Construction Law

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Comments from the Chair

By Amber Hardwick – OAC Services, Inc.

AS THE NEW CHAIR of the Construction Law Section, it is my privilege to write a note to all of you. Having been an active volunteer with the Section for the last 10 years I have seen it through a lot of change. This year's executive council features more new faces than it has in the last decade. The entire council was thrilled with the number of applicants interested in joining this volunteer-run group for the benefit of Washington state's construction law practitioners. A recent construction section retreat brought former leaders of the executive council together with current leaders, and we engaged in a robust exchange of wisdom.

My first order of business as Chair was the **Fall Forum** at the Space Needle. The Fall Forum took place on Nov. 6, 2019. It was a spectacularly well-attended event, featuring speakers from the companies who designed and engineered the jaw-dropping improvements. Participants were treated to a trip to the Atmos where they experienced the transparent floors firsthand. This Fall Forum was offered at below cost, largely subsidized by the Section's success at last year's Mid-Year CLE.

Be on the lookout for more exciting events from the Construction Law Section. Next up is the Winter Forum at Cutters, scheduled for Feb. 6, 2020. It is historically a mini-CLE format with dinner included in the fee. The Section is also putting together a CLE in Vancouver at Warehouse 23 with the theme of cross-border practice; this event is tentatively scheduled for April 10, 2020, and will be a full-day CLE. In the new year, one of my goals is to use technologies like Linkedin or Twitter to better communicate with, engage, and unite Construction Law Section members about these and other spectacular events.

Finally, I would be remiss if I did not thank our outgoing chair, Jason Piskel. Jason's term reflected one of the most successful Mid-Year CLEs in the Section's recent history. By moving the event to Lane Powell's offices, we were able to realize significant savings. Those savings have already been applied to member benefiting events, like the Fall Forum. We will be building on his approach with this year's Construction Law Mid-Year, hosted by Stoel Rives. If you or your firm are interested in hosting future events, please do not hesitate to connect with me or other members of the Section Council.

I look forward to the new year working with and for all of you.
Amber

In This Issue

MARK YOUR CALENDARS!

Feb 6 ..... Winter Forum
Cutters, Seattle

April 10 ..... Full Day CLE
Warehouse 23, Vancouver

Dates tentative.
Details to follow.

Notice of Claims Redux

C. A. Carey Corp. v. City of Snoqualmie, King County No. 17-2-12198-3, 11/4/2019

By Ron English – Seattle Schools, General Counsel, retired

THE CONTRACTOR sought recovery for direct damages and delay impact claims, which the court (Judge Averil Rothrock) dismissed on summary judgment, holding that several contract provisions mandate that failure to file timely notice and supporting information is a waiver of the right to bring a claim, and a condition precedent to seeking recovery in litigation.

The contract notice provisions cited in the decision appear to be based on, or very similar to, the WSDOT Standard Specifications, Division 1, "General Requirements." This makes the decision useful precedent in other situations involving the same contract form.

The court referenced a number of contract provisions, including requirements that notice of formal claims must be made within seven days after receipt of the engineer's determination that a protest is invalid. The contractor did not file notice until six months later, and "Carey therefore waived its claims for [those changes orders] as a matter of law."

The court identified multiple provisions providing that failure to timely submit all required information is fatal to the contractor's position: "Failure to submit … shall operate as a waiver," and "Full compliance … is a contractual condition precedent … to seek judicial relief." And "administrative procedures … must be complied with in full, as a condition precedent to the Contractor's right to seek claim resolution through … litigation."

The Court cited a number of cases as applicable to the controversy: *Absher v. Kent SD*, 890 P.2d, 1071 (1995), *Mike M. Johnson v. Spokane Co.*, 78 P.3d 161 (2003), *NOVA Contracting v. Olympia*, 426 P.3d 685 (2018), *Realm v. Olympia*, 277 P.3d 679 (2012).

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Notice of Claims Redux

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The contractor acknowledged that there was no issue whether the City of Snoqualmie had waived compliance with any contractual notice provision.

The court concluded: "Therefore Carey has waived its right to pursue the claims and failed to comply with conditions precedent to litigation. This requires dismissal of Carey's [cause of action]."

The court also noted that the Final Contract Voucher Certification operates as a release, unless a claim is filed. The agency may unilaterally sign the Certification (after the contractor's failure to do so), which, under the contract, establishes a completion date and sets the timetable for release of claims. The court held the contractor's failure to meet this timetable constitutes an additional ground for dismissal.

