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**LIQUIDATED DAMAGES: HAVE THE COURTS GONE TOO
FAR? HAVE UPPER TIER CONTRACTING PARTIES GONE
TOO FAR?**

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I. Introduction¹

The concept of liquidated damages appears simple in design and not very difficult to understand or implement in practice. In general, a provision for stipulated damages will be enforced as one for liquidated damages if the amount is reasonable in light of the anticipated or actual loss caused by a breach of contract.² Historically, courts looked upon such provisions with disfavor and often struck down liquidated damages clauses as penalties. “Penalties and forfeitures are not favored by courts of equity, and, whenever they can find reasonable ground for holding that the provisions of a contract for ‘stipulated damages’ are in the nature of a penalty or forfeiture they have not hesitated to relieve the party in default from such penalty or forfeiture.”³

Today, the law does not look upon “liquidated damages” provisions with the same disfavor and often finds ways to uphold stipulated damages provisions which would otherwise be unenforceable penalties. When liquidated damages are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, such provisions are enforced.⁴

Gone is the presumption that a clause for stipulated damages is an unenforceable penalty. Courts have opted instead for a presumption of enforceability. Paying mere lip service to the requirement that a provision for stipulated damages be a reasonable estimate of damages and that such damages be difficult of ascertainment, the courts

¹ As is often the case, many performance and payment bonds incorporate the terms of the underlying contract between the contractor/bond principal and the owner and therefore expose the Surety to potential liability for liquidated damages. While this paper focuses its discussion of liquidated damages on courts and upper-tier contracting parties, it should be noted that with some exceptions, the defenses available to a contractor would also be available to the same contractor/bond principal’s surety. See Restatement (Third) Suretyship & Guaranty (1996) § 19 cmt. b. (“Some defenses of the principal obligor on the underlying obligation are available to the secondary obligor. See §34 The secondary obligor has a defense to the secondary obligation to the extent of such a defense.”); Restatement (Third) Suretyship & Guaranty (1996) § 34 cmt. a. (“To the extent that the principal obligor can raise a defense to its duty pursuant to the underlying obligation, the secondary obligor should be able to raise that defense to its secondary obligation.”).

² See Restatement (Second) Contracts §356(1) “a term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”

³ Dave Gustafson & Co. v. South Dakota, 83 S.D. 160, 164 156 N.W.2d 185, 187 citing Barnes v. Clement, 12 S.D. 270, 81 N.W. 301. Alabama courts will be “disposed to lean against any interpretation of a contract which will make the provision one for liquidated damages and, in all cases of doubtful intention, will pronounce the stipulated sum a penalty.” See *also* Milton Constr. Co., Inc. v. State of Ala. Highway Dept., 568 So. 2d 784, 789 (Ala 1990) citing Restatement of Contracts, §339 at 554 (1932); and Camelot Music, Inc. v. Marx Realty and Improvement Co., 514 So. 2d 987, 990 (Ala. 1987), quoting Cook v. Brown, 408 So. 2d 143, 144 (Ala. Civ. App. 1981).

⁴ Williston on Contracts §65:16, -*Reasonableness of Provision and Stipulated Amount* (2003) citing Kothe v. R.C. Taylor Trust, 280 U.S. 224, 50 S.Ct. 142, 74 L.Ed. 382 (1930). (“The courts are strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained....The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out....Such contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties.’ But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—‘to treat the sum named as estimated and ascertained damages.’”)

ultimately seem to opt instead for a freedom of contract approach.⁵ With such a trend in the law, liquidated damages clauses have become particularly useful to upper tier contracting parties when damages are uncertain in nature or amount, or are un-measurable, as the case may be in certain public works or other government owned projects.⁶ Nonetheless, there is still an active hostility to liquidated damages clauses that are deemed to be “mere penalt[ies],” a designation which is still often associated with the judicial kiss of death.⁷

Focusing primarily on government owned and other public works projects, the following is a discussion of the fundamentals of liquidated damages and the abuses of upper tier contracting parties when drafting and enforcing such provisions; the trend in liquidated damages jurisprudence to uphold these dubious provisions in favor of freedom of contract; and the common defenses often asserted to defeat the imposition of liquidated damages. No branch of the law is obscured more by contradictory decisions than whether a sum specified in an agreement to secure performance will be treated as liquidated damage or a penalty.⁸ Accordingly, each case must depend upon its own particular and attendant circumstances, and therefore the general rules of the law on this subject have very little practical significance.⁹ Perhaps this obscurity in the law has become the vehicle by which courts, as well as upper tier contractors have pushed the envelope and taken liquidated damages clauses to the extremes.

III. The Fundamentals of Liquidated Damages

In an attempt to reconcile the conflict between liquidated damages provisions and the importance of freedom of contract principles, courts, over the last hundred years, have encouraged parties to determine their damage exposure in advance. “Liquidated damages” are an estimate, made by the parties at the time of contracting, of the extent of injury that would be sustained as a result of a breach.¹⁰ Facially, the purpose of a liquidated damages provision is to render certain and definite a measure of damages which would otherwise be uncertain, thereby creating a more efficient scheme for allocating damages in the event of a breach.¹¹ Courts routinely recognize that a provision for liquidated damages should be deemed punitive and thus unenforceable when it goes beyond compensation and serves merely to secure a party’s performance.¹² In practice however, the development of liquidated damages provisions, and the principles governing the enforceability of those provisions, “has been marked with ambivalence as a result of efforts to reconcile concepts of contract damages as purely compensatory, recognition of reasonable and freely bargained for . . . clauses, and the hoary rejection of any results smacking of penalty.”¹³

⁵ See Dave Gustafson & Co. v. State, 83 S.D. 160, 167, 156 N.W.2d 185, 189 (S.D 1968). “Unless the sum fixed in the contract is **very** unreasonable, the provision is treated as one for liquidated damages.”

⁶ 126 Misc. 2d 156, 481 N.Y.S.2d 289 (Ct. Cl. NY 1984).

⁷ Robert F. Cushman and James J. Myers, Construction Law Handbook, Aspen Law & Business, 1999.

⁸ Giesecke v. Cullerton, 280 Ill. 510, 513, 117 N.E. 777, 778 (1917).

⁹ Id.

¹⁰ 22 Am. Jur. 2d Damages S 683 (1988).

¹¹ Id.

