

I. THEORIES OF RECOVERY & CAUSES OF ACTION II. DAMAGES & REMEDIES IN CONSTRUCTION DISPUTES

CONSTRUCTION LAW CERTIFICATION REVIEW COURSE

Presented by :

Michael J. Childers, Esq.

Board Certified Construction Lawyer



BOYD & JENERETTE P.A.
EST. 1952

WWW.BOYDJEN.COM

BOCA RATON | JACKSONVILLE | ORLANDO | SAVANNAH

THEORIES OF RECOVERY & CAUSES OF ACTION

ACCOUNT STATED

- *Elements:*
 - Parties had a series of transactions between them;
 - Statement of Account was given to Debtor;
 - No objection was made to Statement within reasonable time; and
 - Resulting balance is due.
- *See Farley v. Chase Bank, 37 So 3d 936 (Fla 4th DCA 2010) re: account stated.*

ACCOUNT STATED

- *A copy of the account must be attached showing:*
 - Items
 - Time of accrual of each
 - Amount of each
- *There is a presumption of correctness of the account*
 - May be overcome by proof of:
 - Fraud
 - Mistake
 - Error
 - Duress

OPEN ACCOUNT

- **Elements:**

- Sales contract existed between the creditor and debtor
- Amount claimed by the creditor represents either the agreed on sales price or the reasonable value of the goods delivered
- The goods were actually delivered.
- *See Evans v. Delro Indus., Inc.*, 509 So. 2d 1262, 1262 (Fla. 1st DCA 1987).
- Must attach copy of account.

BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Elements:*

- Valid Contract;
- Material Breach of Contract; and
- Resulting damages.

BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Contractor liability is cut off after the owner has accepted the work performed if the alleged defect is “patent”:*
 - **Test for patent defect:**
 - Whether the dangerousness of the condition was obvious had the owner exercised reasonable care.
 - *Florida Dept. of Transportation v. Capelettie Bros., Inc.*, 743 So.2d 150, 152 (Fla. 3d DCA 1999), *rev. denied*, 760 So.2d 945 (Fla. 2000).
- *Anticipatory Repudiation*
 - Relieves non-breaching party of its duty to perform and creates an immediate cause of action for breach of contract.
 - *Twenty-Four Collection, Inc. v. M. Weinbaum Construction, Inc.*, 427 So.2d 1110, 1111 (Fla. 3d DCA 1983).

BREACH OF CONTRACT (EXPRESS OR IMPLIED)

- *Construction Contracts are usually not appropriate for Specific Performance.*
 - Levene v. Enchanted Lake Homes, Inc., 115 So.2d 89 (Fla. 3d DCA 1959).
 - Connell v. Mittendorf, 147 So.2d 169 (Fla. 2d DCA 1962).
- *However, Specific Performance may be ordered, if appropriate.*
- Home America, Inc. v. Atkinson, 392 So.2d 268 (Fla. 2d DCA 1980).

Specific performance properly ordered on home construction contract following a finding contractor (although having substantially completed the home) had breached the contract by construction defects.

BREACH OF FIDUCIARY DUTY

- *Elements:*

- Creation of Fiduciary Duty on part of wrongdoer;
- Breach of duty; and
- Resulting damages.
- *See Gracey v. Eaker, 837 So. 2d 348, 350 (Fla. 2002).*

BREACH OF FIDUCIARY DUTY

- *To establish a fiduciary relationship, you must allege:*

- Some degree of **dependency** on one side....

Some degree of undertaking on the other side to:

- **Advise,**
- **Counsel,** and
- **Protect**
the weaker party.

Taylor Woodrow Homes Fla., Inc. v. 4/46 A-Corp., 850 So.2d 536, 540 (Fla. 5th DCA 2003).

BREACH OF CONTRACT IMPLIED IN FACT

- *Elements:*

- Plaintiff has conferred a benefit on Defendant;
- Defendant has knowledge of the benefit;
- Defendant has accepted or retained the benefit conferred;
and
- circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it

BREACH OF IMPLIED IN FACT

- **Note:**

- Must arise from the interaction of the parties. A tacit promise to pay.
- Contract was simply not put into words with sufficient clarity to form a contract.
- **Defense:**
- An express contract.
- **See** *Commerce Partnership v. Equity Const.*, 695 So. 2d 383 (Fla 4th DCA 1997) for a discussion regarding the difference in Contracts Applied in Fact vs. Applied in Law.

BREACH OF CONTRACT IMPLIED IN FACT

- **Elements:**

- person performs services at another's request, or where services are rendered by one person for another without his expressed request, but with his knowledge; and
- under circumstances fairly raising the presumption that the parties understood and intended that compensation was to be paid.
- Based upon a tacit promise.
- *See Com. P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 384 (Fla. 4th DCA 1997).

CONTRACT IMPLIED IN LAW (QUASI CONTRACT)

- Similar to Contract Implied in Fact but it is **not** based upon interactions.
- This is a legal fiction created by the law without regard to the parties' expression of assent by words or conduct.
- Created where one party was **unjustly enriched**.
- Can arise out of the same scenario as Contract Implied in Fact.

CONTRACT IMPLIED IN LAW (QUASI CONTRACT)

- No express contract or contract implied in fact;
- Defendant has received something of value or conferred a benefit;
- Defendant has knowledge of benefit and accepts it.
- *See Com. P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 384 (Fla. 4th DCA 1997).
- Defenses: Subcontractor's action against owner seeking recovery might be defeated if owner paid something and the receipt of the service was not unjust.

BREACH OF THIRD PARTY BENEFICIARY CONTRACT

- ***Elements:***

- **Existence of Contract;**
- **Clear or manifest intent of contracting parties that contract primarily and directly benefit third party;**
- **Breach of Contract by a contracting party; and**
- **Damage to the third party resulting from the breach.**
- ***See Networkip, LLC v. Spread Enters., 922 So. 2d 355, 356 (Fla. 3d DCA 2006).***

BREACH OF THIRD PARTY BENEFICIARY CONTRACT

- In Florida, it is necessary to show both parties to the contract intended the third party to benefit from the agreement:
 - Insufficient to show only one party unilaterally intended to benefit the third party.
 - *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028, 1031 (Fla. 4th DCA 1994).

BREACH OF WARRANTY

- **Express Warranties:**

- **Contractual Warranty**

- **Statutory Warranty**

- **Ex:** §718.203, *Florida Statutes*--Warranty of Fitness of Construction of a Condominium

BREACH OF WARRANTY

- Implied Warranties

- ***Fitness of Plans and Specifications***

- United States v. Spearin, 248 U.S. 132 (1918).

- ***Merchantable or Fit for Particular Purpose***

- *See Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351, 352 (Fla. 4th DCA 1977) (“the complaint should allege that the **seller had reason to know the particular purpose** for which the goods were purchased by the buyer and the buyer relied on the seller’s judgment in providing suitable goods”)

- ***Compliance with a condominium’s restrictive covenants***

- Juno by the Sea Cond. Apts. Inc. v. June by the Sea N. Condo. Ass’n., 418 So.2d 1190 (Fla. 4th DCA 1982).

