largely on the extent to which the particular damage in issue is susceptible of accurate proof. *Dep’t of Transp.*

There are specific rules of damages formulated for particular situations, which are subordinate to the broad rule of damages expressed above. These subsidiary rules of damages as well as the broad rule require considered judicial discretion as to their applicability in a particular situation. *See 525 Main St. Corp. v. Eagle Roofing Co.*, 168 A.2d 33 (N.J. 1961). A number of the instructions provided in this part constitute such subsidiary issues.

This limitation on damages is recognized in the *Restatement (Second) of Contracts* § 352. The comments go on to state that doubts are generally resolved against the party in breach. *See Restatement (Second) of Contracts* § 352 cmt. a. The recognition that damages are not always exactly calculable comes from UCC § 1-106 (1).

### 18.08 Causation and Foreseeability

Recovery in any contract action requires the plaintiff to prove that the damages are the proximate consequence[s] of the breach and that the damages were reasonably foreseeable at the time the parties entered into the contract.

The proximate consequences of an act or omission are those that follow from the breach in the ordinary course of events. They are the usual consequences that might reasonably have been expected. This is different from
remote consequences, which are the unusual and unexpected result, not reasonably to be anticipated from an accidental combination of circumstances or a result over which the defendant had no control. Stated another way, a proximate cause is a “but for” circumstance where the damages would not have occurred “but for” the defendant’s breach of contract.

The plaintiff is required to prove that its damages, if any, were foreseeable to the defendant at the time the parties entered into the contract. This does not mean that the defendant must actually have foreseen the particular loss or damage suffered by the plaintiff. All that is required is that the plaintiff prove by a preponderance of the evidence that a reasonable party in the position of the defendant would have foreseen the harm as a probable result of the breach. Damages are foreseeable if they either (1) follow from the breach in the ordinary course of events or (2) follow from the breach as a result of circumstances that the party in breach had reason to know.

Damages are not recoverable for losses that the defendant did not have reason to foresee as a probable result of the breach when the contract was made.

In establishing proximate causation, the plaintiff must segregate any of its damages caused by the defendant from those damages caused (1) by third parties, (2) by itself, or (3) through no one’s fault. If you find that the plaintiff has failed to prove what portion of its damages, if any, were proximately caused by the defendant, then you may not award the plaintiff any damages in this case.

The plaintiff must prove both causation and foreseeability by a preponderance of evidence.

Comment
Much of this instruction is formulated from the Restatement (Second) of Contracts § 351 and generally follows the rule in Hadley v. Baxendale, 9 Exch. 341 (1854). Similar principles are applicable to the sale of goods. See U.C.C. §§ 2-714(1), 2-715(2).

A party seeking consequential damages must establish that it incurred the claimed costs and that they were foreseeable because the parties specifically contemplated them or reasonably could have contemplated them at the time the contract was executed. See, e.g., Perini Corp. v. Greate Bay Hotel
Casino Inc., 610 A.2d 364 (N.J. 1992) (lost profits deemed foreseeable); Roanoke Hosp. Ass’n v. Doyle & Russell Inc., 214 S.E.2d 155, 160 (Va. 1975) (extended financing costs were foreseeable; higher interest rates for financing were not); Peter Kiewit Sons’ Co. v. Summit Constr. Co., 422 F.2d 242 (8th Cir. 1969) (lost profits on other projects too speculative); Mock v. Cook, 134 Wash. App. 1058 (2006) (extra month of rent was foreseeable result of the breach); Captain & Co. v. Stenberg, 505 N.E.2d 88, 98–99 (Ind. Ct. App. 1987) (final cost of reconstruction exceeding the insurance proceeds and difference being paid by plaintiffs’ own funds deemed foreseeable); Wilcher v. Amerititle Inc., 157 P.3d 790, 794–95 (Or. Ct. App. 2007) (harm to general contractor’s ability to obtain credit, reputation for paying bills, attorney fees, and other costs incurred to litigate subcontractor’s construction lien were not reasonably foreseeable).