¹² Melwood Const. Corp. v. State, 126 Misc.2d 156, 481 N.Y.S.2d 289 (NY Ct. Cl. 1984).

¹³ Shapiro v. Grinspoon, 541 N.E.2d 359, 364 (Mass. App. Ct. 1989).

A. Liquidated Damages Must Be a Reasonable Assessment of Anticipated or Actual Damages

The Restatement (Second) of Contracts is an important development in analyzing liquidated damages provisions.¹⁴ The Restatement (Second) provides for a two-fold test: the liquidated damages amount must be reasonable both “in light of the anticipated or actual loss” and in light of the “difficulties of proof of loss.”¹⁵ These two parts are meant to be considered together. “If a provision is construed to be one for liquidated damages, the sum stipulated forms, in general the measure of damages in case of a breach, and the recovery must be for that amount. No larger or smaller amount can be awarded even though the actual loss may be greater or less.”¹⁶

It should be no surprise that a patchwork of jurisprudence has developed. While most courts have adopted the two-part Restatement test, other courts have imposed the additional requirement of showing that the respective parties intended to liquidate damages by way of the stipulated damages provision instead of merely providing a penalty for breach.¹⁷ (Emphasis added.)

In addition to the two-part Restatement test and the permutations it has taken in some states, several other developments have shaped the landscape of liquidated damages provisions.

1 *The First and Second Restatement of Contracts and the “Requirement” of Actual Loss*

The First Restatement of Contracts disfavored the defense of “no actual damages,” and weighed heavily instead in favor of freedom of contract in reliance on the “intent of the parties.”¹⁸ Interestingly, in the pre-Restatement era, some courts did take

¹⁴ Following the Uniform Commercial Code’s approach to liquidated damages, the Restatement (Second) of Contracts allows a party to assert as a defense the absence of any actual damages which, if sufficient will void an otherwise valid liquidated damage clause. UCC § 2-718(1).

¹⁵ Restatement (Second) of Contracts § 356 (1) (1981) See also 22 Am. Jur. 2d Damages § 683 (1988).

¹⁶ 83 S.D. 160, 164 156 N.W.2d 185, 187 citing 22 Am.Jur.2d, Damages, Ss 235, -pg. 321.

¹⁷ States that have imposed an “intent” element on the Restatement test have typically added the intent inquiry as a third step, whereas others consider intent but only inasmuch as it reflects on one of the two prongs of the Restatement test. *Compare Kernz v. J.L. French Corp.*, 266 Wis.2d 124, 145 (Wis. Ct. App. 2003)(stating first factor in determining reasonableness of liquidated damages provision is to ask, “Did the parties intend to provide for damages or for a penalty.”) with *Miami Valley Contractors, Inc. v. Town of Sunman, Indiana*, 960 F.Supp. 1366, 1377 (S.D. Ind. 1997) (finding the intent of parties must be ascertained and balanced with all other factors bearing on whether the provision is enforceable). A few states have combined both approaches, adding an additional element assessing the party’s intent while also including intent considerations when evaluating the reasonableness of the forecast of damages. See *Security Fence Group, Inc. v. City of Cincinnati*, 2003 WL 22270179 (Ohio App. 1 Dist.)(setting forth Ohio’s three part test in which prong two looks to whether the liquidated damages amount is not so disproportionate to the contract as a whole to not express the true intentions of the parties and prong three asks whether the contract is consistent with the conclusion that the parties intended to provide for damages in the event of breach).

¹⁸ Susan Ferris, *Liquidated Damages Recover Under the Restatement (Second) of Contracts*, -Cornell L. Rev. 875 (April 1982). However, the drafters of the First Restatement included additional material that suggested a no actual damage defense, comment and stated that if “the parties honestly but mistakenly suppose that a breach will cause

judicial notice of the lack of actual damages and decided each case on the individual equities.¹⁹ On the other hand, the Restatement (Second) of Contracts, as seen through its Illustrations, allows for the defense of “no actual damages,” if the liquidated damages sum at the time of trial is “unreasonably large.”²⁰ Despite this shift, many courts, especially in cases involving public works projects, have rejected the Restatement (Second) view and have enforced liquidated damages even in the absence of actual damages, reasoning that damage to a government owner is a “public detriment” and is particularly difficult to estimate.²¹

Obviously, there are certain public projects where the government owner would have difficulty establishing its amount of actual damage. Anyone stuck in gridlocked traffic would agree that the public is harmed when a highway expansion project is delayed. To put a price tag on the cost, inconvenience, or loss of benefits, seems nearly impossible. However, courts have awarded liquidated damages to government owners when the delay causes absolutely no recognizable harm to the public.

The argument that “no actual damages” need be shown for the government owner to be entitled to liquidated damages dates as far back as 1907 when the United States Supreme Court heard the landmark case of United States v. Bethlehem Steel Co.²² In Bethlehem Steel, the Supreme Court held that the government was entitled to liquidated damages for Bethlehem Steel’s failure to deliver gun carriages on time.²³ The gun carriages had been ordered for use in the Spanish-American war, which ended before performance of the contract was due. Bethlehem Steel argued that the government sustained no actual damages and thus the liquidated damages provision could not be triggered.²⁴ The court disagreed, reasoning that “the circumstances were such that it would be almost impossible to show what damage (if any) might or naturally would result from failure to fulfill the contract.”²⁵

Such an approach works an unjust result when liquidated damages provisions are inserted in contracts and subsequently assessed when there was no potential for damages

harm...when in fact the breach causes no harm at all, the contract sum is not enforceable.”

¹⁹ Norwalk Door Closer Co. v. Eagle Lock & Screw Co., 153 Conn. 681, 220 A. 2d. 263 (1966). In Norwalk, the court refused to enforce a liquidated damage clause to which the parties had reasonably agreed on the grounds that there was no actual damages.

²⁰ Ferris, *supra*.

²¹ In J.H. Strain & Sons, Inc. (ASBCA No. 34432, 90-2 B.C.A. (CCH) ¶22, 770 (1990)), the contractor contended that liquidated damages should not be enforced because the government’s actual loss was not difficult to prove. The Board of Contract Appeals rejected this argument based on the complexity of determining the government’s cost. See *also* United States v. Bethlehem Steel Company, 205 U.S. 105 (1907); Southwest Engineering Co. v. United States, 341 F.2d 998 (8th Cir. 1965); and Taos Constr. Co., Inc., 750 S.W. 2nd 522 (Mo. App. 1988); Sides Constr. Co. v. City of Scott City, Mo., 581 S.W. 2nd 443 (Mo. App. S.D. 1979).