The contractor attempted to use the contractual limitation period for filing litigation as a sword, arguing this provision authorizes formal claims in Superior Court within 180 days. The court rejected that reading of the contract, holding this would be inconsistent with the various other contract provisions which require earlier formal submissions in the nonlitigation context. Note: the *Realm* case cited by the *Carey* court follows the rule that contract provisions are to be harmonized with the goal of giving effect to all provisions.

As an alternative ground for rejecting the contractor's claim, the court decided Carey's claim for impact costs failed because the notice was both tardy and deficient in not providing the required critical path analysis detailed in the contract, noting: "The contract clearly allocates to the contractor the burden of proving on a strict timeline, specific information on which its request is based. *This may be a tall task at times for a busy contractor, but is the bargain to which the parties agreed*." (Emphasis added)

Court rejected the argument that *Weber* allowed "technical defects" to be excused, holding that Carey's omissions prevented the City from receiving substantive information. Thus the defects were substantive, not technical.

A footnote distinguishes the *Weber* holding regarding "substantial evidence of compliance" from "substantial performance," noting that Carey "has not presented substantial evidence of compliance, has presented no evidence that it requested specific information from the City to enable it to provide missing information and has not argued that the City waived compliance."

In denying Carey's additional claims, the court noted that the language barring "any claims for protested Work" means "every" and "all," citing *Nova Contracting*.

Carey is currently pursuing an appeal of the court's order.

COMMENT: These contract provisions have multiple provisions fully denying recovery, including at least two notice requirements, denial of claims based on contract closeout by unilateral owner action, and denial based on lack of a timely critical path analysis. The court read the contract as requiring strict adherence to its provisions, and allowed no "wiggle room" at all. Absent express language to modify such provisions, theories such as "substantial compliance" and "lack of prejudice" likely will be rejected as well. It is essential that contractors review and chart the various requirements for submitting claims well before a claim actually arises, to assure strict waiver provisions such as these do not defeat a claim.

Additionally, public agencies should consider whether such strict contract waiver provisions promote the public interest. Potential bidders faced with such provisions may simply refuse to bid, or will increase their prices, or will be more eager to present claims (even questionable or inflated ones), to assure they are adequately compensated. In this writer's opinion, a less onerous provision, requiring waiver for failure to provide timely minimal initial notice, but not a forfeiture of the entire claim for failure to provide complete supporting information absent prejudice to the owner, would better serve the public interest. ■

Additional Insured Representations on Certificates of Insurance are Enforceable

By Athan E. Tramountanas – Ogden Murphy Wallace PLLC

CONSTRUCTION contracts often require contractors to name owners as additional insureds under a general liability policy. The contractors will provide a certificate of insurance stating that the additional insured requirement is met, but does that mean the general liability insurer is actually bound to insure the owner? The Washington Supreme Court recently answered this question in the affirmative.

In the recent case of *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 194 Wn.2d 413, 450 P.3d 150 (2019), the court considered the following question, certified by the Ninth Circuit:

> "Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?"

Under the facts, Selective Insurance Company issued a general liability policy to a contractor, which stated a third party would automatically become an additional insured under the policy if the contractor and the third party entered into their own contract that required the contractor to add the third party as an additional insured. Selective Insurance Company's agent issued a number of Certificates of Insurance to the contractor on an ACORD form for T-Mobile projects that named T-Mobile USA as an additional insured.

The ACORD form also included preprinted industry-standard disclaimers. It stated in bold capital letters that the certificate "is issued as a matter of information only and confers no rights upon the certificate holder," "does not affirmatively or negatively amend, extend or alter the coverage afforded by the" insurance policy, and "does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder." It also stated in bold, "If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed … A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)."

The Washington Supreme Court ultimately held that an insurer is bound to cover entities identified on a certificate of insurance as additional insured, notwithstanding that the certificate was issued by an agent and notwithstanding that the certificate of insurance contained conspicuous disclaimers on its face. As to the agency issue, the Ninth Circuit had already held that the agent acted for Standard Insurance Company with apparent authority. While Standard Insurance Company argued that any reliance by T-Mobile on a certificate of insurance issued by an agent was unreasonable, the court held that the Ninth Circuit foreclosed this argument when it found that apparent authority existed, because reasonable reliance is a necessary element of apparent authority. With respect to the general disclaimers contained on the certificate of insurance, the court held these were ineffective because of the contradictory language in the certificate stating T-Mobile was an additional insured. Pre-printed disclaimers cannot defeat language added by the agent because "a basic rule of textual interpretation is that the specific prevailed over the general." Insurance certificates are to be interpreted in a manner understandable to the average person, and the average person's attention and understanding are likely to be in better focus when language is specific or exact. ■