The general rationale underlying the foreseeability principle is that a party that can reasonably foresee the consequences of a breach of contract can adjust the contract price accordingly to compensate for the risk that is being assumed.

The section on proximate consequences is adapted from a section on torts found in 22 Am. Jur. 2d Damages § 477, which also supplements the definition of remote consequences by adding (1) an injury caused by the intervention of some diverting force that is the actual proximate cause and (2) an injury resulting from the defendant’s activity when the force set in motion has so spent itself as to be too small for the law’s notice. Also see 22 Am. Jur. 2d Damages § 32 for a discussion of the distinction between damages in tort and contract actions.

The case of National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491 (Ct. App. 3d Cir. 1987), states that “[t]he element of causation defines the range of socially and economically desirable recovery” and requires not only “but-for” causation in fact” but also “that the conduct be a ‘substantial factor’ in bringing about the harm.”

The burden of proof element in this instruction can be found in Lichter v. Mellon-Stuart Co., 305 F.2d 216 (3d Cir. 1962).
18.09 Allocation of Delays

In this case, the owner seeks damages for the contractor’s delay in completing the contract. If you find that the owner is partly responsible for those delays, then it is appropriate that you subtract any amounts arising from delays caused by the owner from any damages you award against the contractor. The owner has the burden to prove by a preponderance of the evidence how to properly divide damages resulting from the delay.

The owner cannot recover from the contractor any amounts that the owner cannot establish with reasonable certainty were caused by the contractor.

Comment


It is important to distinguish between costs resulting from the defendant’s breach and costs resulting from other parties or factors. See Rossi v. Mobil Oil Corp., 710 F.2d 821, 834–35 (Temp. Emer. Ct. App. 1983). The cases generally hold that allocation of respective delays among multiple parties
is an issue of fact for the jury to determine based on relative fault. See, e.g., *Robinson v. United States*, 261 U.S. 486 (1923); *Carter Elec. Co. v. Travelers Indem. Co.*, 382 F.2d 567 (10th Cir. 1967); *J.D. Hedin Constr. Co. v. United States*, 347 F.2d 235 (Ct. Cl. 1965). In *Lichter v. Mellon-Stuart Co.*, 305 F.2d 216 (3d Cir. 1962), a subcontractor’s total cost claim was rejected because of the inability to determine “if on the record any substantial part of the added cost of performance was chargeable to non-actionable causes rather than to any breach of contract by [the general contractor].” **219.

Some courts have recognized that damages cannot necessarily be apportioned on a precise, mathematical basis and that the level of certainty required is the reasonable certainty otherwise applicable in determining an appropriate calculation of damages when there is a breach of contract. See, e.g., *Am. Sanitary Sales Co. v. Dep’t of Treasury*, 429 A.2d 403 (N.J. Super. Ct. 1981); *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. 1978). See supra Ch. 10.02. Nonetheless, most courts now require the use of a critical path method schedule analysis as a minimum acceptable standard to prove the cause and impact of delay. See generally J. Wickwire & S. Hurlbut, *Use of Critical Path Method Techniques in Contract Claims: Issues and Developments*, 18 PUB. CONT. L.J. 338 (1989).

18.10 Multiple Defendants—Apportionment of Damages

The court has determined that the damages sustained by the plaintiff must be apportioned among the defendants. It is your duty to determine the amount of damages caused by each defendant.

The party seeking to apportion damages bears the burden of proving how they should be apportioned by a preponderance of the evidence.

Comment

This instruction assumes that the court has found, as a matter of law, that the damages are apportionable and that the liability among the parties should be apportioned rather than joint. In the court’s determination regarding apportionability, the party seeking to apportion the damages bears the burden of proof. *Mathews v. Mills*, 178 N.W.2d 841 (Minn. 1970). This...
is also the case with respect to how the damages should be apportioned. In each case, the rationale is that the parties at fault have access to more information regarding the nature and causation of the damages than does the injured party. Id. at 845; see also Rowe v. Munye, 674 N.W.2d 761, 768 (Minn. Ct. App. 2004), aff’d, 702 N.W.2d 729 (Minn. 2005) (citing Hagsten v. Simberg, 44 N.W.2d 611, 613 (Minn. 1950)).