²² 205 U.S. 105, 27 S. Ct. 450 (1907)

²³ Id.

²⁴ Id. at 120.

²⁵ Id. at 121.

resulting from any delay.²⁶ For example, in SJ Ottingers v. Water Works, the Alabama Supreme Court upheld a stipulated damages provision that provided for delay damages to accrue on weekends and holidays during which the facility would not be open.²⁷ The contractor argued that the inclusion of Sundays and holidays demonstrated that the provision was one for a penalty and not one for liquidated damage as no damage could accrue in days that the facility could not even have been open.²⁸ Rejecting this argument, the court stated that the parties were legally competent to contract and upheld the liquidated damages provision on the basis of freedom of contract. Notwithstanding the court's opinion, the fact that the public clearly was not damaged on Sundays and holidays when the public facility would not have been in use cannot be ignored. Is it logical to impose liquidated damages in these situations?

In Melwood Construction Corp. v. State, the New York Court of Claims appeared to extend the rationale for allowing liquidated damages in the absence of actual damage to justify the imposition of liquidated damages in addition to actual damages to compensate the State for its own additional expenses brought about by the delay.²⁹ The Melwood court likened the government to "trustees for its citizens"³⁰ and reasoned that "[t]he sum forfeited for liquidated damages goes into the treasury, and inures to the benefit of the public."³¹ In support of this proposition, the court cited to a case in which it was held that "a city has no private interests. It is a public agency, and acts for the public; and when it contracts for the establishment and maintenance by a private corporation of waterworks, gas or electric lights, street railroads and other like public utilities, it does so in the performance of its public functions, and for the purpose of promoting the convenience and preserving the health of its citizens, and protecting them in their persons and property."³² This characterization of a city acting only on behalf of its citizens and as a trustee for its citizens begs the question: How then do courts justify treating a city or other government owner as a separate entity for the purpose of recovering actual damages in addition to the liquidated damages it would recover as a trustee for its residents? After all, liquidated damages are intended to reflect actual damages that might otherwise be recoverable but for the difficulty of ascertaining such damages.

Have courts then gone too far in applying the "no actual damages rule" so indiscriminately to government owned projects? In Bethlehem Steel, it is difficult to ascertain how the public suffered any harm by the gun carriages not being delivered on time. The war for which the gun carriages were ordered ended before performance was due! Moreover, the court in Bethlehem Steel found that the government was not even ready to use the gun carriages had they been delivered on time. In the end, however, it simply did not matter that there had been no actual damage.

²⁶ Kenneth W. Dix, *The Use and Abuse of Liquidated Damages in Federal Defense Contracts: An Analysis*, Okla. City U. L. Rev. (June 1983).

²⁷ 278 Ala. 213, 216, 177 So.2d, 320, 322 (Ala. 1965)

²⁸ Id.

²⁹ Melwood, 126 Misc.2d 156, 481 N.Y.S.2d 289.

³⁰ Id. at 292.

³¹ Id. at 293.

³² Id.

In that mind set, courts have been willing to impose liquidated damages for delay in situations identical to SJ Ottinger and Bethlehem Steel, particularly in the context of public construction projects. This may be because there are few cases so simple in nature that a court could reasonably conclude that establishing actual damages would not be a difficult task.³³

2. *But Who Bears the Burden of Proof?*

Courts also disagree as to which party ultimately bears the burden of proving that the liquidated damages clause is enforceable or unenforceable. Some courts, for example, require the project owner to demonstrate that a liquidated damage clause is enforceable while other courts simply *presume* that the liquidated damage clause is valid and place the burden on the contractor to prove otherwise.³⁴ The decision as to which party bears the burden of proof may also determine the outcome of the case. This is particularly true in public works contracts when the contractor has the burden of proving that an “anomalous harm” like public inconvenience was either ascertainable at the time of contracting or is not reasonably related to the actual harm (if any) suffered by the public entity.³⁵ Jurisdictions are not uniform on the issue of burden of proof. More often than not, however, the party challenging the enforceability of a provision is shouldered with the burden of establishing that the damages set are punitive and so unreasonable as to be unenforceable.³⁶

3. *The Time at which Reasonableness is to be Determined*

Finally, the issue of timing requires consideration. The timing of the application of the first prong of the Restatement (Second) test appears to be either at the time of contracting as a reasonable forecast in light of the anticipated loss *or* at the time of trial in light of the actual loss.³⁷ As previously discussed, in public works contracts, the contractor most often has the burden of proving that the liquidated damages provision was an unreasonable estimate of damages.³⁸ Most often, the contractor will argue that the government did not suffer any damages and therefore, the stipulated damages are unreasonable in light of the actual loss.³⁹ However, as we’ve already seen, a contractor would be hard pressed to find a court willing to apply the “no actual damages rule” in the case of a public construction

³³ Cushman and Myers, *supra*; See also, Pierce Assoc., Inc. v. Nemours Found., 865 F.2d. 530, 546 (3d Civ. 1988)

³⁴ Info. Sys. and Networks Corp. v. City of Kansas City, 147 F.3d 711, 714 (8th Cir. 1998). See also Security Fence Group, Inc. v. City of Cincinnati, 2003 WL 22270179 (Ohio App. 1 Dist.) (finding trial court’s holding requiring city to prove actual damages untenable as a matter of contract law and against policy favoring the timely performance of public contracts); Melwood Const. Corp., 481 N.Y.S.2d at 292 (“ . . .the Legislature has evinced an intent to allow governmental bodies to recover liquidated damages for delays in public improvement contracts without having to prove economic damages.”); Utley-James of Louisiana, Inc., v. State of Louisiana, 671 So.2d 473, 476 (La. Ct. App. 1995) (finding no requirement of showing of pecuniary or other actual damage is required to enforce a stipulated damages clause).

³⁵ See Dave Gustafson & Co., 83 S.D. at 165, 156 N.W.2d. at 188 “[D]amages to a city, the traveling public, and abutting property owners caused by delay in performing a paving contract would be extremely difficult, if not impossible, to ascertain.”