And the Winners Are…

THE FOLLOWING ARTICLES were winners of the 2019 WSBA Construction Law Section Writing Competition. The Section invited interested 2L and 3L students from the three Washington law schools to write on a pre-selected construction law topic. Seth Millstein chaired the competition committee with help from others in the Section. First place went to **Aspyn Butzler,** a 3L at Gonzaga, who received a $2,500 award. Second place went to **Bryan Taylor**, a 3L at UW, with a $1000 award. More valuable than money, of course, is that both entries are published below in this venerable newsletter. *Thanks to Seth for his hard work and congratulations to Aspyn and Bryan.*

1st Place

Recovery of Consequential Damages

By Aspyn Butzler, 3L at Gonzaga University School of Law

Introduction

THOSE IN THE construction industry know that the list of things that can go wrong is extensive and any delay may spawn claims for damages.[1] In construction law, consequential damages may be available in the construction defect context.[2] Consequential damages for construction law cases first came into the United States with the case of *Hadley v. Baxendale*.[3] *Hadley* is an English contract law case that sets the leading rule to determine consequential damages from a breach of contract claim. This article addresses how Washington and other jurisdictions in the United States have defined consequential damages, the required elements of a claim for consequential damages, the types of consequential damages that may be available, and how to effectively waive or limit claims of consequential damages.

Consequential Damages Defined

In construction law, most damages can be classified as either "direct" or "consequential",[4] with the former category being routinely recoverable and the latter subject to greater scrutiny and limitations.[5] Direct damages consist of the loss in value to a party of the other party's performance caused by its failure or

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deficiency.[6] Black's Law Dictionary defines consequential damages as those that do not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.[7] Most jurisdictions have defined consequential damages as those that "include 'any loss that may fairly and reasonably be considered as arising naturally ... from the breach of contract itself.'"[8] Using *Hadley*, these jurisdictions allow consequential damages to be awarded if they were a reasonably foreseeable result of a breach at the time the contract was entered into.[9] To be reasonably foreseeable means that (1) damages may be fairly considered as arising naturally from the breach of contract, and (2) the damages logically may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach.[10] The majority of jurisdictions still follow the reasonable foreseeability rule for defining consequential damages originally adopted in *Hadley*.[11] However, the small minority of states say damages are recoverable only if the promisor expressly has "assumed the risk of the consequences in question."[12]

In Washington state, "consequential damages are recoverable in an action for breach of contract if such damages flow naturally and inevitably from the breach and are so related to it as to have been within the contemplation of the parties when they entered into the contract."[13] It is clear from this that Washington follows the majority rule established in *Hadley*. Characterizing damages as direct or consequential can appear arbitrary under *Hadley* and the rule of reasonable foreseeability.[14] The damages that can be described as consequential seems boundless, since there is no bright-line test for distinguishing consequential from direct damages.[15] Courts have attempted to distinguish consequential from direct damages and inconsistencies have resulted.[16] Since *Hadley*, courts in the United States have been inconsistent in defining 'foreseeable' and how damages can be awarded.[17] Language should be used in construction contracts to provide clarity to the "ever-elusive definition of consequential damages."[18] In construction law, determining a consequential damages waiver's scope can be challenging as just what damages are consequential can vary depending upon the factual circumstances and a jurisdiction's law.[19]

Elements of Claim for Consequential Damages

The definition of consequential damages essentially establishes the elements for recovery under a claim of consequential damages. In Washington state and under the *Hadley* rule, "the plaintiff must prove consequential damages are the proximate consequence of the breach and were reasonably foreseeable or within the contemplation of the parties at the time of the contract."[20] In a claim for consequential damages, the nonbreaching party must show that the damage fits into the *Hadley* – created definition of consequential damages. Once the nonbreaching party shows that the consequential damages it seeks to recover were, or should have been, within the breaching party's contemplation at the time of contracting, it must prove the damages were caused by the breach itself, not some other factor.[21]