Where the injury is not divisible, meaning it is not possible to determine which action caused which injury or which action caused what part of a comprehensive injury, there is no need to apportion damages because liability is joint and several. See, e.g., Maday v. Yellow Taxi Co., 311 N.W.2d 849, 850 (Minn. 1981).

A court may reallocate apportioned damages, assigned to a defendant that is not in breach of contract, to other parties in proportion to their respective share of liability. Lesmeister v. Dilly, 330 N.W.2d 95, 100 (Minn. 1983) (finding that a five percent inconsistency of apportionment does not justify a new trial but does warrant a reallocation of damages).

18.11 Total-Cost Theory of Recovery

In a construction case such as the one before you, a plaintiff who seeks recovery from a defendant must link, or tie, its damages to specific breaches of contract, and it must prove its damages with a reasonable degree of certainty.

Here, the contractor admits that it cannot link specific damages to specific breaches of contract and that it cannot prove its damages with a reasonable degree of certainty.

The contractor may still be permitted to calculate its damages, however, under what is known as a total-cost theory. To recover any sums under the total-cost theory of damages, the contractor must prove by a preponderance of the evidence each of the following:

(1) that the nature of the particular losses it suffered makes it impossible to attach a dollar figure to determine them with a reasonable degree of certainty;
(2) that the contractor’s bid for the contract was both a realistic and accurate bid when made;

(3) that the contractor’s actual costs spent on the project were reasonable under the circumstances; and

(4) that the contractor was not responsible for its additional costs to complete the job because of its own delays and mismanagement.

If the contractor fails to prove any one of these elements by a preponderance of the evidence, then you may not award the contractor damages. If the contractor has proved these elements, then you may award damages calculated by the difference between the contractor’s actual costs on the project, plus a reasonable amount for overhead and profit, less what it has been paid so far on the contract.

Comment
This instruction assumes that the court has determined that a total-cost approach is appropriate. This methodology is applied in cases where the owner’s interference with the contractor’s ability to complete the contract makes it nearly impossible to account for each breach by the owner and for the resulting damages to the contractor from each delay. See GCS Inc. v. Foster Wheeler Corp., 437 F. Supp. 764, 767 (W.D. Pa. 1977), aff’d without opinion, 578 F.2d 1374 (3d Cir. 1978). This allows the contractor to recover all of the costs incurred on the project and assumes that, but for the breach of the owner, the contractor would have made a profit, that the contractor’s bid was perfect, that all recorded costs were reasonable, and that the contractor was blameless. See Geolar Inc. v. Gilbert, 874 P.2d 937 (Alaska 1994); see also United States ex rel. Taylor & Polk Constr. v. Mill Valley Constr. Co., 29 F.3d 154 (4th Cir. 1994). As a result, courts have generally applied four prerequisites to application of the total-cost method: (1) the nature of the particular damages make it difficult to determine them with the normal degree of requisite certainty, (2) the plaintiff’s original bid was realistic, (3) the claimed actual costs of the plaintiff are reasonable in light of the work done, and (4) the plaintiff was not itself at fault for the interference. In re Meyertech Corp., 831 F.2d 410, 419–20 (3d Cir. 1987); John F. Harkins Co. v. Sch. Dist., 460 A.2d 260 (Pa. Super. Ct. 1983); Highland...
Constr. Co. v. Union Pac. R.R., 683 P.2d 1042, 1046–47 (Utah 1984). Typically, courts will not accept the total-cost method when alternative means of calculation are available. In re Meyertech Corp., 831 F.2d 410. Indeed, it has been stated that this method “has never been favored by the court and has been tolerated only when no other mode was available and when the reliability of the supporting evidence was fully substantiated.” See Meva Corp. v. United States, 511 F.2d 548 (Ct. Cl. 1975).

