

Limiting Risk with a Waiver of Consequential Damages Clause in Contracts

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Each year, insurers, defense counsel and design professionals are faced with ever increasing damages sought in actions alleging breach of contract and negligence due to the design professional's alleged error or omission. One reason for the inflation is the tendency by plaintiffs' counsel to seek an ever-expanding list of damages, including direct and consequential damages.

Direct damages are the costs to repair or replace the error that was caused by the design professional's negligence. However, plaintiffs' counsel are also seeking special or indirect damages called "consequential damages", which include things like lost rents, rental costs for replacement property, damages to business reputation or the loss of goodwill, down time or idle time, material escalations, home office overhead costs, additional energy costs, increased construction management/supervision costs and additional interest and finance charges. For example, the cost to complete unfinished work on time may be very small in comparison to the loss of operating revenue a client might claim as a result of late completion.

Effective risk management in the construction industry begins with drafting a contract that limits the design professional's exposure to damages. Design professionals, whenever possible, should try to obtain a limitation of liability provision in their contracts so that their liability can be limited to their professional fee or a multiplier of the fee. However, some owners will not agree to such a provision, so design professionals should look to include a mutual waiver of consequential damages in their contracts. This would limit the design professional's exposure for a loss only to the direct costs to repair or replace the error, which is important since consequential damages can be so out of proportion with the reward of a typical design contract.

An effective and enforceable mutual waiver of consequential damages has been incorporated into industry-standard design and construction agreement forms since 1997 and could eliminate the following types of damages noted above, as well as delay damages, loss of income or profit and loss of management or employees.

Starting off a project with a strong contract that includes a consequential damages waiver can go a long way toward helping reduce the risk of damages for design professionals. Here's a sample clause from the *BDP Contract Review Guide* for your consideration:

Mutual Waiver of Consequential Damages

Consultant and Client waive consequential damages (such as lost profits, lost revenues, loss of use, loss of financing, and loss of reputation) for claims, disputes, or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages whether arising in contract, warranty, tort (including negligence), strict liability, or equity, or that might arise out of the parties' indemnification obligations.

If you'd like to learn more, check out this related article, ["Why Your Contract Needs a Limitation of Liability Clause."](#)