The amount of consequential damages must be proven with reasonable certainty or by reasonable estimate, depending on the damages claimed.[22] In Washington, a party is generally required to prove lost profits with reasonable certainty.[23] However, "[a]bsolute certainty is not required when the amount of damage is not susceptible of exact apportionment between loss caused by the breach and loss resulting from other causes."[24] If a reasonable estimate can be made by other means, lost profits may be awarded on the basis of expert testimony.[25] For other consequential damages, Washington courts have held that recovery will not be denied if the evidence is sufficient to afford a reasonable basis for estimating the loss.[26] Recovery of consequential damages requires proof with a greater degree of certainty than under the common law.[27] Certainty of damages is concerned more with the fact of damage than with the extent or amount of damage.[28]

Lastly, consequential damages may be recovered in addition to the general measure of damages applicable to the type of contract breach.[29] Consequential damages are limited because they cannot be fairly considered to have been within the contemplation of the parties, not because they are uncertain or remote.[30] It is important to keep in mind that any damages sought that are too attenuated will not be considered consequential damages.[31]

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Types of Consequential Damages

Consequential damages are effectively limitless.[32] Since state statutes do not provide the answer to what is, and what is not reasonably foreseeable, one must look to case law.[33] The following consequential damages found in case law are not limited to the state of Washington, but provide available consequential damage arguments for construction law practitioners. Two categories of consequential damages exist: general contractor/subcontractor damages and common owner/developer damages.[34]

General Contractor and Subcontractor Damages

Consequential damages sought by a contractor against an owner have included: lost profits; overhead not directly incurred at the project site; wage or salary increases; ripple or delay damages; loss of productivity; increased cost of funds for the project; extended capital costs; lost opportunity to work on other projects; inflation costs of labor, material, or equipment; non-availability of labor, material, or equipment due to delay; damages as a result of owner interference; diminished bonding capacity; financing damages; diminution in value.[35]

While lost profits are usually direct damages, they can be consequential damages "when they would have been generated by transactions that were separate from, but depended upon, the contract that was breached."[36] Again, the plaintiff must prove with reasonable certainty that the lost profits would have been earned, but were not a direct result of the defendant's breach.[37] To recover lost profits as consequential damages, a party must prove they "(1) were within the contemplation of the parties at the time the contract was made; (2) were lost as a proximate result of the defendant's breach; and (3) are proven with reasonable certainty."[38] As stated earlier, this is the reasonable foreseeability test established in *Hadley*. Overhead costs can include home office overhead expenses that are fixed and continuous regardless of reduced business including rent, taxes, administrative salaries, and expenses that vary in proportion to business volume.[39] To recover for lost opportunity damages, the contractor must demonstrate that the reduced profit level was caused by the defendant's actions.[40] This is difficult to show for contractors who do not have a record of making a profit, and during times where there is a downturn in the market.[41] Recovery of the above consequential damages will be based on the foreseeability of the damage at the time the parties entered into the contract, so long as they are not too attenuated.

Attorney's fees have also been recovered as consequential damages by a general contractor in a case out of Nevada.[42] When the owner breached its agreement with the general contractor, the contractor was forced to breach a subcontract.[43] The court found that a foreseeable result of the owner's breach was that the general contractor would abrogate its subcontract, which would spawn a lawsuit.[44]

Common Owner and Developer Damages

Consequential damages sought by an owner against a contractor have included: lost rent or revenue; rental of temporary offices and the increased cost of administration; costs or delays suffered by others unable to work or provide services previously scheduled; increased costs of borrowing funds for the project; delays in selling the project upon completion; termination; postponement or other revision to agreements to lease or buy the project; increased taxes; lost tax credits or deductions due to delay; impairment of security; increased labor or fuel expenses; project financing.[45] These consequential damages reflect that a project owner is entitled to the benefit of the bargain.

Waivers and Limitations

Consequential damage waivers are generally enforceable and will only be voided if they are found unconscionable.[46] When negotiating consequential damage waivers, it is important for the parties to identify the damages that are to be considered '"consequential".[47] In order to preserve a client's right to a particular category of consequential damages, counsel should expressly exclude such losses from the broad reach of the consequential damage waiver.[48] Many consequential damages waivers are problematic because they do not clearly define consequential damages.[49] As counsel in construction law, it is important to keep in mind when dealing with parties outside of the industry that the damages that may be reasonably foreseeable to you are not so predictable to outsiders, such as owners.[50]

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Conclusion

Hadley defined consequential damages as those losses arising naturally from a breach of contract that are reasonably foreseeable at the time the parties entered into the contract. The definition of consequential damages has developed into the test to determine when these damages can be recovered. United States courts have been inconsistent in defining what is foreseeable. Using case law that has previously defined consequential damages gives practitioners a framework to use when drafting construction contracts. It is important to define consequential damages in construction contracts and draft effective waivers that will avoid lengthy and expensive litigation. ■

1 Benton T. Wheatley & Randy A. Canché, *Navigating the Labyrinth of Consequential Damages in the Construction Industry: A History of and Legal Approaches to Living with Them*, 33 CONSTRUCTION LAW. 6, 6 (Summer 2013).

