

Proving Construction Contract Damages: Maximizing Claims, Seeking Equitable Relief, and Recouping Attorney's Fees

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Topics to be Addressed

01



How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities

02



When is Equitable Relief Appropriate?

03



How Can Plaintiffs Maximize Monetary Damages in a Construction Claim?

04



How Does the Prevailing Party Prove Attorney's Fees?

05

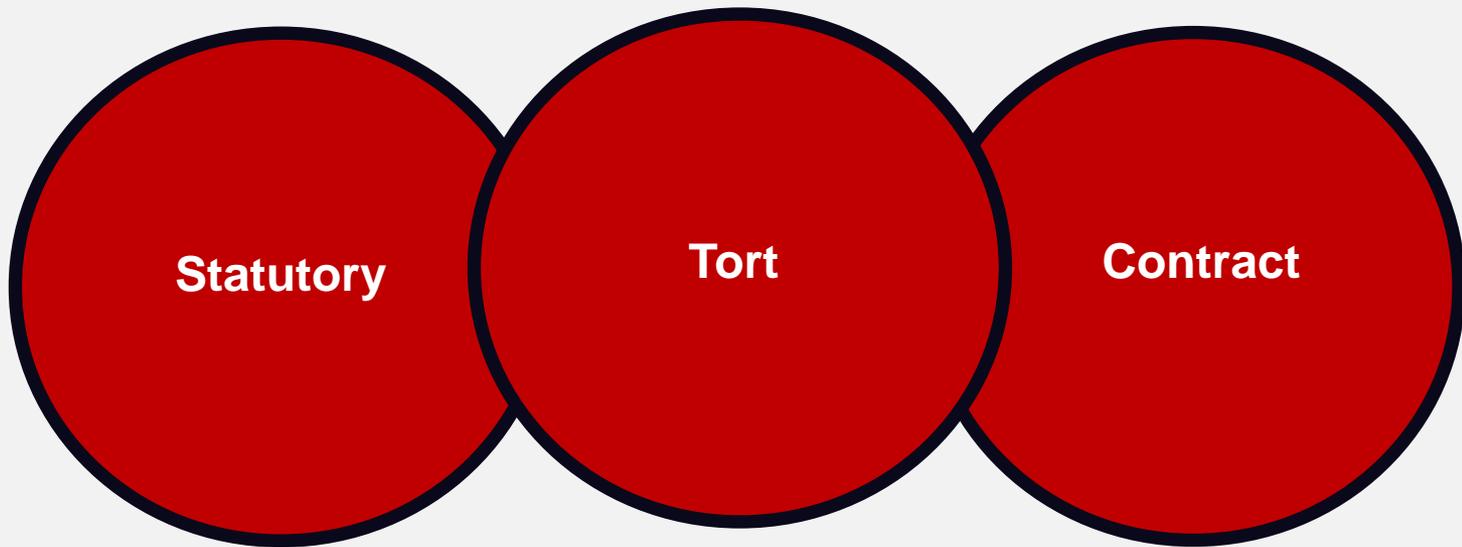


What Are the Best Practices for Defending Against Construction Claims?

01

How Do Current Construction Contract
Claims Vary From **Statutory or Tort**
Liabilities?

How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities?



How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities? (cont'd)

- **Contractual Claims**
 - Express Claims
 - Contractual limitations on remedies and damages
 - Implied Claims
 - *Quantum Meruit*
 - Quasi Contract
 - *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383 (Fla. 4th DCA 1997).
 - Warranty of habitability
 - Sale of new homes
 - Exception to *Caveat emptor*
 - *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972), cert. discharged, 264 So. 2d 418 (Fla. 1972).
 - Extended to builder's implied warranty obligations of fitness for a particular purpose, merchantability, and habitability to private roads, drainage systems, retention ponds, and underground pipes "immediately supporting" residential subdivision). *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902 (Fla. 5th DCA 2010)
 - Now limited by statute - Fla. Stat. § 553.835 (2012). The statute was created in direct response to the holding of *Maronda Homes*

How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities? (cont'd)