- ***Habitability of a residence***

- *See Elizabeth N. v. Riverside Grp., Inc.*, 585 So. 2d 376, 377 (Fla. 1st DCA 1991) (“The implied warranty of habitability is a judicial innovation which evolved, as a matter of public policy, to protect purchasers of new houses upon discovery of latent defects in their homes. The warranty of habitability does not arise out of the execution of a deed, but exists independently as an undertaking collateral to the covenant to convey.”)

BUILDING CODE VIOLATION FLA. STAT. §553.84

- **Any person**, individually or on behalf of a class, damaged as a result of a violation of §553.84 (the Florida Building Code) has a cause of action in any Court of competent jurisdiction against the person who committed the violation.
- It may be possible to recover damages for remedial costs without a resulting damage from the code violation. *See D.R. Horton v. Heron's Landing Condo. Association of Jacksonville, Inc.*, 44 Fla. L. Weekly 109 (Fla. 1st DCA 2018)

SAFE HARBOR: BUILDING CODE VIOLATION

FLA. STAT. §553.84

- Does not apply if:
 - The person obtains the required building permits;
 - Plans approved by proper entity;
 - Project passes all required inspections under the code; and
 - No personal injury or damage to property other than property that is the subject of the permits, plans, and inspections

****Unless: the party knew, or should have known, that the violation existed.****

CIVIL CONSPIRACY

- ***Elements:***

- **An agreement between two (2) or more parties;**
- **To do an unlawful act or to do a lawful act by unlawful means;**
- **The doing of some overt act in pursuance of the conspiracy; and**
- **Damage to Plaintiff as a result of the acts done under the conspiracy.**
- ***See Raimi v. Furlong, 702 So. 2d 1273, 1275 (Fla. 3d DCA 1997).***

CIVIL CONSPIRACY

- **There must be two types of intent:**
 - **Intent to enter into the agreement**
 - *See Newborn v. Isbell*, 165 So. 3d 16, 17 (Fla. 1st DCA 2015) (“Conspiracy is defined as a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means.”)
 - **Intent to achieve the objective of the agreement**
 - *See Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) (“Each coconspirator need not act to further a conspiracy; each “need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators.”)
- **Plus an overt act**

CIVIL THEFT –

§812.014, *FLORIDA STATUTES AND 772.11*

- A plaintiff that can show a Defendant violated the provisions of Florida Statutes Sections 812.012 – 812.037, which are criminal statutes, may bring a statutory action of civil theft under Fla. Stat. 772.11.
- Plaintiff may not bring an action for civil theft for violation of a criminal statute not listed under Fla. Stat. 772.11
 - *See Seabridge, Inc. v. Superior Kitchens, Inc.*, 672 So. 2d 848 (Fla. 4th DCA 1996).

CIVIL THEFT –

§812.014, *FLORIDA STATUTES AND 772.11*

- *Elements:*

- Knowingly;
- Obtaining or using, or endeavoring to obtain or use, Plaintiff's property;
- With felonious intent;
- To temporarily or permanently
 - Deprive Plaintiff of right to, or a benefit from, property or
 - Appropriate the property to Defendant's own use or the use of a person not entitled to the property.

CIVIL THEFT –

§ 772.11, *FLORIDA STATUTES*

- **Before seeking treble damages, must make a written demand for return.**
 - Return within thirty (30) days of the demand absolves the claim for treble damages.
- **Existence of a contractual relationship does not preclude an action for civil theft:**
 - Where the property at issue is also the subject of a contract between the parties, a civil theft claim requires additional proof of an **intricate, sophisticated scheme of deceit and theft.**
 - *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla. 4th DCA 2000); *Seymour v. Adams*, 638 So.2d 1044, 1049 (Fla. 5th DCA 1994).

CONSTRUCTION LIEN ENFORCEMENT – CHOICE OF REMEDIES

- §713.28, *Florida Statutes*:
 - If a Lienor shall fail, for any reason, to establish a Lien for the full amount to be due him or her in an action to enforce the same under the provisions of this part, he or she may, in addition to the Lien decreed in his or her favor, recover a judgment or decree in such action against any party liable therefor for such sums in excess of the Lien as are due him or her or which the Lienor might recover in an action on a Contract against any party to the action from which such sums are due him or her.

LIEN FORECLOSURE (IN CHANCERY)

- The law sets forth two different statutes for Lien foreclosure:
- Privity - §85.011, *Florida Statutes*
- Non-Privity - §85.021, *Florida Statutes*
 - § 713.75, Fla. Stat.

LIEN FORECLOSURE (IN CHANCERY) – FLA. STAT. 85.011(2)

- *Elements:*

- Agreement/Contract to improve property;
- Notice of Commencement, if Lien is within the effective period to establish relation back date;
- Timely service of Notice to Owner or Contractor's Affidavit, as applicable;
- Timely recording of Claim of Lien within 90 days of last work or delivery;
- Performance of Contract;
- Unpaid balance; and
- List of Defendant(s) with liens, or interests that are inferior, seeking to foreclose those interests.

LIEN FORECLOSURE (IN CHANCERY) – FLA. STAT. 85.011(2)

- **Request Court:**

- Recognize Lien in amount found to be due, from date Lien attached to title of the property
- Enter judgment in that amount and Judgment against Lienor's owner;
- Order sale of Owner's interest in property;
- Attorneys' fees and interest, from date debt was due; and

- **Record a Notice of *Lis Pendens***

- *Written notice a lawsuit has been filed concerning real estate.*

ORDINARY ACTION AT LAW – FLA. STAT. 85.011(3)

- ***Elements:***
 - **Agreement/Contract to improve property;**
 - **Timely service of Notice to Owner or Contractor's Affidavit, as applicable;**
 - **Timely recording of Claim of Lien within 90 days of last work or delivery;**
 - **Performance of Contract;**
 - **List of Defendant(s) with liens, or interests that are inferior, seeking to foreclose those interests;**

ORDINARY ACTION AT LAW

- **Request Court:**
 - Recognize Lien in amount found to be due, from date Lien attached to title of the property
 - Enter judgment in that amount and Judgment against Lienor's customer;
 - Order sale of Owner's interest in property;
 - Deficiency judgment - §713.28(3), *Florida Statutes*
 - Attorneys' fees and interest, from date debt was due; and
 - Request levy of execution on the lien property.
- **May be appropriate where Lien has been transferred to Bond.**

SPECIAL ACTION AT LAW – FLA. STAT. 85.011(4)

- Privity - §85.011(4), *Florida Statutes*
- ***Elements:***
 - Manner in which Lien arose;
 - Amount of Lien;
 - Description of property; and
 - Demand that property be sold to satisfy Lien.

SPECIAL ACTION AT LAW

- Judgment for Plaintiff is a personal judgment against Defendant, as well as a Lien on property.
- If non-privity Lien, also request Judgment against Contractor.