2 David K. DeWolf & Matthew C. Albrecht, 33 WASH. PRAC., CONSTRUCTION LAW MANUAL § 16:28 (2018-2019 ed.)

3 *Id*. at 6.

4 *Id*.

5 Douglas M. Poulin, *Recovering Consequential Damages*, 23 CONSTRUCTION LAW. 29, 29 (Fall 2003).

6 DeWolf & Albrecht, *supra* note 2, at 6.

7 *Black's Law Dictionary* 249 (2nd ed.).

8 Wheatley & Canché, *supra* note 1, at 6 (citing *W. Haven Sound Dev. Corp. v. W. Haven*, 201 Conn. 305, 319, 514 A.2d 734, 741 (1986)).

9 Poulin, *supra* note 5, at 29.

10 *Id*. (citing *Clark County Sch. Dist. v. Rolling Plaints Constr. Inc*., 16 P.3d 1079, 1082 (Nev. 2001)).

11 *Id*.

12 *Id*. at 29-30 (citing *Rexnord Corp. v. DeWolff Boberg & Associates, Inc*., 286 F.3d 1001, 1004 (7th Cir. 2002)).

13 David K. DeWolf, Keller W. Allen & Darlene Barrier Caruso, 25 WASH. PRAC., CONTRACT LAW AND PRACTICE § 14:8. COMPENSATORY DAMAGES- CONSEQUENTIAL DAMAGES (3d ed.).

14 Poulin, *supra* note 5, at 29.

15 *Id*.; Wheatley & Canché, *supra* note 1, at 7.

16 Wheatley & Canché, *supra* note 1, at 7.

17 *Id*. at 8.

18 *Id*. at 6.

19 Philip L. Bruner & Patrick J. O'Connor, Jr., 6 BRUNER & O'CONNOR CONSTRUCTION LAWS § 19:55. WAIVERS OF CONSEQUENTIAL DAMAGES (June 2018).

20 Wheatley & Canché, *supra* note 1, at 8.

21 *Id*.

22 *Id*.

23 *Tiegs v. Watts*, 135 Wash. 2d 1, 954 P2d 877 (1998); *Larsen v. Walton Plywood Co*., 65 Wash. 2d 1, 390 P.2d 677 (1964).

24 DeWolf, Allen & Caruso, *supra* note 13 (citing *Alpine Industries, Inc. v. Gohl*, 30 Wash. App. 750, 645 P.2d 737 (Wash. Ct. App. Div. 1 1982)).

25 *Id*.

26 *Prier v. Refrigeration Engineering Co*., 74 Wash.2d 25, 31, 442 P.2d 621, 625 (1968) (citing *Hartman v. Anderson*, 49 Wash.2d 154, 160, 298 P.2d 1103 (1956)).

27 Wheatley & Canché, *supra* note 1, at 6.

28 DeWolf, Allen & Caruso, *supra* note 13 (citing *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wash. App. 66, 248 P.3d 1067 (Div. 3 2011)).

29 David K. DeWolf, Keller W. Allen & Darlene Barrier Caruso, 25 WASH. PRAC., CONTRACT LAW AND PRACTICE § 18:303.04 CONTRACT- DAMAGES- LOST PROFITS (3d ed.).

30 DeWolf, Allen & Caruso, *supra* note 13.

31 Poulin, *supra* note 5, at 30.

32 *Id*. at 29.

33 *Id*. at 30.

34 Wheatley & Canché, *supra* note 1, at 9.

35 *Id*. (citing Charles M. Sink & Mark D. Petersen, *Indirect Consequential and Punitive Damages,* CONSTRUCTION LAW HANDBOOK 1159, at 1160).