³⁶ Rohaven v. Little, 736 P.2d. 403, 410 (Col. 1987)

³⁷ Ferris, *supra*.

³⁸ Dix, *supra* citing Priebe & Sons, 332 U.S. at 411-12.

³⁹ Id.

project.

Fortunately, or unfortunately, the Restatement is silent as to the time at which the difficulty of ascertainment test is to be applied. However, the Illustrations of the Restatement (Second) indicate a change from the old rule of considering the “difficulty” of proof of loss at the time of contracting to the time of breach or trial. In fact, if questions of uncertainty of damages or difficulty of ascertainment were viewed at any time prior to the breach, uncertainty and difficulty would be automatically present in all cases.⁴⁰ In most cases however, the difficulty of ascertainment prong is applied at the time of contract, thereby neutering any requirement that actual damages must be difficult or impossible to ascertain.⁴¹

Notwithstanding the new “vantage point” provided by the Restatement (Second), courts differ in their application of the two-part Restatement test. Some courts apply the test to the time at which breach occurred. Still, other courts apply the test at the time of trial⁴² and ignore whether “damages could be anticipated at the time of execution of the contract.”⁴³

As previously stated, the two prongs of the Restatement test are meant to be considered together. However, would not the interests of all of the parties be better served by treating the two-prong test of the Restatement (Second) as separate and distinct prongs, applying the difficulty of ascertainment prong either at the time of breach (or trial) and the reasonable estimate prong at the time of contracting? Doing so would allow the courts to look at all the circumstances surrounding the drafting and enforcement of these stipulated damages provisions. If the goal is to determine the reasonableness of the parties, the better view is that the test of reasonableness should be applied at the time of contracting, looking at the efforts made by the contracting parties to arrive at a fairly negotiated and reasonable estimate of potential damages caused by a delay.

⁴⁰ Ralph C. Nash and John Cibnic, *Liquidated Damages or Penalty? A Rose by Any Other Name*, Nash & Cibnic Report Government Claims (August 1994).

⁴¹ Nash and Cibnic, *supra* citing Bubble Up Delaware, Inc. v. U.S. 684 F.2d 1259 (9th Cir, 1982) (“it would have been very difficult to calculate actual damages in advance of breach.”); see also Mega Const. Co., Inc. v. U.S., 29 Fed. Cl. 396, 503 (Fed. Cl. 1993) (“These provisions are to be judged at the time of the making of the contract.”); see also Dave Gustafson & Co., supra citing Anderson v. Cactus Heights Country Club, 80 S.D. 417, 125 N.W.2d 491

⁴² Courts have applied different time reference points to different prongs of the Restatement test in almost every conceivable configuration. *Compare* Miami Valley Contractors, Inc. v. Town of Sunman, Indiana, 960 F.Supp. 1366, 1375 (S.D. Ind. 1997) (“Damages are to be evaluated as of the time of the making of the contract. . .”); Monsanto Company v. Homan McFarling, 363 F.3d 1336, 1350 (Fed. Cir. 2004) (stating that contracting parties must expect at the time of contracting that the actual harm will be difficult to measure at the time of breach . . . uncertainty only at the time of contracting is insufficient.) with Westhaven Associates, Ltd. v. C.C. of Madison, Inc., 257 Wis.2d 789, 800 (“. . . we must look at both the ‘harm anticipated at the time of contract formation and the actual harm at the time of breach.’”).

⁴³ Southwest Engineering Company v. United States, 341 F.2d. 998, 1002 (8th Cir. 1965), citing Priebe & Sons, 332 U.S. at 411-412.

B. The Bargaining Position of the Contracting Parties

“[T]he only real means of determining whether the parties in good faith endeavored to assess the damages is afforded by the amount of damages stipulated for, and the nature of the breach upon which the stipulation was agreed to become operative. This is saying in other words that the reasonableness or unreasonableness of the stipulation is decisive, and that an unreasonable stipulated amount is by itself a basis sufficient to support the conclusion that the amount stipulated was intended to act as a penalty, and is thus unenforceable.”⁴⁴

As set out earlier, courts that have struck down liquidated damages clauses as penalties have relied upon the assessment of whether the liquidated damages incurred are a reasonable approximation of actual damages.⁴⁵ In other words, these courts do not support the position that just because the parties acted reasonably in estimating these damages at the time of contracting, liquidated damages clauses that are disproportionate or unreasonable should be given effect. Such courts demand proof that at least some actual damages were incurred.⁴⁶ In determining whether to enforce a liquidated damages provision, it is only proper that courts take into account the conduct of the parties in establishing liquidated damages as well as the reasonableness and the bargaining position of the contracting parties.

While the reasonableness of the liquidated damages clause may be determined on the basis of “actual loss,” the Restatement (Second) Illustration (supra) differs from the government contracts rule.⁴⁷ In government contracts, the focus is only on the circumstances that existed at the time the contract was formed. Moreover, if the amount of liquidated damages is reasonable when established, it is not considered a penalty, even if the amount greatly exceeds the actual loss or even if no actual loss occurs.⁴⁸ For this reason, federal defense contracts have been a source of criticism because of what is often a “mandatory” requirement that liquidated damages clauses be included in a wide variety of government contracts. The question still remains, however, whether these clauses are (when asserted) substantively reasonable.

While on the one hand is the rule that liquidated damages may be assessed even if the government suffers no loss, the rule does not apply (or at least should not in theory) to situations where at the time of contracting, it should have been anticipated that no loss

⁴⁴ See Williston on Contracts §65:16 *Reasonableness of Provision and Stipulated Amount* (2003).

⁴⁵ See e.g. Bair v. Axiom Design, 20 P.3d 388, 394 (Utah 2001) (finding that “the burden is on the party who would avoid a liquidated damages provision to prove that no damages were suffered or that there is no reasonable relationship between compensatory and liquidated damages); see also Kernz v. J.L. French Corporation, 266 Wis.2d 124, 149 (Wis. Ct. App. 2003) (finding party who seeks to avoid imposition of the stipulation damages clause carries the burden).

⁴⁶ See Wehr Contractors, Inc. v. Steel Fabricators, Inc., 769 S.W. 2d 51 (KY. Ct. App. 1989); Cushman and Myers, *supra*.

⁴⁷ In practice, liquidated damages provisions are often abused by not only the government but other public entities as well.