LABORER'S SUMMARY ACTION

- Privity - §85.011(5), *Florida Statutes*
- ***Elements:***
 - Description of property; and
 - Facts which authorize or create Lien.
 - 15% attorneys' fees and costs.

ENFORCEMENT OF LIENS BY PERSON NOT IN PRIVITY WITH OWNER – FLA. STAT. 85.021

- A person not in privity may resort to Fla. Stat. 85.011. (privity statutes).
- Judgment may provide for the recovery from the contractor or other person whom the labor or material was furnished.
- Even though no lien is found to exist and no judgment rendered against the owner, judgment may be rendered against the contractor or other person for whom the labor/materials were furnished.

FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- Claim may be made as a defense to Lien enforcement or as an affirmative claim by Owner, Contractor, Subcontractor, or Sub-subcontractor who has been damaged as a result of Fraudulent Lien.

FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- *Elements:*

- Lien has been recorded by Defendant;
- Plaintiff is Owner, Contractor, Subcontractor, or Sub-subcontractor who has been damaged by Lien;
- Lienor has willfully included a claim for work not performed or materials not furnished or Lienor has compiled claim with such willful and gross negligence as to amount to a willful exaggeration;
- Describe damages; and
- Attorneys' fees.

FRAUDULENT LIEN – §713.31(2)(C), *FLORIDA STATUTES*

- **What Doesn't constitute a willful exaggeration?**
 - A minor mistake
 - Error in a claim of lien
 - Good faith dispute as to the amount due

FRAUD/COLLUSION IN DEPRIVING LIENOR OF RIGHTS/BENEFITS - §713.31(1), *FLORIDA STATUTES*

- ***Elements:***

- Defendant has by fraud or collusion;
- Deprived or attempted to deprive, Owner or Lienor of benefits or rights;
- By giving false affidavits, releases, invoices, worthless checks, statements, or written instruments permitted or required under Lien law;
- To detriment of Lienor.

FRAUD/COLLUSION IN DEPRIVING LIENOR OF RIGHTS/BENEFITS - §713.31(1), *FLORIDA STATUTES*

- **Upon request, Court can:**
 - Issue temporary and permanent Injunctions;
 - Order Accounting;
 - Grant discovery;
 - Utilize all remedies available under creditors' bills and proceedings supplementary to execution;
 - Marshal assets; and
 - Exercise any other appropriate legal or equitable remedies or procedures without regard to the adequacy of a remedy at law or whether or not irreparable damage has or will be done.

SHORTEN LIEN WITH SUMMONS TO SHOW CAUSE - §713.21(4), *FLORIDA STATUTES*

- Where Plaintiff has interest in Defendant's Lien that has been recorded, Plaintiff can issue a special Summons that says:
 - “Pursuant to §713.21(4), *Florida Statutes*, Defendant is directed to show cause within twenty (20) days why Lien should not be enforced by action or vacated and canceled of record.”
 - Allege any other facts that are critical of Lien.
 - **If Defendant then fails to counterclaim to enforce the Lien, show cause (sworn to or affirmed) why Lien should be enforced in the action, or file a separate action to enforce Lien, the Court is duty bound to discharge Lien by order.**

REPOSSESSION – §713.15 *FLORIDA STATUTES*

- **Peaceable Repossession**
 - No action filed
- **Replevin**
 - Right of repossession and removal.
- **Extend only to materials whose purchase price does not exceed amount remaining due to the person repossessing.**
- Where materials have been partly paid for, person delivering them may repossess them if refund part of the purchase price which has been paid.
- **Materials retaken must be credited against any Lien at the original sales price (no restocking charges or reduced price).**

REPOSSESSION– §713.15

- ***Elements:***

- Improvement is abandoned or completed and materials not used;
- Claimant is a Lienor (within definition of §713.01, *Florida Statutes*);
- Claimant furnished the materials, and is the Owner of the materials;
 - Must describe the source of the title to the materials;
 - Attach a copy of any documents reflecting ownership.
- Claimant delivered materials to the project and the materials are uninstalled;
 - Describe the materials.
 - Attach a statement as to the value of the materials .

REPLEVIN –§ 78.01 *FLORIDA STATUTES*

- **Objective of Replevin:**

- Plaintiff who prevails on the merits is entitled to:
 - Final judgment for recovery of the materials or their value, or the value of Plaintiff's lien or special interest, and damages sustained as a result of the wrongful taking/detention;
- Plaintiff may elect to seek a writ of replevin prior to the entry of final judgment in order to obtain possession of the property during the pendency of the replevin action and until the parties' claims are finally adjudicated
 - Pursuant to **§78.068**, *Florida Statutes*, the prejudgment writ may be issued without notice and a hearing, but the Plaintiff must post a bond.

FLA. STAT. 78.055 – REPLEVIN ACTION

- **Description of claimed property that is sufficient to make possible its identification;**
- **Statement that plaintiff is the owner;**
- **Statement that property is wrongfully detained by defendant;**
- **Statement that claimed property has not been taken for a tax, assessment, or fine.**
- **Statement that property has not been taken under an execution or attachment.**

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- ***Elements:***

- **Existence of a Contract with Plaintiff “Lienor” (as defined in §713.01, *Florida Statutes*), to improve real property;**
- **Description of labor, services, or materials provided;**
- **Allegation that labor, services, or materials were provided in accordance with the Contract;**
- **Amount of Contract;**
- **Amount, if any, paid pursuant to Contract;**

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- *Elements (Continued):*

- Amount that remains unpaid pursuant to Contract, and amount that is undisputed;
- Undisputed amount has remained due and payable pursuant to Contract for more than 30 days after date labor or services were accepted or materials were received;
- Or Defendant received payment for the labor, services, or materials described in the Complaint more than 30 days prior to date Complaint was filed and has not paid the laborer/material supplier; and
- Counsel has been retained, fees have been incurred, and fees are sought.

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- **Court shall conduct an evidentiary hearing on Complaint, upon not less than 15 days written notice.** The claimant is entitled to the following remedies, to the extent of the undisputed amount due, and upon proof of each allegation in the Complaint:

- ✦ Accounting of use of any payment received such payment.
- ✦ Temporary Injunction against person who received payment, subject to Bond requirements specified in the Florida Rules of Civil Procedure.
- ✦ Prejudgment attachment against person who received payment, in accordance with requirements of Chapter 76.
- ✦ Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

UNDISPUTED FUNDS - §713.346, *FLORIDA STATUTES*

- Remedies must be granted without regard to any other remedy at law and without regard to whether or not irreparable damage has occurred or will occur.
- Remedies do not apply:
 - To extent of ***bona fide dispute*** regarding any portion of Contract price.
 - If Plaintiff committed a **material breach**, would relieve the defendant from obligations under the contract.

LENDER RESPONSIBIITY – §713.3471, *FLORIDA STATUTES*

Failure to give notice of final decision to cease funding.