36 Wheatley & Canché, *supra* note 1, at 9; DeWolf, Allen & Caruso, *supra* note 27.

37 DeWolf, Allen & Caruso, *supra* note 13 (citing *Alpine Industries, Inc. v. Gohl*, 30 Wash. App. 750, 645 P.2d 737 (Wash. Ct. App. Div. 1 1982)).

38 *Id*. (citing *Tiegs v. Watts*, 135 Wash. 2d 1, 954 P.2d 877 (1998)). .

39 Wheatley & Canché, *supra* note 1, at 9.

40 *Id*.

41 *Id*.

42 Poulin, *supra* note 5, at 30.

43 *Id*.

44 *Id*.

45 Wheatley & Canché, *supra* note 1, at 11.

46 Poulin, *supra* note 5, at 30.

47 Wheatley & Canché, *supra* note 1, at 13.

48 Poulin, *supra* note 5, at 31.

49 Wheatley & Canché, *supra* note 1, at 6.

50 Poulin, *supra* note 5, at 30.

2nd Place

Recovery of Consequential Damages

By Bryan Taylor, 3L at University of Washington School of Law

Introduction

SIMPLY PUT, consequential damages are losses that arise from the result of injury, rather than the injury itself.[1] In the context of a construction contract, these would be losses that flow from consequences that follow a breach of the contract, and not the immediate result of that breach.[2] With little case law offering guidance, litigants in Washington are left to infer how consequential damages may be recovered. Drawing inferences from case law in Washington and beyond, this paper finds that consequential damages are likely recoverable if and only if: (1) they were or should have been anticipated by both parties when the contract was agreed upon; (2) they were reasonably foreseeable by the defendant when the contract was breached; (3) their amount is proven with reasonable certainty; and (4) the plaintiff took all reasonable steps to avoid the consequential injury.

Defining Consequential Damages

Consequential damages are effectively "indirect" damages, as opposed to "direct" damages.[3] Whereas direct damages ordinarily and immediately arise from a breach of contract,[4] indirect damages arise only from the consequences that follow,[5] hence the term "consequential" damages. Consequential damages often arise from special circumstances that tend to be unpredictable.[6] And therein lies the trouble, because paradoxically—as will be elucidated under § III *infra*—these unpredictable damages are recoverable only when they were foreseeable.[7]

Consequential damages may include losses that are economic or noneconomic,[8] and tangible or intangible.[9] Examples of consequential damages include lost (future) profits,[10] relocation expenses following the breach of a construction contract to repair defects in a property,[11] mold growth caused by water infiltration after construction is completed,[12] inability of the non-breaching party to perform other profit-generating contracts,[13] and increased interest rates resulting from construction delays.[14] Whether certain damages are construed as consequential is a question of law for the court to decide,[15] which provides some measure of consistency through precedent.

Noteworthy Wrinkle in Washington

Though Washington's Supreme Court recognizes that consequential damages include intangible losses,[16] Washington's Court of Appeals found that the plaintiff "sustained minimal lost profits and consequential damages, meaning that a large majority of the damages award must have related to injury to its reputation."[17] By distinguishing consequential damages (minimal losses) from damages "related to injury to [the plaintiff's] reputation" (majority of losses), it appears that lower courts hold that reputational injury is outside the scope of consequential damages.[18] A strong reputation (i.e., "goodwill") is the most valuable intangible asset a business can possess, so such a rule would effectively negate recovery of consequential damages for intangible injury in a commercial context. Therefore, the Washington Supreme Court would likely correct course (if given the opportunity) by holding that reputational injury is an intangible loss that may be recovered as consequential damages.

Recovering Consequential Damage

Not all consequential damages are recoverable. Consequential damages are recoverable only when they were (or should have been) anticipated by both parties,[19] were reasonably foreseeable by the defendant when the contract was breached,[20] and are proven by the plaintiff with reasonable certainty.[21] Whether consequential damages should have been anticipated by the contracting parties (i.e., whether they were "reasonably foreseeable"), and by extension, whether the consequential damages are recoverable, is a question of fact for the jury to decide.[22] This naturally provides less predictability for litigants—given that juries are not bound by precedent—though courts have offered some guidance by holding that the scope of "foreseeability" is narrower in a contract action than in a tort action. [23]

Another duty imposed upon plaintiffs deserves attention here: a plaintiff cannot recover consequential damages that they could have avoided through reasonable effort.[24] Such reasonable effort does not require the plaintiff to undertake undue risk, expense,

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Recovery of Consequential Damages *by Bryan Taylor*

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or humiliation,[25] but this duty of "avoidance" is nevertheless problematic in the context of consequential damages. To illustrate, consequential damages can be recovered only when they were (or should have been) anticipated by both parties,[26] so as a practical matter, plaintiffs must always argue that they anticipated the losses, while defendants must argue that they had no reason to anticipate the losses. At least theoretically, this means that every plaintiff could have "avoided" consequential damages by putting the defendant on notice of the anticipated losses, and that a defendant could raise an affirmative defense that the plaintiff failed to do so in every case. With no case law on point, it remains unsettled how courts would resolve this issue.