⁴⁸ See e.g. Southwest Engineering Co., 341 F.2d. 998.

would occur.⁴⁹ On the other hand, the use of liquidated damages clauses in federal defense contracts is governed in part by regulations set forth in the Federal Acquisition Regulations.⁵⁰

The Defense Acquisition Regulations (DAR) was replaced by the FAR. Former DAR 18-113, which dealt with construction, architecture and engineering contracts offered the following rule: a liquidated damages clause shall be included in all contracts in excess of \$25,000.00 except cost-plus-fixed-fee contracts or those where the contractor cannot control the pace of work...where such a provision is used, the clause set forth in 7-603.39 shall be included in the invitation for bids or requests for proposal. The minimum amount of liquidated damages should be based on the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the government will suffer other specific losses due to the failure of the contractor to complete the work on time, such as the cost of substitute facilities, the rental of buildings, or the continued payment of quarter's allowances, an amount for such items should also be included. Under DAR 18-113, it was obvious that a liquidated damages clause was required for government defense contracts in excess of \$25,000.00 regardless of whether actual damages could ever be proven.⁵¹

FAR 36.206 is considerably more liberal than DAR 18-113. It provides that: "the contracting officer must evaluate the need for liquidated damages in a construction contract in accordance with 11.502 and [other] agency regulations." FAR 11.502(b) (similar to DAR 18-113) provides as follows: "construction contracts with liquidated damages provisions must describe the rate(s) of liquidated damages assessed per day of delay. The rate(s) should include the estimated daily cost of government inspections and superintendence. The rate(s) should also include an amount for other expected expenses with delayed completion such as (1) renting substitute property; or (2) paying additional allowances for living quarters." While the FAR does not have a mandatory requirement for liquidated damages, various governmental agencies themselves have required liquidated damages. In addition to reviewing substantive reasonableness, courts also consider, or at least should consider, the reasonableness of the procedure through which the liquidated damages were set.⁵² What is relevant is what the parties knew and anticipated at the time of contracting. Some of the factors to determine the relative bargaining positions of the parties are: whether an attempt was made to calculate actual damages in arriving at a liquidated damages amount; and whether liquidated damages were actually bargained for at all. It is more likely that a court will determine that a liquidated damages provision is reasonable the more it can be said the parties were on the same level playing field, had equal bargaining leverage and actually negotiated the amount of liquidated damages. The more the liquidated damages resulted from good faith and reasonable bargaining, the more

⁴⁹ Priebe & Sons, Inc., 332 U.S. at 407. In this case, there were two liquidated damages provisions. The first required dealing with the acceptability of the supplies delivered. The court held that the government could only be injured if the deliveries were not made on time. Since the delivery of supplies were made on time, there were no damages due to the contractor's failure to obtain the certificates by the specified date; See also, Southwest Engineering Co., 348 F.2d. at 1001 (The court enforced a liquidated damages provision in favor of the government despite the parties stipulation that no actual damage had occurred.)

⁵⁰ Dix, *supra*.

⁵¹ Id.

⁵² Cushman and Myers, *supra*; Justin Sweet, *Liquidated Damages in California*, 60 Cal. L. Rev. 84, 136 (1972).

deference should be given to the parties' contract. Unfortunately, many courts have looked only to the fact that the parties signed the contract and assume that all parties are on a level playing field, in order to find that a stipulated damages clause should be upheld as an enforceable liquidated damages provision.

As is often the case, many liquidated damages provisions in government contracts even though they are actually penalty provisions, are often upheld by the courts. This is especially true when the government owner has advertised solicitations.⁵³ In these situations, a contractor very often has absolutely no control over the formulation of liquidated damages (use or calculation). With no voice in their formulation, a contractor who asserts his objection to the inclusion of liquidated damages provisions, or the amount thereof, may be disqualified as a non-responsive bidder.⁵⁴

Since in advertisement bid solicitations, the government owner drafts the language of the liquidated damages provision, it also inserts the amount in the invitation for bids. With respect to construction contracts with the federal government, the liquidated damages amount and the use is determined by what are known as Part I and Part II liquidated damages. As set out above, Part I damages include "the estimated daily cost of government inspection and superintendence." Part II damages are the other expenses the government may incur if the contractor breaches. The contractor is typically at the mercy of the government to properly and in good faith determine the amount of liquidated damages. Difficulties and abuses occur in situations where the government knows or is aware at the time of contracting that it does not anticipate damages. Obviously, in these cases, such provisions should be stricken as nothing more than penalty clauses. Nonetheless, it is government practice (regardless of whether damage is anticipated), in most advertised bid solicitations, to implement such liquidated damages provision and impose such provisions on the contractor at the time the contract is awarded and then assess such damages in the event of breach.⁵⁵

In those cases, the government argues that it is trying to spur the contractor to perform. But if all the upper tier contractor is attempting to do is spur performance, shouldn't such clauses be stricken as an unenforceable penalty? As an aside, other ways of arguably spurring a contractor to perform are graduated per diem liquidated damages provisions. In Information Systems and Networks Corp. v. City of Kansas City, the 8th Circuit upheld a stipulated damages provision which provided for varying per day damage amounts if five progression dates were not met.⁵⁶ Absent evidence that the City could have anticipated damage at certain milestones, the stipulated damages provision should have

⁵³ "Public construction contracts differ from private contracts in that they are awarded by competitive bid and are not [typically] subject to bi-lateral, arms length-negotiations." *Public Works Projects*, Journal of the Missouri Bar, John W. Maupin, W. Dudley McCarter, March/April 1996. (Emphasis added.)

⁵⁴ Dix, *supra*.

⁵⁵ *Id.* See also Garden State Painting Co., ASBCA No. 22248, 78-2. BCA ¶ 9275 at 66, 071-072 (government knew that thee would be no inspection or supervision costs on a daily basis.)

⁵⁶ 147 F.3d 711, 715 (\$250 per day for failure to meet certain preliminary milestones, \$500 per day for failure to meet certain intermediate milestones and \$1500 per day or FAA imposed penalty whichever was larger for failure to complete the project on time.)

been treated as an unenforceable penalty.⁵⁷ Intermediate increases in the amount of damages seem contrary to the logical assumption that the closer a project comes to completion, the lesser the damages that might be incurred by delay. If these provisions are only intended to spur performance, they are also penal in nature.