However, one court determined a modification of the total-cost approach, in the form of a force-account provision called for by the contract, that may be implemented if the breaching party originally agreed to the use of the force-account method. Pa. Dep’t of Transp. v. Trumbull Corp., 513 A.2d 1110, 1113 (Pa. Commw. Ct. 1986).

In Thalle Construction Co. v. Whiting-Turner Contracting Co., 945 F. Supp. 652 (S.D.N.Y. 1996), the court took the subcontractor’s total costs after the delay event, subtracted payments received from the prime contractor, and finally subtracted those costs that could be attributed to factors that were not the prime contractor’s responsibility. This is often called the modified total-cost method, and it attempts to address each of the assumptions inherent in a pure total-cost claim. Typically, adjustments are made for errors in the bid, costs that were not reasonably incurred, and costs for which the contractor is responsible. See Glasgow Inc. v. Dep’t of Transp., 529 A.2d 596 (Pa. Commw. Ct. 1982); Bagwell Coatings Inc. v. Middle S. Energy Inc., 797 F.2d 1298 (5th Cir. 1986).

18.12 Lost Profit

In this case, the contractor claims that defendant [owner] breached the contract between them. The plaintiff [in part] seeks the profits that it would have received under the contract as damages.

You may award damages based on anticipated profits if the plaintiff can show with reasonable certainty the amount of profits the plaintiff would have received if the contract had been performed to completion by both parties.
Lost profits are recoverable when (1) they are within the contemplation of the parties at the time the contract was made—that is, that it is reasonably probable that profits would have been earned except for the breach—(2) they are the proximate result of defendant’s breach, and (3) the amount of loss can be proved with reasonable certainty. The plaintiff must produce evidence sufficient to afford a reasonable basis for estimating its loss. Damages for profits that are unsatisfactorily proved, remote, or speculative cannot be recovered.

Comment

In some instances where contractors have been required to perform extra work because of the owner’s interference, the contractor has attempted to recover for the profit that it normally would have received in furnishing that extra work. Courts may not recognize this extra profit as a compensable damage in some cases. See, e.g., C.J. Langenfelder & Son Inc. v. Dep’t of Transp., 404 A.2d 745 (Pa. Commw. Ct. 1979). But see Pa. Dep’t of Cnty. Affairs v. Craftech Int’l Ltd., 456 A.2d 247, 250–52 (Pa. Commw. Ct. 1983). However, the instruction stated here reflects the general rule that a contractor is entitled to the “benefit of his bargain,” meaning the profits reasonably anticipated under the original contract. See Dep’t of Cnty. Affairs v. Craftech Int’l Ltd., 456 A.2d 247. In other words, “[w]hen a contract is breached, the injured party is entitled to be placed in the position he would have been in had the contract been performed and is entitled to whatever net gain he would have made under the contract.” Maloney v. Pihera, 573 N.E.2d 1379 (Ill. App. Ct. 5th Dist. 1991).

Lost profits and other anticipatory damages are not recoverable in a breach of contract action unless the complaining party can establish that such loss was reasonably foreseeable at the time the contract was made. Duggin v. Williams, 353 S.E.2d 721, 723–24 (Va. 1987); Kraft Foods N.
Am. Inc. v. Banner Eng’g Sales Inc., 446 F. Supp. 2d 551, 572–73 (E.D. Va. 2006). Further, “damages are recoverable for loss of profits prevented by a breach of contract only to the extent that evidence affords a sufficient basis for estimating their amount with reasonable certainty.” Boggs v. Duncan, 121 S.E.2d 359, 363 (Va. 1961) (“profits which are remote, speculative, contingent or uncertain are not recoverable”); Water Eng’g Consultants Inc. v. Allied Corp., 674 F. Supp. 1221, 1224 (S.D. W. Va. 1987); see supra Ch. 10.03.