Calculating Consequential Damages

Courts have discretion when deciding how to calculate the amount of consequential damages a plaintiff may recover. Consequential damages may be measured by the value of the breaching party's performance, the collateral value that such performance could have produced, or the loss caused by the breaching party's failure to perform.[27] When the consequential damages are lost (future) profits—which they very often are—courts may also consider the plaintiff's "track record," as well as the profits of comparable businesses.[28] Indeed, the plaintiff's track record and the profits of comparable businesses are the two most-favored methods of calculating lost profits.[29]

While "mathematical certainty" is not required when calculating consequential damages,[30] the amount must be more than speculative to be recovered.[31] To help facilitate an accurate calculation, plaintiffs may establish the amount of consequential damages through post-breach evidence, which courts may freely admit at their discretion.[32] Given that the plaintiff's track record and the profits of comparable businesses (i.e., the preferred method of calculating lost profits) are extrinsic to the contract at issue, this rule makes perfect sense.

Noteworthy Wrinkle in Washington

When a contract is breached, plaintiffs sometimes may bring either a contract action or a tort action. And when that is the case, wise plaintiffs choose the theory that offers them the greatest amount of recovery. Some Washington courts have distinguished recovery of consequential damages under contract actions from tort actions, noting that "it would violate contract law to allow the [plaintiff] to recover more in tort litigation than it could obtain in the contract bargaining process."[33] This suggests that consequential damages resulting from a breach of contract action should always equal or exceed the amount recoverable for the same loss under a tort theory.[34] In other words, when consequential damages are available under contract or tort law, wise plaintiffs in Washington should sue for breach of contract.

Conclusion

For the foregoing reasons, consequential damages may be recovered if and only if: (1) they were or should have been anticipated by both parties when the contract was agreed upon; (2) they were reasonably foreseeable by the defendant when the contract was breached; (3) their amount is proven with reasonable certainty by the plaintiff; and (4) the plaintiff took all reasonable steps to avoid the consequential injury. ■

1 Primetime Hospitality, Inc. v. City of Albuquerque, 206 P.3d 112, 120 (N.M. 2009).

2 *See* Park Ave. Condo. v. Buchan Devs., 71 P.3d 692, 701 (Wash. Ct. App. 2003); U.S. v. Reifler, 446 F.3d 65, 108 (2d Cir. 2006) (citing Black's Law Dictionary 390 (6th ed. 1990)).

3 Conger v. Pierce Cty., 198 P. 377, 382 (Wash. 1921).

4 Roanoke Hospital Asso. v. Doyle & Russell, Inc., 214 S.E.2d 155, 160 (Va. 1975).

5 Park Ave. Condo., 71 P.3d at 701; Reifler, 446 F.3d at 108 (citing Black's Law Dictionary 390).

6 Reifler, 446 F.3d at 108 (citing Black's Law Dictionary 390); Roanoke Hospital, 214 S.E.2d at 160.

7 *See* Wash. & O. D. Ry. v. Westinghouse Elec. & Mfg. Co., 91 S.E. 646, 647 (Va. 1917); see Roanoke Hospital, 214 S.E.2d at 160 (citing Arthur L. Corbin, Corbin on Contracts 1012 (1964)); see also Martin v. Phillips, 440 A.2d 1124, 1125–26 (N.H. 1982).

8 Staton Hills Winery Co. v. Collons, 980 P.2d 784, 786 n.2 (Wash. Ct. App. 1999).

9 *See* Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc., 199 P.3d 376, 384 (Wash. 2008).

10 *See* Golf Landscaping v. Century Constr. Co., Div. of Orvco, 696 P.2d 590, 594 (Wash. Ct. App. 1984); *see* Mead Corp. v. McNally-Pittsburgh Mfg. Corp., 654 F.2d 1197, 1209 n.17 (6th Cir. 1981); *see also* Penncro Assocs. v. Sprint Spectrum, L.P., 499 F.3d 1151, 1156 (10th Cir. 2007).