- **Statutory Claims**
 - Implied Warranty Claims
 - Magnuson Moss Federal Trade Commission Improvement Act, 15 U.S.C. § 2301, *et seq.*
 - Enforce existing express or implied warranties under state law
 - Florida Uniform Commercial Code – Sales
 - Fla. Stat. § 672.313 (express)
 - Fla. Stat. § 672.314 (implied – merchantability)
 - Fla. Stat. § 672.315 (implied – fitness for particular purpose)
 - Predominant Factor Test
 - *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1329-30 (11th Cir. 1998)
 - Followed in Florida
 - Waiver of implied warranties
 - Fla. Stat. § 672.315
 - Must be in writing and conspicuous

How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities? (cont'd)

- Florida Condominium Act, Fla. Stat. § 718.203
 - Developer implied warranty to purchaser of each unit of fitness and merchantability for the purposes or uses intended
 - Contractor, Subcontractor Supplier implied warranty to developer and to purchaser of each unit of fitness as to the work performed or materials supplied
 - 1 – 3 years
 - Lack of routine maintenance is a defense!
 - Must be related to cause of defect See *Stroshein v. Harbor Hall Inlet Club II Condo. Ass'n, Inc.*, 418 So. 2d 473, 474 (Fla. 4th DCA 1982) (holding developer liable for breach of implied warranty of fitness for defects in tennis courts despite association's lack of routine maintenance where cracks in court surface did not result from lack of maintenance but instead from improper drainage and inadequate foundation).
- Florida Deceptive and Unfair Trade Practices Act (FDUTPA) - Fla. Stat. § 501.202
 - Unfair or deceptive trade practices
 - Applies to “to any act or practice occurring ‘in the conduct of any trade or commerce’ even as between purely commercial interests” *James D. Hinson Elec. Contracting, Inc. v. Bellsouth Telecomms., Inc.*, No. 3:07-cv-598-J-32MCR, 2008 WL 360803, at *2 (S.D. Fla. Feb. 8, 2008).
 - Allows recovery of “actual damages” only

How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities? (cont'd)

- Florida Building Code - Fla. Stat. § 553.84
 - Provides remedy under the statute for violation of building code
 - Remedy unavailable when all required permits are obtained, the building department or other governmental agency having jurisdiction over the work approves the plans, and the construction project passes all required inspections under the code, unless the person or party (committing the violation) knew or should have known that the violation existed
 - Also not available where contractor establishes compliance with the statute by demonstrating that it obtained the required permits, the plans were approved, and the construction passed all required inspections
 - Party's bare allegation that the contractor "knew or should have known that violations existed" is insufficient to establish a claim under the statute See *Cohen v. Hartley Bros. Constr., Inc.*, 940 So. 2d 1251, 1253 (Fla. 1st DCA 2006); see also *Gazzara v. Pulte Home Corp.*, 207 F. Supp. 3d 1306, 1310 (M.D. Fla. 2016).
 - May be applied by contractor against subcontractor. See *Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So. 2d 61, 64 (Fla. 2d DCA 2005).
 - Architects also have liability where their design fails to comply with the building code. See *Edward J. Seibert, A.I.A. Arch. & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, Inc.*, 573 So. 2d 889, 892 (Fla. 2d DCA 1990).

How Do Current Construction Contract Claims Vary From Statutory or Tort Liabilities? (cont'd)

- **Tort Remedies**
 - Negligence/Professional Negligence
 - Standards of Care
 - Contract
 - Common Law
 - Strict Liability
 - Applies to manufacturers
 - Unreasonably dangerous product
 - Used without inspection for defects
 - Must cause personal injury or property damage
 - See *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976).
 - Privity not required
 - See *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (Fla. 1988) (holding that doctrine of strict liability in tort announced in *West* supplants all non-privity, breach of implied warranty cases, but that latter remedy remains where privity of contract is shown).
 - Applies to contractors engaged in “ultra-hazardous activities”
 - See *Hutchinson v. Capeletti Bros., Inc.*, 397 So. 2d 952 (Fla. 4th DCA 1981) (pile driving); *Morse v. Hendry Corp.*, 200 So. 2d 816 (Fla. 2d DCA 967) (blasting).
 - Fraud / Fraudulent Inducement



02



When is Equitable Relief Appropriate?