- **Claim by Contractor against Lender;**
- **For failure to provide notice to Contractor within five (5) business days of a final determination to cease funding under the Construction Loan;**
- **Prior to distribution of all funds available under the Construction Loan,**

LENDER RESPONSIBIITY – §713.3471, *FLORIDA STATUTES*

- **Contractor may sue Lender for the:**
 - **Actual value of the materials and direct labor costs;**
 - **Plus 15 percent for overhead, profit, and all other costs;**
 - **From the date on which notice of the Lender's decision should have been served on the Contractor and the date on which notice of the Lender's decision is served on the Contractor.**

LENDER RESPONSIBIITY - §713.3471, *FLORIDA STATUTES*

Failure to give notice of re-designated loan proceeds.

- If Lender and Borrower have designated a portion of construction loan proceeds;
- Borrower may not authorize Lender to disburse funds for any other purpose;
- Until Owner serves Contractor (and any other Lienor who has given the Owner a Notice to Owner) with written notice of that decision, including the amount of the loan proceeds to be disbursed.

CONVERSION

- *Elements:*

- Act of dominion

- Wrongfully asserted

- Over another's property

- *See Belford Trucking Co. v. Zagar, 243 So. 2d 646, 647 (Fla. 4th DCA 1970).*

CONVERSION

- Damages are fair market value of property when converted, plus legal interest, *not replacement value*.
- Where parties are engaged in a contractual dispute over the amount owed and no fraud is involved, no conversion (or civil theft) can occur.
- Making a demand is necessary for a claim for conversion to survive in Florida.

FRAUD IN THE INDUCEMENT

- ***Elements:***

- **False statement concerning a material fact;**
- **Knowledge by the person making the statement that the statement is false;**
- **Intent by Defendant that statement will induce Plaintiff to act on it; and**
- **Reliance on the statement to the damage of the Plaintiff.**
- ***See Geico Gen. Ins. Co. v. Hoy, 136 So. 3d 647, 648 (Fla. 2d DCA 2013).***

FRAUD IN THE INDUCEMENT

- In Florida, a claim for fraud in the inducement must be alleged with particularity, including:
 - Who made the false statement;
 - The substance of the false statement;
 - The time frame in which the false statement was made; and
 - The context in which the false statement statement was made.

FRAUDULENT MISREPRESENTATION

- *Elements:*

- False statement concerning a material fact;
- Knowledge by the person making the statement that the statement is false;
- Intent by Defendant that the statement will induce the Plaintiff to act on it;
- Reliance on the statement to the damage of the Plaintiff; and
- Resulting damages.
- *See Cohen v. Corbitt*, 135 So. 3d 527, 528 (Fla. 1st DCA 2014).

FRAUDULENT MISREPRESENTATION

- **An agent, even though acting for an acknowledged principal, is independently liable for fraudulent misrepresentation.**
- **The knowledge element of fraudulent misrepresentation is satisfied where a representation is made:**
 - **Without knowledge as to either truth or falsity or**
 - **Under circumstances in which the representor ought to have known, if he did not know, of the falsity of the representation**

FLORIDA DECEPTIVE UNFAIR TRADE PRACTICES ACT §501.201, *FLORIDA STATUTES*, ET SEQ.

- If consumer has been damaged by deceptive act or trade practice, consumer may maintain an action for actual damages, plus attorneys' fees and costs.
 - Attorneys' fees are discretionary with the Court. *See Fla. Stat. 501.2105.*
- If there is a defense the claim is frivolous, Court shall conduct a hearing and may require posting of a Bond to maintain the action.
 - Bond is to indemnify Defendant for damages, plus costs and fees.

EQUITABLE LIEN

- **Stems from two possible sources:**
 - **Written Contract which shows an intent to charge some particular property with a debt or obligation;**
 - **Judgment by a Court of equity out of general consideration of right and justice, as applied to the relations of the parties and the circumstances of their dealings in the particular case.**
 - ***See Dewing v. Davis*, 117 So. 2d 747, 748 (Fla. 2d DCA 1960).**
- **Arises at the time of the transaction from which it springs.**

EQUITABLE LIEN

- Complaint must allege ultimate facts that show there is no adequate remedy at law.
 - Conclusion is not enough.
- Defendant must own property on which Lien is sought to be enforced.
- Recording a Notice of *Lis Pendens* is discretionary.
 - If *Lis Pendens* is filed, there must be a Bond since the Equitable Lien is not based on a recorded instrument or Claim of Lien.
- Appropriate for unpaid improvements to a Leasehold where Lease prohibits liens against landlord's interest and landlord has been unjustly enriched.
- May be appropriate against a designated but undisbursed construction fund.

EQUITABLE SUBROGATION

- ***Elements:***

- Subrogee made payment to protect their own interest;
- Subrogee did not act as a volunteer;
- Subrogee was not primarily liable for the debt;
- Subrogee paid off the entire debt;
- Subrogation would not work any injustice to the rights of a third party; and
- Amount of debt.
- *See Villa Maria Nursing & Rehab. Ctr., Inc. v. S. Broward Hosp. Dist.*, 8 So. 3d 1167, 1169 (Fla. 4th DCA 2009).

EQUITABLE SUBROGATION

- **The policy behind equitable subrogation is to prevent unjust enrichment by assuring that the person who in equity, and good conscience, is responsible for the debt is ultimately answerable for its discharge.**
- **A subrogation suit is a separate, independent action against a subsequent tortfeasor by the initial tortfeasor. This spares the injured party from the subrogation action.**

GOODS SOLD AND DELIVERED

- *Elements:*

- **Goods were sold and delivered to Defendant;**
 - **Sale can be proven by delivery, from which sale is presumed or implied.**
- **Agreed price or reasonable value.**

INDEMNITY – COMMON LAW

- *Elements:*

- Indemnity between tortfeasors is allowable only where whole fault is in one against whom indemnity is sought.
 - Indemnity shifts entire loss from one who, without active negligence or fault, has been obligated to pay another because of some vicarious, constructive, derivative or technical liability.
- Indemnification can come only from a party who is wholly at fault.
- Special relationship between parties is required for common law indemnification to exist in Florida.
- *See Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490 (Fla. 1979).*

INDEMNITY – CONTRACTUAL

- ***Elements:***

- Agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.

INDEMNITY – CONTRACTUAL

- Typically for personal injury or property damage, but may include economic losses.
- In the construction setting, there are restrictions on contractual indemnity, Fla. Stat. 725.06:
 - Must be commercially reasonable limit of not less than \$1,000,000.00, unless otherwise agreed by the parties; and
 - Limit must be part of project specifications or bid documents, if any.
 - Without the limit, agreement to indemnify another's negligence is void and unenforceable.
- *CB Contractors v. Allens Steel Prods.*, 2018 Fla. App LEXIS 18140 (Fla. 5th DCA 2018)

INDEMNITY – CONTRACTUAL

- May raises a duty to defend depending on contract language.
- Special relationship not required because it is based upon a written contract.