Consistent with its own arguably abusive practices, the government by FAR 11.501(b) attempts to get around a court striking liquidated damages provisions as being penal in nature by explicitly saying that “liquidated damages are not punitive and are not negative performance incentives.” While FAR may indicate such language, the bottom line is that the government or any other public entity, should act in good faith and with reasonableness if it intends to have its liquidated damages provisions upheld.⁵⁸

There are few reported cases that discuss the manner in which the amount stipulated to was reached, or the fact that the contract was drafted by the owner and the contractor had little to say as to the amount of stipulated damages.⁵⁹ “Generally speaking, the per diem amount set for liquidated damages are usually established by either the architect or the owner’s consultant/construction manager by ad hoc means without any meaningful attempt to analyze the probable damages which would occur as a consequence of the breach.”⁶⁰

In any event, perhaps the best way for courts to determine whether any liquidated damages clause is enforceable is by a case-by-case assessment of the damage expected. The scope and effect of the liquidated damage clause should be determined by its language, the nature of the contract, evidence of efforts by the parties to reasonably estimate delay damage, the proportionality of actual damages incurred, as well as other provisions of the contract in which it is formed.

C. Scope of Liquidated Damages

Obviously, the party seeking to enforce a liquidated damages provision cannot recover both actual and liquidated damages for the same injury. While this seems simple enough, problems arise because parties are free to agree between themselves that certain types of damage should be governed by the liquidated damages provisions of their contract. In some cases, the liquidated damages clauses appear to supplant actual damages that would ordinarily be recoverable. For example, in Transworld Airlines v.

⁵⁷ See Id. at 413 citing *Salmond & Williams on Contracts* (2d Ed. 1945) s 202 “All provisions for damages are, of course, deterrents of default, but an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust.” ; *but see Security Fence Group, Inc. v. City of Cincinnati, supra*, in which the Ohio Court of Appeals stated that a provision that will encourage timely performance of a contract is favored.

⁵⁸ See *Wise v. United States*, 248 U.S. 361, 362 (1919); see also *United States v. Bethlehem Steel Co.*, 205 U.S. at 115).

⁵⁹ J. Charles Sheak and Timothy J. Korzum, *Liquidated Damages and the Surety: Are they Defensible?* Construction Lawyer April 1989. (“Although the circumstances known to the parties in setting the stipulated sum at the time the contract is executed is a factor to be taken into consideration, it is difficult to find a case which actually addresses the factual question of whether the contract drafter actually attempted to objectively set a sum representing a reasonable estimate of the anticipated damages which would result from a prospective breach.”)

⁶⁰ Some government entities simply select the amount of liquidated damages based on the amount used in a prior contract for some other purpose or some other project.

Travelers Indemnity Co., the lessee of an airline sought to establish that the liquidated damages provision was only intended to cover its special damages for delays in construction and that it was not precluded from also recovering its actual damages. The court, in reliance on the rules of contract interpretation ruled that the contract intended to embody all damage under the liquidated damages provision at the per diem rate agreed to by the parties.⁶¹ Whether or not the result in Transworld and cases like it are correct may depend on the bargaining positions of the parties at the time the contract was negotiated and entered into.

In short, the key to determining enforceability of a liquidated damages provision is reasonableness. Parties, including upper tier contractors, when drafting a liquidated damages provision, should determine what is reasonable by taking into account what actual damages might result from a breach based on the circumstances, as the parties understand them at the time the contract is made.⁶² Despite this difference in the law, while not infringing on the parties freedom of contract rights, the Restatement (Second) in the end offers the following the guidance: invalidate clauses that may have been a reasonable estimate of the probable harm at the time of contracting but which are disproportionate to the actual damages (if any) incurred. Thus, regardless of the time element, even the most liberal court would do well by taking into account whether there is any disparity between the amount agreed to as liquidated damages and the amount of actual damages incurred. Accordingly, the party objecting to the enforcement of the liquidated damages provision, if possible, should attempt to invalidate the clause by raising the defense of “no actual damages” even though the clause, at the time the contract was signed, was a reasonable estimate of “possible damages.”⁶³

III. Other Defenses to Enforcement of Liquidated Damages Clauses

In addition to the argument that a liquidated damages clause is an unenforceable penalty, some of the other common defenses to the enforcement of liquidated damages clauses are: apportionment, abandonment, and substantial completion. Despite the sometimes over reaching and abusive practices of owners, especially government owners, perhaps these defenses may give contractors an available loophole to escape the imposition of liquidated damages even when the liquidated damages clause was deemed reasonable at the time of contracting.

A. Apportionment

The concept of apportionment is available to construction contractors as an extrinsic defense to the assessment of liquidated damages.⁶⁴ When delay occurs on a construction project, the facts are usually complex. The delay could be attributable to the

⁶¹ 62 F.2d. 321 (8th Cir. 1959); see also Cushman and Myers, *supra*.

⁶² It may also be advantageous for the parties to hold on to any documents used in negotiating liquidated damages amounts.

⁶³ 22 Am. Jur. 2d Damages S 704 (1988).

⁶⁴ Scott M. Tyler, *No (Easy) Way Out: 'Liquidating' Stipulated Damages for Construction Delay in Public Construction Contractors*, Duke L.J. (November 1994).

owner, the contractor or some other unforeseen circumstance(s). Obviously, an owner can assess liquidated damages only if the construction delay is not excusable.⁶⁵ Historically, the “Rule Against Apportionment”⁶⁶ was available as a remedy. (Emphasis added) This is an all or nothing approach and provides that when an owner seeks to enforce a liquidated damage provision, but is himself responsible for the delay or has contributed to it, the liquidated damages provision will not be enforced.

Other jurisdictions apply the “rule of apportionment” to liquidated damages clauses in circumstances in which both parties have contributed to the delay. By this rule, each party’s percentage of fault is determined and the liquidated damages are assessed only to the amount of delay for which the contractor was responsible.⁶⁷

The Illinois Court of Appeals hypothesized in Calumet Construction Services that the modern trend of apportionment has become increasingly applied, due at least in part, to the popularity of liquidated damages provisions and the increasing complexity of contractual relationships.⁶⁸

Despite the two rules, most decisions addressing apportionment indicate that courts are willing to apportion damages and apply the clause to that point of a delay for which the contractor is responsible. While the contemporary approach is to apply liquidated damages by apportioning delay, some decisions indicate that mutual responsibility for delay waives an owners ability to assess liquidated damages altogether.