For example, profits “from an activity dependent on uncertain or changing market conditions, or on chance business opportunities, or on promotion of untested products or entry into unknown or unviable markets, or on the success of a new and unproven enterprise, cannot be recovered.” Tex. Instruments Inc. v. Teletron Energy Mgmt. Inc., 877 S.W.2d 276, 279 (Tex. 1994). Some courts hold that no recovery of lost profits is permitted when, under the new business rule, “profits of a new business are considered too remote and speculative to meet the legal standard of reasonable certainty.” RSB Lab. Servs. Inc. v. BSI Corp., 847 A.2d 599, 609 (N.J. Super. Ct. App. Div. 2004) (citations omitted).


18.13 Liquidated Damages

In some cases, such as that presented here, the parties incorporate in a contract the conditions on which damages will be assessed for a breach of the contract or the amount of damages to be paid. This is known as a “liquidated damages” provision.
A liquidated damages provision is enforceable if (1) the amount fixed is a reasonable forecast of the just compensation for the harm caused by the breach and (2) the harm caused by the breach is one that is incapable or very difficult of accurate estimation.

It is the policy of the courts to hold the parties to their express contract for liquidated damages. The burden is on the defendant to prove the stipulation of the parties if it wishes to show that only a penalty was intended. Each case on liquidated damages must be determined on its own facts.

Comment

Liquidated damages provisions are often relied on by an owner to withhold funds from a contractor for delayed completion of a project. In a suit by a contractor to recover amounts withheld as liquidated damages, an owner should be prepared to show how the liquidated damages rate was determined. *Roblin Constr. Co. v. Hinton*, 476 N.W.2d 78 (Iowa 1991).

It sometimes happens that provisions for liquidated damages are really stipulations for penalties or forfeitures against which the courts, in most cases, will not enforce. See, e.g., *Rye v. Pub. Serv. Mut. Ins. Co.*, 315 N.E.2d 458 (N.Y. 1974); *Wilt v. Waterfield*, 273 S.W.2d 290 (Mo. 1954).


However, the court’s inquiry and evaluation still “requires the resolution of questions of fact.” *Liberty Life Ins. Co. v. Thomas B. Hartley Constr. Co.*, 375 S.E.2d 222, 223 (Ga. 1989); *Gopman v. Northcutt*, 428 So. 2d 303 (Fla. Dist. Ct. App. 1983). Moreover, the provision at issue may be considered a question of fact for a jury when the court cannot ascertain if the stipulated sum is disproportionate, and the language is not clear as to the provision’s role as a penalty or calculation of damages. *Benya v. Gamble*, 321 S.E.2d 57, 62 (S.C. Ct. App. 1984).

A liquidated damages clause in a contract will be enforced when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness, and when the amount fixed is not out of all proportion to the probable loss. *Brooks v. Bankson*, 445 S.E.2d 473 (Va. 1994); *Taylor v. Sanders*, 353 S.E.2d 745, 747 (Va. 1987). Contract language, such as the word “forfeited,” does not determine whether the clause is a penalty clause. *Brooks*, 445 S.E.2d 473. “No matter how clearly such penalty clauses are written, courts as a matter of public policy should decline to enforce an agreement which clearly is not one for true liquidated damages.” *John Jay Esthetic Salon Inc. v. Woods*, 377 So. 2d 1363, 1367 (La. Ct. App. 1979); see also Va. Unif. Commercial Code § 8.2-718(1) (“term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy”); *Restatement (Second) of Contracts § 356(1) (1979).*

In *Brooks*, a 10 percent liquidated damages clause was enforced in a real estate sale case. Liquidated damages clauses calling for a 5 percent payment are routinely enforced. Nonetheless, when “contractual provisions for a fixed sum to be paid as damages for a contractual breach would be ‘grossly in excess of actual damages, courts of law usually construe such a stipulation as an unenforceable penalty.’” *Brooks*, 445 SE 2d 473, 248 Va. at 210 (Whiting, J., dissenting) (citing *Taylor*, 353 S.E.2d at 747); see also *Colonna Dry Dock Co. v. Colonna*, 61 S.E. 770, 774 (Va. 1908) ($15,000 deemed an excessive penalty on $185,000 contract).