When is Equitable Relief Appropriate?

- **Declaratory Judgment – Fla. Stat. Ch. 86.**

- Determines “the existence of nonexistence: (1) of any immunity, power, privilege, or right; or (2) of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future.” Fla. Stat. § 86.011.
- Substantive and remedial in nature to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed. Fla. Stat. § 86.101
- A contract may be construed either before or after there has been a breach of it. Fla. Stat. § 86.031
- Existence of another adequate remedy does not preclude a judgment for declaratory relief. Fla. Stat. § 86.111
- Must be an actual controversy between the parties, not just curiosity by them as to rights, privilege, immunity or power. *1108 Ariola, LLC v. Jones*, 71 So. 3d 892, 898 (Fla. 1st DCA 2011).



When is Equitable Relief Appropriate? (cont'd)

- Proper use of declaratory judgment found in determining the enforceability of a liquidated damages clause
See Conley v. Morley Realty Corporation, 575 So. 2d 253 (Fla. 3d DCA 1991).
- Specific Performance
 - equitable remedy whereby a court issues an order requiring a party to perform a specific act, such as to complete performance of the contract.

Typical Defenses

- **Economic Loss Rule/Independent Tort Doctrine** - *Tiara Condo. Ass'n, Inc., v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 408-09 (Fla. 2013) (Pariente concurring)
- **Slavin Doctrine** - *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1958); see also *Valiente v. R.J. Behar & Co., Inc.*, 254 So. 3d 544 (Fla. 3d DCA 2018).
 - Protects a contractor from claims from third parties suffering personal injury or property damage from defective construction
 - In order to prevail under the doctrine, the contractor must show that the owner of the property finally accepted the work with knowledge of the defect giving rise to the claim
 - Defect must be patent, not latent
 - However, mere knowledge by an owner of a condition does not automatically render the defect patent
 - See *Brady v. State Paving Corp.*, 693 So. 2d 612 (Fla. 4th DCA 1997).
 - Doctrine not applicable to liability of an owner arising from breach of a contractual obligation See *Cisu of Fla., Inc. v. Aetna Cas. & Sur. Co.*, 457 So. 2d 1118 (Fla. 1st DCA 1984); *University Comm. Hosp., Inc. v. Prof. Serv. Ind., Inc.*, No. 8:15-cv-628-T-27EA, 2017 WL 2226578, at *7 (M.D. May 19, 2017) (finding Slavin inapplicable as a defense to claims by hospital owner against geotechnical firm for breach of contract and professional negligence which allegedly resulted in additional foundation work and delays, noting that the geotechnical firm was not being sued for injuries sustained by a third party).

Typical Defenses (cont'd)

- **Spearin Doctrine** - *United States v. Spearin*, 248 U.S. 132 (1918).
 - Known as the implied warranty of constructability
 - Owner impliedly warrants that its plans and specifications are suitable for construction
 - Contractor not be responsible for the consequences of defects in the plans and specifications
 - May also be used to pursue affirmative claims of the contractor
 - Requires privity
 - See, e.g., *Lincoln v. Fla. Gas Transmission Co.*, No. 4:13-cv-74-MW/CAS, 2014 WL 3057113, at *5 (N.D. Fla. July 7, 2014) (“It is not clear that the Spearin doctrine may be used in this case to provide compensation to Plaintiff who is not a party in any contract with any Defendant.”) (citing *Rick’s Mushroom Serv., Inc. v. U.S.*, 521 F.3d 1338, 1345 (Fed. Cir. 2008)).