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11 Park Ave. Condo. v. Buchan Devs., 71 P.3d 692, 701 (Wash. Ct. App. 2003).

12 *See* Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 143 A.3d 273, 286 (N.J. 2016).

13 *Penncro*, 499 F.3d at 1156.

14 Roanoke Hospital Asso. v. Doyle & Russell, Inc., 214 S.E.2d 155, 161 (Va. 1975).

15 Desco Corp. v. Harry W. Trushel Constr. Co., 413 S.E.2d 85, 91 (W. Va. 1991); Roanoke Hospital, 214 S.E.2d at 160 (citing Arthur L. Corbin, Corbin on Contracts 1012 (1964)).

16 *See* Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc., 199 P.3d 376, 384 (Wash. 2008).

17 Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 315 P.3d 1143, 1146 (Wash. Ct. App. 2013).

18 *See* Gregg Roofing, 315 P.3d at 1146.

19 Wash. & O. D. Ry. v. Westinghouse Elec. & Mfg. Co., 91 S.E. 646, 647 (Va. 1917); Roanoke Hospital, 214 S.E.2d at 160 (citing Arthur L. Corbin, Corbin on Contracts 1012 (1964)); Martin v. Phillips, 440 A.2d 1124, 1125–26 (N.H. 1982).

20 Golf Landscaping v. Century Constr. Co., Div. of Orvco, 696 P.2d 590, 594 (Wash. Ct. App. 1984); Salem Eng'g & Constr. Corp. v. Londonderry Sch. Dist., 445 A.2d 1091, 1094 (N.H. 1982) (citing Petrie- Clemons v. Butterfield, 441 A.2d 1167, 1170 (N.H. 1982)).

21 Westinghouse Elec., 91 S.E. at 653; *see also* Karlen v. Butler Mfg. Co., 526 F.2d 1373, 1380 (8th Cir. 1975).

22 Desco Corp. v. Harry W. Trushel Constr. Co., 413 S.E.2d 85, 91 (W. Va. 1991); Roanoke Hospital, 214 S.E.2d at 160 (citing Arthur L. Corbin, Corbin on Contracts 1012 (1964)); Zareas v. Smith, 404 A.2d 599, 601 (N.H. 1979) (noting that the scope of foreseeability in contract actions is narrower than in tort actions).

23 Salem Eng'g & Constr. Corp. v. Londonderry Sch. Dist., 445 A.2d 1091, 1094 (N.H. 1982) (citing Zareas, 404 A.2d at 601).

24 *Zareas*, 404 A.2d at 602 (quoting Restatement of Contracts § 336(1) (1932)).

25 *Id.*

26 Wash. & O. D. Ry. v. Westinghouse Elec. & Mfg. Co., 91 S.E. 646, 647 (Va. 1917); Roanoke Hospital Asso. v. Doyle & Russell, Inc., 214 S.E.2d 155, 160 (Va. 1975) (citing Arthur L. Corbin, Corbin on Contracts 1012 (1964)); Martin v. Phillips, 440 A.2d 1124, 1125–26 (N.H. 1982).

27 Trans-Western Petroleum, Inc. v. United States Gypsum Co., 379 P.3d 1200, 1202 (Utah 2016) (quoting Dan B. Dobbs, Law of Remedies § 12.1(1) (2d ed. 1993)).

28 Cates v. Morgan Portable Bldg. Corp., 591 F.2d 17, 21 n.7 (7th Cir. 1979).

29 *See* Cates v. Morgan Portable Bldg. Corp., 591 F.2d 17, 21 n.7 (7th Cir. 1979).

30 Martin v. Phillips, 440 A.2d 1124, 1126 (N.H. 1982).

31 Ambrogio v. Beaver Rd. Assocs., 836 A.2d 1183, 1187 (Conn. 2003) (quoting Kay Petroleum Corp. v. Piergrossi, 79 A.2d 829 (Conn. 1951)).

32 E.g., Trans-Western Petroleum, Inc. v. United States Gypsum Co., 379 P.3d 1200, 1202 (Utah 2016).

33 Staton Hills Winery Co. v. Collons, 980 P.2d 784, 787 (Wash. Ct. App. 1999) (citing Berschauer/Philips Constr. v. Seattle Sch. Dist. No. 1, 881 P.2d 986 (Wash. 1994)).

34 *See Id.*

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