Meglan, Meglan & Company, Limited
CONSTRUCTION
Claims Topics

Consequential or 'Extra' Damages in Construction Claims and Disputes

Although **Meglan, Meglan & Company, Limited,** is not a legal firm, it still gets heavily involved with construction law attorneys and their clients, whether they be owners, contractors, subcontractors, suppliers, construction managers, engineers, or architects. Consequently, as a reader of *Construction Claims Topics*, you might appreciate a layman's translation of how to proceed in proving and collecting on the resulting consequences of a serious construction contract breach or dispute.

Stated simply, you and your company have to demonstrate and prove through an unbroken chain of incontrovertible facts that the construction contract breach(s) unilaterally imposed caused you and/or your company serious additional harm and damages over and above those alleged and sought due to the contract breach(s) by the other party.

The most prevalent of consequential damages claims is often referred to as an "interference with business" claim. The interference has to be *intentional, purposeful,* and *willful* — not accidental — in nature. That is to say, you have to tell the other party in writing that its acts or failures to act, in accordance with the contract provisions, are causing serious damage to you and your business (the entire business and its abilities to perform on all contracts, not just this one) and then have the breaching party continue its breach unabated.

Written notice of the *onset* of such consequential events is an absolute requirement. A written detailing of the *exact* consequences being suffered to the offending party is usually a good practice. Sometimes, these written details will cause those breaching the contract to correct the matter immediately, halting even the possibility of having to ultimately pay for consequential damages.

Once the serious interference-with-business allegation is made in writing and the notice and facts of the alleged interference are succinctly described in writing or otherwise, the monkey is now on the back of the offending party. If they do nothing to mitigate, alleviate, stop, or correct the situation and the resulting consequences, then it's on to the next step. This involves gathering legal, financial, and other verification of the damages being experienced and start the process of showing, conclusively and without doubt, that the damage would not have been suffered but for the intentional acts or failures to act by the offending or breaching party. If that all sounds simple, you need to pay closer attention.

You have to be able to *conclusively* prove that the willful, intentional, and continuing actions or inactions of the other party in breach of its contract are the *sole* cause of the additional consequential damages suffered by you and/or your company.

Most people have heard of the "beyond a reasonable doubt" standard for a jury returning a guilty verdict in a criminal trial. The standard for awarding consequential damages is that tough and more. Remember, simple breach of contract awards are governed by "preponderance of the evidence available" standards. Generally, 51 percent to 75 percent of the evidence in favor will net an award for damages, but not if the damages sought are "consequential."

So what are consequential damages? Some refer to them as off-site "ripple damages." Here's a partial list:

■ ***Loss of bonding capacity and, therefore, the ability to bid and earn additional profits.*** Obviously, if unbonded projects are available to bid, that won't fly. And even if they're not available, then there's still the problem of showing in writing through witnesses, depositions, testimony, documents, etc., that serious and earnest attempts were made to bid and obtain bonded projects, including the securing of both bid and performance bonds for those projects.

■ ***Inability to pay reasonable and normal costs, expenses, and invoices on other jobs or projects, coupled with creditor or lender refusals to extend further loans and credit, and a consequential shutdown, slowdown, or inefficient operation of the other projects.*** You have to prove that serious, willful, and continual nonpayments or unpaid extra costs due to changes, delays, etc., caused the "conditions" that drained the company of cash or credit. A normal recession or "crunch" (cash, business, bidding, or credit) simultaneously occurring during the breaches of the contract is *not* good news. The crunch may be deemed the real cause, not the breaches of the contract. Additionally, you can't incur another "sour job" or serious breach of contract situation on a separate project underway at the same time, including another project that was bid too low to "roll" cash.

■ ***Forced sale of (or pledging to secure loans backed by) company assets at below-market value to secure necessary cash and/or credit or lender repossession of secured loan-pledged assets.*** The comments noted above apply here, also.

■ ***Loss of key personnel (supervisory and skilled tradesmen) in both the field and home office.*** Again, the comments noted above apply.

■ ***Loss of insurance coverages due to nonpayment of premiums — and normally covered loss occurrences that are now not covered.***

■ ***Unusually high interest rates and fees paid to secure high-risk loans and capital infusion.*** Usury or high-interest rate loans are not legal in most states, so this one probably won't get much consideration from a court.

■ ***Subcontracted work that deals 100 percent with another contractor who charges a fee of 10 percent or more to back and bond the project, even though that contractor does no actual work on the project—and you do it all.*** This practice has become quite prevalent in the Southwest in recent years. The bond fee *can* be considered a consequential damage.

■ ***Special situations and losses that tie directly back to the willful and continuing breach(s) of the contract.*** The key and operative word is *directly*.

In laymen's terms, consequential damages are a real pill to serve up and get a judge, jury, arbitrator, or panel of arbitrators to swallow. It has been done, but not very often.

However, if consequential damages are being suffered and the contract breaches are continuing unabated or worsening by the day (nonpayment being the chief culprit above all others), a well-thought-out but simple letter stating that the breaches are seriously interfering with the ongoing operation of your company is a wise move. Send it certified (return receipt requested), and then watch what happens. Also, be sure you contact your attorney as you're drafting the letter so he or she can assist you during the process and thereafter.

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Construction Claims Topics **serve as guidance documents only and are written for the expressed purpose of helping construction industry executives and supervisors learn better ways of identifying the sources and causes of construction claims and preventing disputes.**

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