INDEMNITY – IMPLIED COMMON LAW INDEMNITY

- **Complaint must allege:**
 - Cause of action;
 - Against Indemnatee;
 - Based at least in part on imputed liability.
- **Third Party Complaint must allege:**
 - Special relationship running from Indemnitor to Indemnatee;
 - Indemnitor breached duty to Indemnatee;
 - Plaintiff's injuries resulted from same actions that constitute breach of Indemnitor's duty to Indemnatee; and
 - Indemnatee can be held liable to Plaintiff for injuries to Plaintiff resulting from Indemnitor's act.

INJUNCTIONS

- ***Elements:***
 - **Equitable grounds;**
 - **Clear legal or equitable right in favor of party seeking Injunction;
and**
 - **Inadequate remedy at law.**
 - **Rule 1.610, *Florida Rules of Civil Procedure***

INJUNCTIONS

- There may be considerations of Public Interest.
- Court must specify reasons for entry of Injunction with findings of fact.
- Preliminary Injunction must provide for a Bond for damages.

NEGLIGENCE

- *Elements:*
 - Defendant owed legal duty to Plaintiff;
 - Defendant breached that duty;
 - Plaintiff was injured as a result of Defendant's breach of duty; and
 - Resulting damage.
- *Don't forget Economic Loss Rule Considerations (i.e. are buildings "products" and the Independent Tort Doctrine.

PROFESSIONAL NEGLIGENCE

- *Elements:*

- **Breach by a professional of the standard of care of a like professional; and**
- **Resulting damage to any person who with reasonable certainty was intended to have been protected by the duty.**

STRICT LIABILITY

- *Elements:*

- The wrongdoer's relationship to the product or dangerous activity in question;
- The product or activity has a defective and unreasonably dangerous condition when used as intended;
- There is proximate cause between the condition of the produce or dangerous activity and Plaintiff's injuries or damages; and
- Resulting damages.

INTENTIONAL INTERFERENCE WITH CONTRACT OR BUSINESS RELATIONSHIP

- *Elements:*

- The existence of a business relationship, not necessarily evidenced by an enforceable Contract;
- Knowledge of relationship by Defendant;
- Intentional and unjustified interference with relationship by Defendant; and
- Damage to the Plaintiff as a result of breach of the relationship.

PAYMENT BOND CLAIM

- ***Elements:***

- Bond issued by Defendant;
- Claimant falls within permitted class under Bond;
- Claimant is unpaid for covered labor, services, or materials;
- Claimant has complied with Bond conditions, and any applicable statutory conditions;
- Suit has been timely filed; and
- Reasonable attorneys' fees incurred.

PERFORMANCE BOND CLAIM

- *Elements:*

- Defendant furnished Performance Bond;
- Claimant is an Obligee under the Bond;
- Bond Principal has breached the Contract or Bond obligations (in default);
- Claimant has performed any conditions precedent to recovery under Bond, including any timely notices and/or filing of suit; and
- Claimant has suffered damages as a result of the breach.

PROMISSORY ESTOPPEL

- *Elements:*

- **Promise;**
- **Which Promisor should reasonably expect to induce action or forbearance on the part of the Promisee or a third person;**
- **Which does induce such action or forbearance; and**
- **Injustice can be avoided only by enforcement of the promise.**

PROMPT PAYMENT ACT – FEDERAL: 31 U.S.C. §3901 THROUGH 3907

- **31 USCA 3903(a)(6):**

- Interest on construction contracts begins to accrue 14 days after a progress payment request is received, unless Contract provides for a longer period of time;
- Interest accrues on unpaid retainage by a date specified in the Contract or, in the absence of such a specified date, by the 30th day after final acceptance;

- **31 USCA 3903(7):**

- Defective invoices may be returned within seven (7) days of receipt for correction;

PROMPT PAYMENT ACT – FEDERAL: 31 U.S.C. §3901 THROUGH 3907

- **31 USCA 3905(a):**
 - Contractor owes interest to Owner for amounts overbilled;
- **31 USCA 3905(b):**
 - Contractor shall pay Subcontractors within seven (7) days of receipt of payment, and is liable for interest on late payments;
- **31 USCA 3907:**
 - Claims for interest may be filed under 41 USCA 7103;
 - Interest accrues until claim is filed or for up to one (1) year

PROMPT PAYMENT ACT – STATE: §255.072, *FLORIDA STATUTES*

- §§255.073 and 215.422, *Florida Statutes*:
 - Owner must pay undisputed amounts timely
 - Interest of 1% per month due on late payments
- If payment of an invoice is not issued within forty (40) days after receipt of the invoice and receipt, inspection, and approval of the goods and services, the agency or judicial branch shall pay the vendor, in addition to amount of invoice, interest at legal rate on the unpaid (undisputed) balance from the expiration of the 40-day period until such time as payment is issued to the vendor;
- Subcontractors must be paid within ten (10) days of receipt of payment by Contractor;

PROMPT PAYMENT ACT – STATE: §255.072, *FLORIDA STATUTES*

- **§255.075, *Florida Statutes*:**

- **Contract may not waive interest on late payments; and**
- **In an action to recover amounts due for construction services purchased by a public entity;**
- **Court shall award court costs and reasonable attorneys' fees, including fees incurred through any appeal, to prevailing party;**
- **If the Court finds the non-prevailing party withheld any portion of payment without any reasonable basis in law or fact.**

PROMPT PAYMENT ACT –FLORIDA LOCAL GOVERNMENT §§218.70 - 218.80, *FLORIDA STATUTES*

- Payment for construction services is due twenty (20) business days (25 days if an agent needs to approve) after delivery of invoice, unless rejected within ten (10) days after receipt of invoice.
 - Rejection must specify reasons, and undisputed portions of invoice must be paid.
- Subcontractors must be paid within ten (10) days after payment to prime.

PROMPT PAYMENT ACT – FLORIDA LOCAL GOVERNMENT §§218.70 - 218.80, *FLORIDA STATUTES*

- Local governments are required to have an informal dispute resolution procedure to resolve billing disputes within sixty (60) days after payment request was properly received.
 - Interest of 1% per month is due on late payments, unless contractual rate is higher.
 - Contract may not waive interest on late payments.
- Attorneys' fees and costs to be awarded to prevailing party for violation of this Act (Part).

PROMPT PAYMENT ACT – PRIVATE WORK: §715.12, *FLORIDA STATUTES*

- Interest is due on payments that are late, as defined in §715.12(4), and bear interest at no less than the legal rate, computed beginning on the 14th day after the payment is due. Obligor has fourteen (14) days to return incomplete payment requests.
- Unless Contract provides otherwise, dispute is not grounds to withhold payment for work not affected by the dispute.
- Retainage is due within fourteen (14) days of the earlier of:
 - substantial completion
 - beneficial occupancy or
 - issuance of a certificate of occupancy.
- Contractor may substitute specified security for a portion of retainage withheld.
- This is not a separate cause of action.

QUIA TIMET – WHEN SURETY IS IN JEOPARDY

- Agreement where Surety is entitled to demand from Indemnitors an amount sufficient to discharge any claim made against the Bond;
- There must be a rational basis for the Surety's fear that the Bond is in jeopardy; and
- Surety must establish the nature and approximate amount of possible claims and liabilities it reasonably anticipates under the Bond.