However, courts may render a contract enforceable even if a provision includes both liquidated damages and an option to pursue additional damages. *Bartley v. Merrifield Town Ctr. LP*, 580 F. Supp. 2d 495, 503 (E.D. Va. 2008).

“A liquidated damages provision in a construction contract will be enforced for each day of delay beyond the completion date, so long as the liquidated damages clause is not a penalty.” *Hous. Auth. of City of Chickasaw v. CBE Inc.*, 656 So. 2d 1219, 1221 (Ala. Civ. App. 1995) (quoting *Cove Creek Dev. Corp. v. APAC-Ala. Inc.*, 588 So. 2d 458 (Ala. 1991)). Liquidated damages start to accrue on the deadline for project substantial completion in the contract. However, excusable delay can be shown...
to extend the deadline and mitigate a liquidated damages assessment. See, e.g., Koko Contracting Inc. v. State, 626 N.Y.S.2d 886 (A.D. 1995) (necessary winter shutdown entitled contractor to an extension and precluded assessment of liquidated damages). To receive the extension for excusable delay, a contractor must follow whatever guidelines are established in the contract. In Cove Creek Development Corp. v. APAC-Alabama Inc., 588 So. 2d 458 (Ala. 1991), the contract specified that written requests for time extensions had to be submitted within 20 days of commencement of the delay. The contractor failed to comply, and liquidated damages started to accrue even though the delay was excusable.

### 18.14 Cost of Correction or Completion—Defective Construction

The court instructs you that if you find from the evidence that the contractor was to perform its work in a good and workmanlike manner [or that the material, or some part thereof was defective], and if you further find from the evidence that said work was not done in a good and workmanlike manner, that the material furnished was not of good and merchantable quality [or otherwise that the contractor breached the contract], and that the owner was damaged by reason thereof, you must find for the owner in such sum as you find the owner is damaged. Ordinarily, the damages to be recovered will be the cost of repairing or completing the work so that it meets the terms of the contract or specifications agreed to by the parties.

However, if a defect cannot be repaired at a cost that is reasonably proportionate to the benefit to be obtained, or if correcting the defective work would entail an unreasonable destruction of the contractor’s work, then the damages shall be measured not by the cost of remedying the defect but by the difference between the value of the work as it is and what it would be worth if it had been built in conformity with the plans and specifications.

**Comment**

Owners are entitled to require contractors to comply with contract specifications. Madigan v. Hobin Lumber Co., 986 F.2d 1401, 1403–04 (Fed. Cir.)
An owner’s right to insist on strict compliance, however, is not unlimited and is circumscribed by the doctrine of economic waste. *Granite Constr. Co. v. United States*, 962 F.2d 998 (Fed. Cir. 1992). This principle is generally recognized by the Restatement (Second) of Contracts § 348(2). For example, strict compliance is not warranted when the contractor has demonstrated that his or her work “was at least equal if not better than the specified product, or that the contractor substantially performed under the contract.” *Crest Inc. v. Costco Wholesale Corp.*, 115 P.3d 349, 354 (Wash. Ct. App. 2005).

Generally, the measure of damages for breach of contract when a contractor has provided less than full performance or has provided defective work is the cost of correcting the defective condition. See *Park v. Sohn*, 433 N.E.2d 651 (Ill. 1982). The so-called cost rule is appropriate unless the cost to repair would be grossly disproportionate to the results to be obtained or would involve unreasonable economic waste, in which case the diminution-of-value rule would apply. *Lochaven Co. v. Master Pools by Schertle Inc.*, 357 S.E.2d 534 (Va. 1987). The determination of which rule applies is contingent on the facts and circumstances of each case. *Green v. Burkholder*, 160 S.E.2d 765 (Va. 1968); see also *Westlake Props. Inc. v. Westlake Pointe Prop. Owners Ass’n Inc.*, 639 S.E.2d 257, 268 (Va. 2007) (finding that a combination of removal, replacement, and repair is the most cost-effective method of remedying the damages).