Typical Defenses (cont'd)

- **Failure to Mitigate**
 - Doctrine of “avoidable consequences,” commonly applies in contract and tort actions and is based on the notion that a party should not benefit from its failure to take reasonable measures to avoid the consequences of another’s actions
 - See *Systems Components Corp. v. Fla. Dep’t of Transp.*, 14 So. 3d 967, 982 (Fla. 2009); see also *Jenkins v. Graham*, 237 So. 2d 330 (Fla. 4th DCA 1970)
 - No actual *duty* to mitigate
 - Party is not required to engage in extraordinary efforts to mitigate. See *Thompson v. Fla. Drum Co.*, 651 So. 2d 180, 182 (Fla. 1st DCA 1995).
- **Statute of Limitations/Repose**
 - Fla. Stat. § 95.11(3)(c)
- **First Costs/Betterment**
- **Unenforceable Indemnity Obligations**
 - Fla. Stat. § 725.06
 - Fla. Stat. § 726.08



03



How Can Plaintiffs Maximize Monetary Damages in a Construction Claim?



How Can Plaintiffs Maximize Monetary Damages in a Construction Claim?

- Pursuing correct parties
- Identifying available funding sources (e.g., insurance or bond) early on
- Pursuing appropriate theories of recovery
 - Avoiding bars to recovery (contractual and legal)
- Seeking *recoverable* damages
 - Liquidated damages (LDs) vs. actual delay damages
 - Penalty?
 - Void under anti-indemnity statutes?
 - Double recovery?
 - Costs to correct and complete
 - Reasonable cost estimates
 - Other damages
 - Understanding different scopes and proper allocation among parties
- Finding the right expert(s) to support theories of liability and damages



04



How Does Prevailing Party Prove Attorney's Fees?



How Does Prevailing Party Prove Attorney's Fees?

- **American Rule**
 - Contractual basis
 - Statutory basis
- **Statutory**
 - FDUTPA
 - Fla. Stat. § 501.201 *et seq.*
 - Civil Theft
 - Fla. Stat. § 772.11
- Prompt Payment Act
 - Fla. Stat. § 218.735
- Fla. Construction Lien Law
 - Fla. Stat. § 713.29
- Public Payment Bonds
 - Fla. Stat. § 255.05
- Miller Act
 - 40 U.S.C.A. § 270a-270d
- Proposals for Settlement / Offers of Judgment
 - Fla. Stat. § 768.79 / Fla.R.Civ.P. 1.442 / Fed.R.Civ.P. 68



05



What Are The Best Practices for
Defending Against Construction Claims?





What Are The Best Practices for Defending Against Construction Claims?

- Identifying possible legal defenses and contractual bars
- Identifying the main drivers in a case
- Proper Documentation
- Finding the Right Experts



「Thank You!」

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Proving Construction Contract Damages

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Proving Damages From The Contractor Perspective

TYPICAL ELEMENTS OF CONTRACT BREACH OF CONTRACT DAMAGES

- Contract Balance
- Pending Change Orders
- Denied Change Orders
- Delay Claims
- Inefficiency/Acceleration Claims
- Consequential Damages
- Subcontractor Pass-through Claims
- Subcontractor Liability/Defense Costs
- Interest
- Prompt Payment Penalties
- Attorney's Fees

UNPAID CONTRACT BALANCE

- Typically unpaid retention and progress payments.
 - Assuming a solvent defendant, usually amounts that have been withheld in response to backcharges and assessed LDs.
- Approved change orders that have not been paid.
- Determined by subtracting amounts paid to date from the agreed upon contract balance.

PENDING CHANGE ORDER REQUESTS

- Change Order Requests that are still pending approval
- Change Order Requests that have been improperly denied
- Change Orders that have been partially approved and partially paid.

DELAY CLAIMS

- Extended project site overhead or extended “general conditions.”
- “Unabsorbed” Home Office Overhead or “Eichleay” Damages.

EXTENDED SITE OVERHEAD

- Must first prove entitlement to a compensable time extension (i.e. there are owner caused delays).
- Typically not recoverable for weather and other delays not caused by either party. Only get a time extension.
- Typical calculation is to determine a daily rate for overhead costs and apply that to the number of compensable delay days.
- Overhead items are time related costs like rent, utilities, equipment, personnel, computer equipment.
- Items not incurred on a time basis are excluded. Annual insurance premium or other one time costs unless the one time costs was incurred solely because of the delay.
- Requires schedule analysis to determine the delay caused by the owner, owner's designers or owner's separate contractors.