QUI TAM – FEDERAL 31 U.S.C. §3729

Any person who does the following is liable to the U.S. Government for a civil penalty of not less than \$5,000.00 and not more than \$10,000.00, plus three (3) times the amount of damages which the Government sustains because of the act:

- Knowingly presents, or causes to be presented, to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;**
- Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;**
- Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;**

QUI TAM – FEDERAL 31 U.S.C. §3729

- **Cont.**

- **Has possession, custody, or control of property or money used, or to be used, by the U.S. Government and, intending to defraud the U.S. Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;**
- **Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the U.S. Government and, intending to defraud the U.S. Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; and**
- **Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the U.S. Government.**

FALSE CLAIMS ACT – §68.082, *FLORIDA STATUTES*

- *Elements:*

Any person who does the following is liable to the state for a civil penalty of not less than \$5,500.00 and not more than \$11,000.00 and for treble the amount of damages the agency sustains because of the act or omission of that person:

- Knowingly presents or causes to be presented to an officer or employee of an agency a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made or used a false record or statement in order to get a false or fraudulent claim paid or approved by an agency;
- Conspires to submit a false or fraudulent claim to an agency or to deceive an agency for the purpose of getting a false or fraudulent claim allowed or paid;

FALSE CLAIMS ACT – §68.082, *FLORIDA STATUTES*

- **Has possession, custody, or control of property or money used or to be used by an agency and, intending to deceive the agency or knowingly conceal the property, delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;**
- **Is authorized to make or deliver a document certifying receipt of property used or to be used by an agency and, intending to deceive the agency, makes or delivers the receipt without knowing that the information on the receipt is true; or**
- **Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to an agency.**

FALSE CLAIMS ACT - §68.082, *FLORIDA* *STATUTES*

- A person may bring a civil action for a violation of §68.082 for the person and/or for the affected agency.
 - Civil actions instituted under this act shall be governed by the Florida Rules of Civil Procedure and shall be brought in the name of the State of Florida.
 - Prior to the Court unsealing the Complaint under subsection (3), the action may be voluntarily dismissed by the person bringing the action only if the department gives written consent to the dismissal and its reasons for such consent.
- The Complaint shall be identified on its face as a Qui Tam action and shall be filed in the Circuit Court of the Second Judicial Circuit, in and for Leon County.
 - Immediately upon the filing of the Complaint, a copy of the Complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General and the Chief Financial Officer, by registered mail, return receipt requested.
 - They may elect to intervene and proceed with the action, on behalf of the state, within 60 days after receiving the Complaint and the material evidence and information.

FALSE CLAIMS ORDINANCES – LOCAL GOVERNMENT

- **A municipality may have a false claims ordinance, e.g. Article XV, §§ 21-255 to 21-266, Metropolitan Dade County Code of Ordinances.**
- **Check for such an ordinance and then be mindful of its terms.**

UNAUTHORIZED USE OF PLANS - COPYRIGHT

– 17 U.S.C. §§101-810

- *Elements:*

- Plaintiff is Owner of copyright;
- Defendant has published plans or built a building, which was copyrighted;
- Plan or building of Defendant is substantially similar to that of Plaintiff; and
- Plaintiff seeks damages and/or Injunction.

UNLICENSED CONTRACTOR

- **Statutory Action for Damages - §768.0425, *Florida Statutes*:**
 - “In any action against a Contractor for injuries sustained resulting from the Contractor’s negligence, malfeasance, or misfeasance, the consumer (person who contracts for the performance of any construction or building service which is regulated by any state or local law), shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorneys’ fees if the Contractor is neither certified as a Contractor by the state nor licensed as a Contractor pursuant to the laws of the municipality or county within which she or he is conducting business.”

UNLICENSED CONTRACTOR

- **Contracts Entered Into by Unlicensed Contractors Are Unenforceable - §489.128, *Florida Statutes*:**
 - **“As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed Contractor shall be unenforceable in law or in equity by the unlicensed Contractor.”**
 - **“[...]a Contractor shall be considered unlicensed only if the Contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein. If the contract does not establish such a date, the Contractor shall be considered unlicensed only if the Contractor was unlicensed on the first date upon which the Contractor provided labor, services, or materials under the contract.”**

UNLICENSED CONTRACTING (CONT).

- *See Taylor Morrison v. Esos, 163 So. 3d 1286 (Fla 1st DCA 2015)* (Holding: “The trial court erred in ruling that a contractor was an unlicensed contractor for the construction of the owners' home because it met the requirement § 489.128(1), Fla. Stat. (2003) to be considered licensed where the evidence undisputedly showed that the contractor had the required qualifying agent on the effective date of the contract, and the contractor's apparent violations of §§ 489.127(4)(c), 489.119, Fla. Stat. (2003) occurred after the effective date of the contract”).
- Case involving unlicensed contracting in Florida.

WORTHLESS CHECKS – §68.065, *FLORIDA STATUTES*

Elements:

- Check is given for materials or services furnished;
 - With intent to defraud;
 - Payee gave written notice (specified in the statute) of a worthless check; and
 - 30 days have gone by without payment.
-
- Holder of the check may sue the maker for the amount of the check, plus treble damages, and attorneys' fees and costs.

DAMAGES & REMEDIES IN CONSTRUCTION DISPUTES

AGENDA

- **Damages Concepts**
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- **Damages Concepts Regarding Specific Causes of Action**
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

DAMAGES CONCEPTS

PROOF OF DAMAGES

- Claimant has the burden of proof
- Claimant is not required to prove exact amount of damages
 - Estimates are acceptable
- Sufficient to have a reasonable basis of computation, even though the result may only be approximate.
- Uncertainty that defeats recovery relates to whether damage occurred, rather than the amount of damage suffered.

TYPES OF DAMAGES SUFFERED BY A CONTRACTOR

- **Traditional terms: “Direct” and “Indirect Costs”**
 - Direct costs: the labor, material and equipment expenses necessary to physically build the work
 - Indirect costs: overhead, often associated with delay (e.g., jobsite and home office overhead)
 - These classifications are overly broad and can be inaccurate

TYPES OF DAMAGES SUFFERED BY A CONTRACTOR

- **Contractors often incur increased overhead costs, direct costs and project-wide support costs performed in the field due to extended performance**
- **Additionally, using contrasting terms like direct vs. indirect costs can create confusion and unnecessary debates regarding legal concepts that are not strictly limited to construction disputes.**
- **“Activity-related” and “Time-related” costs are more accurate classifications**

TYPES OF DAMAGES SUFFERED BY A CONTRACTOR

- **Activity-related costs vary with productive effort for performing construction work in the field, or design effort for design-build projects.**
 - Labor, materials, equipment, subcontractor and subconsultant
 - *Example:* the costs of forming, pouring and placing a concrete slab

TYPES OF DAMAGES SUFFERED BY A CONTRACTOR

- **Time-related are driven by time**
 - Time-related overhead
 - Classically labeled as “indirect” costs:
 - Jobsite overhead
 - District / regional office overhead
 - home office overhead
 - Time-related direct costs
 - Labor, material (e.g., extended rental), equipment, subcontractor and subconsultant expenses that increase due to extended performance requirements
 - Project-wide support expenses (not limited to performing isolated work activities in the field):