“If the defect is remediable from a practical standpoint, recovery generally will be based on the market price of completing or correcting the performance and this will generally be shown by the cost of getting work done or completed by another person.” *Kirk Reid Co. v. Fine*, 139 S.E.2d 829, 835 (Va. 1965) (quoting Williston on Contracts § 1363, at 3825–26). Examples of irreparable defects include completed swimming pools that were too shallow or narrow to accommodate the planned diving board. *See Lochaven*, 357 S.E.2d 534; *Ideal Pool Co. v. Hipp*, 370 S.E.2d 32 (Ga. Ct. App. 1988).

(Fla. 1982). In *Di Mare v. Capaldi*, 146 N.E.2d 517, 520–21 (Mass. 1957), the court deducted the unpaid difference between the contract price and the sum, which the plaintiffs had already paid under the contract, from the damages to be paid by the defendant. See *Ficara v. Belleau*, 117 N.E.2d 287, 289 (Mass. 1954) (“It is not the policy of our law to award damages which would put a plaintiff in a better position than if the defendant had carried out his contract”); *Ideal Pool Co.*, 370 S.E.2d 32 (in applying “value” rule, court found it an “unconscionable advantage” to allow owner to benefit from contractor’s repeated performance).

In construction cases most jurisdictions follow the rule against economic waste, as stated in *Restatement of Contracts* § 346 (1)(a):

(a) For defective or unfinished construction [the owner] can get judgment for either (i) the reasonable cost of construction and completion in accordance with the contract, *if this is possible and does not involve unreasonable economic waste*; or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, *if construction and completion in accordance with the contract would involve unreasonable economic waste* (emphasis added).

See also *Kirk Reid Co. v. Fine*, 139 S.E.2d 829 (Va. 1965).

Some courts applying the rule of economic waste in construction cases have used the relationship between the cost of remedial work and the cost or value of the structure to determine whether remedial work constitutes economic waste; however, there is no consistent mathematical rule. See *Correa v. Maggiore*, 482 A.2d 192 (N.J. Super. Ct. 1984) (finding economic waste in $33,000 repair on a home that sold for $25,000); *Asp v. O’Brien*, 277 N.W.2d 382, 384 (Minn. 1979) (finding economic waste when cost of repair exceeded original cost of building component); *Andrus v. Levin*, 628 A.2d 197, 206 (Md. 1993) (increasing difference-in-value award to cost-of-repair award when the cost of repair was 4.35 percent of contract price for house); *R.I. Tpk. & Bridge Auth. v. Bethlehem Steel Corp.*, 379 A.2d 344, 356 (1977), *vacated on other grounds*, 415 A.2d 1295 (1980) (finding no economic waste when cost of repair was 25 percent of contract...

Where remedial work is performed that is not considered economic waste to put a building in the condition contracted for by the parties and defendant shows that the work could have been performed at a lower cost, then damages may be reduced by the difference between the necessary amount and the amount claimed. First Nat’l Bank of Akron, 503 F. Supp. at 441. The reasonable cost of repairs is the appropriate measure of damages. See, e.g., Williams v. Chas. Sloan Inc., 706 S.W.2d 405, 406 (Ark. Ct. App. 1986) (citing Jacobs & Youngs Inc. v. Kent, 129 N.E. 889 (N.Y. 1921)).

Furthermore, a court may grant damages to a plaintiff that include both loss of value and cost of repair if the total value is still less than the building’s value would have been if it had been properly constructed by defendant. N. Petrochemical Co. v. Thorsen & Thorshov Inc., 211 N.W.2d 159, 165 (Minn. 1973) (finding that combined damages also did not exceed either the diminution of value without any reconstruction or the costs of complete reconstruction). Courts may also allow a jury to consider cost of repair where the appropriate measure of damages is ruled to be the diminution in value of a building. St. Louis LLC v. Final Touch Glass & Mirror Inc., 899 A.2d 1018, 1027 (N.J. Super. Ct. App. Div. 2006) (finding no economic waste in a damage award that did not allow for a substantial upgrade of the house or exceed the value of the property).

