

Design Professional Newsletter



WHAT ARE CONSEQUENTIAL DAMAGES ANYWAY?

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We often discuss commonly used terms such as ‘indemnification’ and ‘standard of care’ when attempting to manage risk via your project contracts. There are, of course, many other provisions that must be carefully reviewed and considered as part of your risk management practices, one of which is the Consequential Damages provision. These damages can be a ‘silent killer’ if not addressed appropriately.

Unlike direct damages, which are damages that cover direct losses relating to a clear breach of contract, Consequential Damages, also known as “special damages” or “indirect damages”, are damages that flow *indirectly* from a breach of contract and are often related to delays in performance or completion of a project.

The potential for substantial consequential damages often results from projects that rely on profits, such as restaurants, casinos, hotels, and retail stores from which an owner will derive revenue. If the project is not completed on time, the owner will lose the benefit of that revenue and the design professional, contractor and responsible subcontractors/subconsultants can face liability for that loss of revenue, i.e., consequential damages. Further, other project participants (design professionals, contractors) can claim consequential damages resulting from the loss of subsequent work at other projects because of current project delays.

Many times, Project Owners will offer a one-sided waiver of consequential damage provision, meaning that they are the only party to receive the benefit. However, it is recommended that the provision is *mutually beneficial* to both the Owner and Design Professional. An example of such language is noted below:

“Neither the Client nor the Design Professional shall be liable to the other or shall make any claim for incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver, includes, but is not limited to, damages or related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.”

It's important to note that if your contract is silent in addressing these types of damages, your firm can still be held accountable. Therefore, it is highly recommended that consequential damages

be clearly discussed in your contract. Remember, specificity and communication with your client is key to ensure the enforceability of the clause.

About the author: Roseanne DeBellis is a Divisional Vice President at Great American Insurance Group. In her role as a Divisional VP, Roseanne is the lead on Design Professional and Real Estate Claims and also provides risk management services to agents and insureds. Roseanne has more than 17 years of professional liability experience, beginning her career in private practice defending design professionals against errors and omission claims. She is a licensed attorney admitted to practice law in New York and Connecticut. In addition, she holds adjuster licenses in various jurisdictions.

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