For example, in United States v. United Engineering & Contracting Co., in refusing to enforce the stipulated damages provision, the Supreme Court reasoned:

“We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated to a fixed sum as liquidated damages not wholly disproportionate to the loss for each day(s) in delay, in order to enforce such payment, the other party must not prevent the performance of the contract within the stipulated time, and that when such is the case, and thereafter the work is completed, though by the fault of the contractor, the rule of the original contract cannot be insisted upon, and the liquidated damages measured thereby are waived.”⁶⁹

⁶⁵ George C. Baldwin, *The ABC’s of Liquidated Damages*, 12th Annual Construction Law Conference. February 1999, <http://www.constlaw.org/papers/baldwin.cfm>.

⁶⁶ S.O.G.-San-Org-Gardner v. Missouri Pacific R.R. Co., 658 F.2d 562, 570 (8th Cir. 1981)(The Eight Circuit interpreted Arkansas law to apply the Rule Against Apportionment, thereby allowing the contractor in the case to escape the applicable liquidated damages for delay provision.).

⁶⁷ See S.O.G.-San-Org-Gardner, *supra*, at 570-71 for a recitation of cases applying a rule of apportionment. See also Aetna Casualty and Surety Co., *supra*. (discussing and following principal cases applying a rule of apportionment). In PCL Constr. Services, Inc. v. United States, 53 Fed. Cl. 479, 486 (Fed. Cl. 2002), the Federal Claims Court described this principal as the “clear apportionment rule.”

⁶⁸ Calumet Construction Corp. v. Metropolitan Sanitary District of Greater Chicago, 533 N.E.2d. 453, 456 (Ill. Ct. App. 1988) (analogizing the computation process to that of comparative negligence).

⁶⁹ 234 U.S. 236 (1914).

Perhaps this uncertainty in the law gives contractors who are completely responsible for a delay the opportunity to produce evidence that might give the appearance of some fault on the part of the owner. In these situations, a contractor by presenting such evidence may have everything to gain and nothing to lose.⁷⁰

In short, since authorities appear to be “irreconcilably split,” it seems within the realm of possibilities that a breaching contractor in reliance upon United Engineering may try to escape the imposition of what is an otherwise reasonable liquidated damages clause by simply abandoning the project, regardless of how much delay has occurred. While the court in United Engineering attempted to downplay this potential result, is it possible such a consequence could be real?⁷¹

B. Abandonment

Another extrinsic defense a contractor may present to defend against the imposition of liquidated damages is the concept of “abandonment.” Courts traditionally have not allowed owners to collect per diem charges from a contractor who has abandoned the project before completion.⁷² Obviously, the abandoning contractor will still be liable for actual damages resulting from the breach but not liquidated damages. Traditionally, only by not abandoning the project is a contractor charged with liquidated damages. This rationale was most recently articulated in City of Elmira v. Larry Walker, Inc. When a liquidated damage clause does not contain clear and unambiguous language indicating that the per diem damage assessment was intended to apply in the event of the defaulting contractor’s complete abandonment of its obligation to perform under the contract, a reviewing court should not expand the reach of the clause to instances of “complete renunciation of the contract”.⁷³ As the New York Court of Appeals observed, the defaulting contractor’s liability for the stipulated sums did not accrue unless and until the contractor fulfilled its agreement by substantially completing its obligations to perform under the contract.⁷⁴ (Emphasis added)

A recent trend has emerged that imposes a broader application of per diem delay damages clauses upon contractors who abandon work before completion. This trend has left the issue of whether per diem damages may be assessed against an abandoning

⁷⁰ Tyler, *supra*.

⁷¹ Tyler, *supra*.

⁷² Six Companies v. Highway District, 311 U.S. 180 (1940); City of Rainier v. Masters, 154 P. 426 (1916); Fidelity & Deposit Co. of Maryland v. Robertson, 34 So. 933 (1903), *See also*, Charles and Korzun, *supra* at 22-23 (citing same cases).

⁷³ 564 N.E. 2d 655, 656 (N.Y. 1990). The New York Court of Appeals is the highest state court in New York; it sat reviewing a decision of the New York Supreme Court, Appellate Division.

⁷⁴ Id. In a situation in which an aggrieved owner, whose contractor has abandoned the work under the contract, was faced with a situation in which the sum of contractual liquidated damages would be far less than actual damages, the United States District Court for the Southern District of West Virginia construing West Virginia law came to the same result, stating concisely that “abandonment is a breach, voiding the liquidated damages clause”. Continental Realty Corp. v. Andrew J. Crevolin Co., 380 F. Supp. 246, 256 (D.C. S.D. W. Vir. 1974).

contractor a little more “unclear”.⁷⁵ In Southeast Alaska Constr. Co. v. Department of Transportation and Public Facilities, the Supreme Court of Alaska permitted the state to impose \$750 per day delay damages against an abandoning contractor.⁷⁶ The court examined the particular language of the clause, which provided the state with broad power to assess per diem delay damages—even if the state was responsible for the delays—and upheld the trial court’s entry of summary judgment premised on the strict reading of the delay damages clause without discussing the effect of the contractor’s abandonment to void the delay damages clause.⁷⁷

Adding to the uncertainty, the Supreme Court of New Mexico, in a calculated diversion from the historical approach to avoid assessment of liquidated damages upon an abandoning contractor, articulated a middle standard in Construction Contracting & Management, Inc. v. McConnell.⁷⁸ In Construction Contracting, the court concluded that an abandoning contractor could be held subject to a liquidated damages provision of the contract, but such liability could only extend to liquidated damages for delay.⁷⁹ Under this holding, an abandoning contractor could be held liable for both non-delay-related compensatory damages and per diem liquidated damages for delay.⁸⁰ Accordingly, we see yet another example of a court going further in awarding liquidated damages than courts have gone before.