However, if a contractor deliberately deviates from the plans and specifications, the owner’s damages may be measured by the cost to correct the deviations. Kaiser v. Fishman, 590 N.Y.S.2d 230 (App. Div. 1992).

18.15 Interest as Damages

If you find that the defendant [owner] breached its obligation to pay the plaintiff [contractor] a certain definite sum of money under the contract,
then you may award the plaintiff interest from the date that the payment should have been made.

Comment
This instruction may not be appropriate in many jurisdictions where decisions on entitlement to interest rests with the court and not the jury. To provide this instruction, there must be evidence that (1) the fault for non-payment rests with the defendant; (2) it is an ascertainable amount, *Allen & O’Hara Inc. v. Barrett Wrecking Inc.*, 964 F.2d 694 (7th Cir. 1992); *United States f/u/o CJC Inc. v. W. States Mech. Contractors Inc.*, 1996 WL 453420 (Del. Super. Ct.), 834 F.2d 1533 (10th Cir. 1987); *Aetna Cas. & Sur. Co. v. Doleac Elec. Co.*, 471 So. 2d 325, 331 (Miss. 1985) (finding that lower court did not err in denying prejudgment interest when damages were unliquidated and there was a legitimate dispute as to the amount of damages); and (3) the date the money was due can be set with reasonable certainty. *Marrazzo v. Scranton Nebi Bottling Co.*, 263 A.2d 336 (Pa. 1970); *Dep’t of Transp. v. Anjo Constr. Co.*, 666 A.2d 753, 760–61 (Pa. Commw. Ct. 1995) (finding that contractor should be granted prejudgment interest from the date it presented its claim to the Department of Transportation and not from the date the contractor filed with the Board of Claims).

The allowance of interest is recognized by, and the structure of this instruction comes from, the Restatement (Second) of Contracts § 354. However, the comments recognize that parties may contractually agree to preclude interest from any damage awards arising under the contract. See *id.*, cmt. a.


The appropriate rate of interest is typically set in each jurisdiction at some basic legal rate of simple annual interest. See, e.g., *Crystal v. W. & Callahan Inc.*, 614 A.2d 560 (Md. 1992); *Daset Mining Corp. v. Indus. Fuels Corp.*, 473 A.2d 584 (Pa. Super. Ct. 1984) (recognizing a rate of six percent pursuant to 41 P.S. § 201). Some states specify special rates of interest for construction and public works projects. See, e.g., 73 P.S.
§§ 505(d), 507(d), and 512 (one percent interest per month plus possible recovery of additional amounts for penalties and attorney’s fees for nonpayment of sums due to contractors or subcontractors regarding improvements covered by statute); N.Y. C.P.L.R. §§ 5001, 5004 (nine percent per annum interest).

Generally, prejudgment interest on consequential damages is not awarded as a matter of right, and courts have discretionary power in deciding to grant prejudgment interest on consequential damages. Cresci Constr. Servs. Inc. v. Martin, 64 A.3d 254, 266 (Pa. Super. Ct. 2013) (finding that the damages total was not fixed by the construction contract and that defendant could not have determined the damages total by interpreting the terms of the contract); see also Rockland Indus. Inc. v. E+E (US) Inc., 991 F. Supp. 468, 474–75, on reconsideration in part sub nom. Rockland Indus. Inc. v. E+E (US) Inc., 1 F. Supp. 2d 528 (D. Md. 1998) (finding that prejudgment interest is generally not awarded when damages are not liquidated). Moreover, even when interest is awarded as a matter of right, courts may decide against the equitable approach of assigning interest and hold defendants liable only for interest at the legal rate of the respective state. In re Traffic Safety Co., 21 B.R. 669, 674 (Bankr. E.D. Pa. 1982).