EXTRA OR ADDITIONAL WORK

- **Approaches:**

- Lump sum (forward-priced)
- Unit price - to the extent the extra or additional work is within the scope of an established (or agreed) unit price
- Time & materials, or “force account”
- Standardized rates (e.g., Rental Rate Blue Book) for items like equipment may be specified
- Contract provisions often include specified levels of markup (covering overhead, profit, insurance, bonds and/or supervision)

DISRUPTION, INEFFICIENCIES AND LOSSES OF PRODUCTIVITY

- Often intertwined with issues of delay
- Can be cause of delay or consequence of delay
- Should be evaluated separately from the delays
- **Several approaches for pricing inefficiencies:**
 - Measured mile
 - Industry studies
 - Planned vs. actual analysis
 - Total cost
 - Modified total cost

MEASURED MILE APPROACH TO INEFFICIENCY

- Preferred method, but can involve practical challenges
- Compares the productivity achieved during an un-impacted period with the productivity achieved for the same work during impacted period
- **Important considerations:**
 - Is the un-impacted period a representative sampling of performance?
 - Measured “mile or measured “inch”?
 - Is the work performed during both periods truly comparable
 - Or was the work was influenced by factors in addition to the specific, claimed impact?
 - Are there adequate, accurate records for identifying the productivity achieved during both periods?
- **If a representative period of un-impacted work did not exist, may attempt to compare:**
 - With productivities achieved on similar work activities on the same project, or
 - With the historical productivities achieved for the same work activities on prior projects

INDUSTRY STUDIES

- **More generalized and more subjective than the measured mile method**
- **Uses industry studies to identify estimated percentage impacts by a variety of potential causes – the effect on productivity caused by:**
 - Ambient temperatures
 - Weekly work shift structure/overtime
 - Stacking of trades
 - Other issues affecting efficiency
- **Criticisms:**
 - Generic nature of the data does not account for specific circumstances on a project
 - There is still a need to corroborate the use of studies with the data from the project

PLANNED V. ACTUAL ANALYSIS OF IMPACTED WORK

- Compares the actual costs incurred to the planned costs *for a work activity*
- **Alternative approaches:**
 - Modify the estimated planned costs (to account for any “bid busts” on that item), and/or
 - Reduce the actual costs (to account for self-inflicted problems)
- **Sometimes *erroneously* referred to as “total cost” or “modified total cost” methods**
 - With corresponding reference to case law that courts heavily disfavor these approaches
- **Criticisms and criteria:**
 - Were the planned costs a reasonable reflection of the costs for performing the (un-impacted) work?
 - Were the actual costs incurred reasonable?
 - **Was the contractor responsible for some (or all) of the additional costs?**

TOTAL COST METHOD OF PROJECT

- Disfavored by the courts.
- Requires:
 - Reasonable original bid
 - Reasonable actual costs
 - Additional costs not caused by contractor problems.
 - No other method available to quantify claim

TOTAL COST METHOD

Total Cost

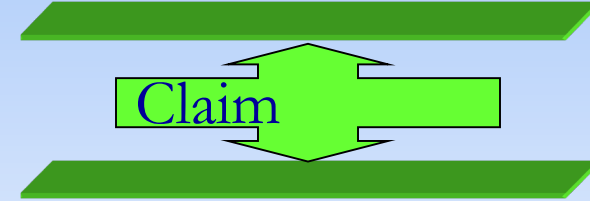
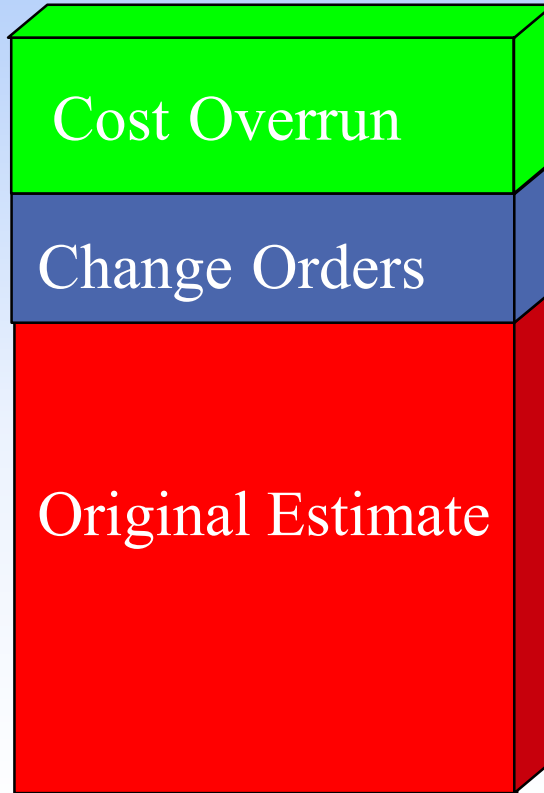
Incurred