C. Substantial Completion

The substantial completion doctrine in certain situations can undermine the usefulness of liquidated damages provisions.⁸¹ As a general rule, courts hold that substantial completion tolls the assessment of liquidated damages. Whether a project is “substantially complete” on or before the scheduled completion date, however, is a question of fact. Accordingly, the standard is often held to be when the work “is satisfactorily completed to the extent that the facilities may be occupied or are actually used for the purpose for which they are intended.”⁸²

The doctrine of substantial completion is intended to protect the rights of contractors to receive compensation after materially and substantially completing their performance, so

⁷⁵ Pacific Employers Insurance Co. v. City of Berkeley, 159 Cal.Rptr. 387, 394 (Cal. Ct. App. 1984)(The Court initially observed that the cases in which contractors abandon the work leave it “unclear” as to whether per diem charges should apply, but the Court was able to avoid reaching a conclusion: Because the contractor’s surety completed the work—and when a surety assumes the contractor’s obligations to complete the contract, the surety stands in the same position as the original contractor—the case was not analyzed as an example of contractor abandonment; the per diem liquidated damages provision applied to the contractor.)

⁷⁶ 791 P.2d 339 (Alaska 1990)(The State of Alaska contracted with the Defendant to construct a runway in Ruby, Alaska; the contractor never completed the work.)

⁷⁷ Id. at 343.

⁷⁸ 815 P.2d 1161 (N.M. 1991)(discussing the assessment of liability of an abandoning contractor on a \$250 per day liquidated damages provision in a contract of the construction of a restaurant).

⁷⁹ Id. at 1167-68.

⁸⁰ Id.

⁸¹ E.R. Stone v. City of Arcola, 536 N.E.2d 1329, 1338 (Ill. Ct. App. 1989); Manganaro Corp. v. Hitt Contracting, Inc., 193 F. Supp.2d 88, 98 (D.C.D.C. 2002).

⁸² Tyler, *supra*.

that their rights may not be prejudiced or interfered with by “mere technical, inadvertent or unimportant omissions or defects”.⁸³ In effect, an attempt to assess liquidated damages upon a contractor that has substantially performed under the contract is unenforceable as a penalty.⁸⁴ For example, in R.S. Rowland Construction Co. v. Beal Pipe & Tank Corp., the court stated that because the harm inflicted on the city by an incomplete project was, presumably, non-existent after substantial completion, the effect of continuing to impose stipulated damages would only induce performance, not compensate for loss.

The Supreme Court of Utah took the extraordinary position in Reliance Insurance Co. v. Utah Department of Transportation to not give a contractor the benefit of the substantial completion doctrine when determining the date upon which liquidated delay damages tolled. The case concerned a contract for the construction of a highway, in which the state sought to enforce its liquidated damages provision after the highway, was put into use by the public but before certain landscaping, striping and sign placement was complete.⁸⁵ In making its determination, the court looked at the literal text of the provision, which stated that the contract completion date shall be “the date upon which *all* work on the Project *shall be completed*.”⁸⁶ The court rejected the contractor’s substantial completion argument by construing the damages provision not as compensation to the state for delay damages but rather as compensation for the state’s cost to daily monitor the project up to final completion. This analysis runs afoul of the protective aspect of the substantial completion doctrine based on the following rationale.⁸⁷ Because the court assessed liquidated damages to compensate the state for its costs to supervise the contractor’s work, perhaps the owner’s damages would have been reduced if the state had simply completed the remaining work on its own and simply charged the contractor for its *actual damages* and for the cost of completing the minor work remaining.⁸⁸

An intermediate appellate court in Missouri created a new paradigm when it held in Taos Construction Co., Inc. v. Penzel Construction Company, Inc. that a public entity in whose benefit a liquidated damages provision exists is entitled to recover its liquidated damages “solely upon proof of a violation of the contract”.⁸⁹ The court in Taos Construction examined a contract for the construction of four bridges, in which the contractor was obliged to complete certain landscaping work for erosion control after its completion of the bridges and roadways.⁹⁰ The contract allowed for the State to collect \$200 per day in delay

⁸³ Notwithstanding the inherent subjectivity of what constitutes substantial completion, a contractor may choose to challenge a liquidated damage clause if *he* believes the project is substantially complete.

⁸⁴ Sheak and Korzun, *supra*, at 23.

⁸⁵ Id. at 1371.

⁸⁶ Id. at 1370 (emphasis in original).

⁸⁷ Id. at 1371.

⁸⁸ As an aside, theoretically, a non-breaching party could challenge “unreasonably low” liquidated damages amounts (“underliquidated”) damages as unconscionable. Restatement (Second) of Contracts § 356 cmt. A. In Brown Co. v. Garrison, the owner sought its actual damages rather than significantly lower liquidated damages. The owner, who was authored the liquidated damage clause claimed that the liquidated damages clause was penal in nature. The court rejected the owner’s challenge to the liquidated damages provision based upon the fact that the parties were experienced business people.

⁸⁹ 750 S.W.2d. 522 (Mo. App. 1988).

⁹⁰ Id. at 523-24.

damages.⁹¹ The contractor completed the bridges and the State put the bridges into public use; however, certain landscaping remained incomplete.⁹² The court allowed the State to recover liquidated damages for the time during which the bridges were being used but the landscaping was not yet complete because the State simply demonstrated a breach, and by so doing any further analysis was obviated thereby allowing the court to sustain the imposition of liquidated damages.⁹³

In Taos Construction, the court avoids any analysis whatsoever of the substantial completion doctrine. Arguably, the remaining landscaping work is inconsequential to the overall purpose of the contract. Moreover, if the highway opened on time, neither the State nor the public suffered any actual harm. Is it possible that the Taos Construction decision, if relied upon by other courts, could erode the doctrine of substantial completion entirely as applied in public works contracts; and, perhaps, provide support for an argument that when a public works contract contains a stipulated per diem delay provision, the contractor will be held liable for delay damages as long as the contract remains incomplete (no matter how insignificant) even if there has been substantial completion?

IV. Conclusion

While upper tier contracting parties will probably continue to push liquidated damages provisions to their limits and courts will almost certainly continue to leave the door open for parties to contract as they choose, perhaps abuses in this area of law can be curtailed by taking the advice to document all attempts, or lack thereof, to negotiate a reasonable estimate of potential damages resulting from delay so as to establish the argument and proof for courts to invalidate clauses on the grounds they were in fact not fairly bargained for or representative of the intent of all parties to the contact.

⁹¹ Id. at 523.

⁹² Id. at 524.

⁹³ Id. at 527 (The suit was brought by the general contractor that was assessed the delay damages against the subcontractor that was responsible for the associated delays.)

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