UNABSORBED HOME OFFICE OVERHEAD

- Concept is based on a decision in the *Eichleay* decision in an Armed Services BCA decision. Has been adopted by various states including California.
- Focus on unabsorbed home office overhead is confusing. Really just a claim for unearned profits caused by idle forces.
- Eichleay claim arises from “idle” forces due to delays on a project. Theory is idle forces cannot be put to work to generate income to pay the home office expenses, thus “unabsorbed home office overhead.”
- More properly characterized as lost profits on idle forces part of which would be used to pay home office overhead?

UNABSORBED HOME OFFICE OVERHEAD (CONT.)

- Formula generally looks at what portion of the home office overhead would be paid by a particular job and then determines the inability to pay that overhead from the idle forces.
- Case law continues to evolve and claims have to be refined to be consistent with the applicable law.
- Need for completely idle forces can be challenging since not often forces are completely idle.
- Can you make the claim when forces are mostly idle and not able to generate revenue they are capable of producing?

INEFFICIENCY/ ACCELERATION/ DISRUPTION COSTS

- Primarily a claim that occurs when project acceleration occurs.
- Can also arise from constructive acceleration when owner denies time extensions
- No precise formula for determining inefficiency costs.
- Idea is determining the additional labor and equipment costs caused by need to accelerate
- Main means of acceleration is extended overtime.
- Preferred methodology is “measured mile” approach. Requires comparable work without disruptions. Not always available.

INEFFICIENCY/ ACCELERATION/ DISRUPTION COSTS (CONT.)

- Another common approach is use of various industry studies to estimate levels of inefficiency based on working conditions such as extended overtime, lots of changes, many Requests for Information, etc.
- This method still involves much subjectivity.
- Simple, but least desirable method is to take total labor and equipment overruns and assume 100% caused by the owner disruptions. Total costs concept, but not a total cost claim.
- Hybrid of overrun method is to fairly assign overruns between owner and contractors.
- Inefficiency claim should always be compared to a pure total overrun number to make sure not claiming hours that were not occurred.

CONSEQUENTIAL DAMAGES

- Damages that are unique to a particular party's situation and that are not reasonably foreseeable or an anticipated consequent of a breach.
- Many contracts contain waiver of consequential damages such as the AIA forms.
- If no waiver, then must determine if damages are recoverable under the applicable jurisdiction. Common requirement is that they were foreseeable when the contract was made.
- Examples of consequential damages are loss of bonding capacity, loss of other jobs, interest incurred due to late payments.

SUBCONTRACTOR PASS-THROUGH CLAIMS

- Claims from subcontractors that arise out of acts of the owner such as delay and disruption claims.
- Subcontract should address how such claims are managed.
- Ideally they are prosecuted in conjunction with the contractor's claims under conditions to be worked out between the subcontractors and contractor.

SUBCONTRACTOR LIABILITY/DEFENSE COSTS

- Can contractor recover cost to defend claims from subcontractors that arise from pass-through claims improperly denied by the Owner.
- Is this a direct contract damage or a claim for equitable (implied contractual) indemnity
- Amounts can be significant if subcontractor recovers its fees as part of prevailing on a pass-through claim. Also includes contractor's fees to defend against subcontractor claim asserted against contractor.

INTEREST

- Jurisdictional depend, but many states provide a right for pre-judgment interest.
- California is 10%, but only required by law if the amount in controversy is a liquidated sum (like retention).

PROMPT PAYMENT PENALTIES

- Statutory damages for wrongfully withheld amounts.
- Typically focuses on unpaid progress payments and retention
- In California unapproved change orders do not qualify for PPP.
- Can be a means to recover attorney's fees.

ATTORNEY'S FEES

- Most states apply the America Rule which means each party bears their own fees.
- Ways to recover fees:
 - Allowed by contract
 - Allowed by statute such as prompt payment penalties
 - Recoverable under a bond claim.
 - Recoverable on a mechanic's lien claim.
- The court determines a right to fees at the end of the case.
- In certain cases fees can make settlement difficult when fees start to exceed the amount in controversy.
- Consider if an offer of judgment or statutory settlement offer can change the right to attorney fees.