Cost

Plus

Change

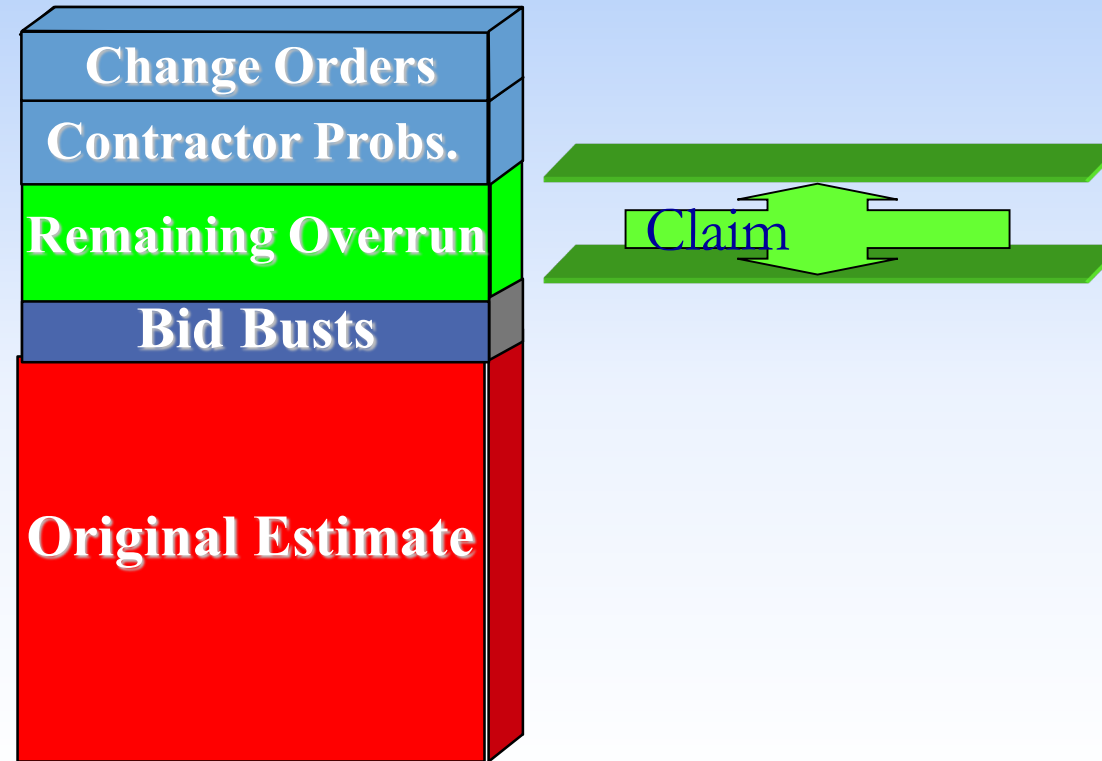
Orders



MODIFIED TOTAL COST METHOD

- **Modifies the total cost approach to compensate for:**
 - Bid errors
 - Specific costs arising from the contractor's actions
 - Unclaimable costs
 - Specific costs arising from actions of other parties

MODIFIED TOTAL COST METHOD



DISPLACED ACTIVITY COSTS AND ESCALATION

- Related to delay
- May involve the deferral of activities
- Heavily-influenced by the contract
- Can compare quoted prices (at bid time) to the actual prices incurred
- Some purchase orders include provisions (*e.g.*, set annual or periodic increases) making quantification of the increased costs straightforward
- Some contracts (*e.g.*, FDOT or other institutional owners) recognize market volatility of certain products
 - Include indices for price adjustments associated with the same

DELAYS

- **Time-Related Direct Costs**
- **Time-Related Overhead**
 - Jobsite Overhead
 - Home Office Overhead

TIME-RELATED DIRECT COSTS

- **May include labor, material (e.g., extended rental), equipment, subcontractor and subconsultant expenses**
- **May also be incurred when an activity's performance has been moved or displaced to a later period than originally planned**
- **May include expenses for project-wide support (not limited to performing isolated work activities)**
 - Casting yard
 - Surveying
 - Maintenance & protection of traffic
 - Dewatering
 - Sedimentation / erosion control
 - Quality control, quality assurance, and inspection

TIME-RELATED DIRECT COSTS

- **Can be compiled utilizing a combination of:**
 - Project schedules (for identifying affected activities' planned and actual durations)
 - Cost-accounting system (for quantifying the actual costs incurred during the extended or displaced time periods).
- It may be appropriate to identify a typical fleet of equipment on the project, or a grouping of key personnel for field operations, required for an extended duration

INCREASED EQUIPMENT COSTS

- **Need detailed equipment plan**
- **Perform overrun analysis**
 - More equipment
 - Increased use
 - Increased rates
- **Determine liability for overrun**
- **Contract terms**

INCREASED LABOR COSTS

- **Perform detailed overrun analysis**
 - Costs
 - Hours
 - Wage rate
 - Productivity rates
 - Quantities
 - Extra work
 - Others
- **Decide on an approach**

JOBSITE OVERHEAD

- **Often called extended general conditions, jobsite overhead includes:**
 - Facilities (office, trailer, utilities, furniture, computers, software, etc.)
 - Management and administrative staff
 - Cars / trucks for management / administrative staff
 - Insurance and bond costs (unless separately addressed by contract).
- **Isolate the jobsite overhead (time-related) costs**
 - Eliminate one-time expenses
- **Different approaches:**
 - Averaging the costs over the entire project length
 - Selecting a reasonable time covering the period(s) in which the impact(s) occurred
 - Evaluating the costs incurred after the original contract completion date
- **No one-size-fits-all approach**

INCREASED FIELD OVERHEAD COSTS

TIME RELATED COSTS CALCULATION

- **Identify Cost Components Which Are Time Related**
- **Review Indirect / Field Office Overhead Costs Over Time To Aid In Determining Which Are Time Related**
- **Screen the Pool for One-Time Costs**
- **Calculate A Daily Or Monthly Rate For Time Related Costs**

JOBSITE OVERHEAD COSTS

Sample of Cost Classifications

<i>Time-related</i>	<i>Not Time-related</i>
Rent	Insurance based on Contract Price
Utilities	Consultant Fees
Office Supplies	Temporary Structures
Janitorial Services	Job Office Set Up
Project Management	Mobilization
Safety Department	

HOME OFFICE OVERHEAD

- **Costs that are expended for the benefit of the whole business**
- **Cannot be attributed or charged to any particular contract**
- **Fixed costs that are allocated on a pro-rata basis among various contracts**

HOME OFFICE OVERHEAD

- The *Eichleay* formula is most common method used for the calculation of home office overhead costs:

1.
$$\frac{\text{Delayed Contract Billings}}{\text{Contractor's Total Billings}} \times \frac{\text{Total Home Office Expenditures}}{\text{Overhead to Contract}} = \text{Overhead Allocable}$$

2.
$$\frac{\text{Overhead Allocable to the Contract}}{\text{Days of Contract Performance}} = \text{Overhead Allocable Per Day}$$

3.
$$\text{Overhead Allocable Per Day} \times \text{Days of Delay} = \text{Extended / Unabsorbed Overhead}$$

HOME OFFICE OVERHEAD PRE-REQUISITE

- **Three requirements for utilizing the *Eichleay* formula:**
 - Owner-imposed delay occurred;
 - The owner required the contractor to ‘standby’ during the delay
 - While ‘standing by,’ the contractor was unable to take on additional work
- *See Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536, 540 (Fla. 4th DCA 2005)
- *See Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126, 131 (Fla. 4th DCA 2010)

ACCELERATION

- **Any action taken to increase the rate work is accomplished (compared with the planned rate)**
- **Normally implemented in an effort to mitigate / overcome delays or impacts**
- **Typical acceleration measures:**
 - Re-sequencing the work
 - Extending work hours / paying premium time
 - Offering incentives / bonuses for increased productivity
 - Other creative solutions.

ACCELERATION

- **Discretely added resources or changes to how the work is performed are, for the most part, readily-identifiable for purposes of pricing**
 - However, disputes may arise as to whether the originally-provided resources were sufficient
- **Working longer hours, crowding crews and other accelerative measures can have diminishing returns on the productivity achieved per worker or per crew**
 - Segregating the inefficiency costs from the acceleration costs can be challenging
- **Another challenging situation arises when acceleration measures are implemented (to overcome / mitigate delays), but new or further impacts occur, which delay the accelerated work**
- **Care must be taken to ensure that costs are not duplicated through pricing the discrete components of a claim.**

CONSEQUENTIAL DAMAGES

- **Generally, consequential damages are those that do not “naturally flow” from breach of a contract**
- **Specific to a contractor, examples may include:**
 - Financing costs
 - Reputational damage
 - Loss of goodwill
 - Lost profits on other projects
 - Losses of or impaired bonding capacity
 - Lost bidding opportunities
 - Insolvency and bankruptcy

CONSEQUENTIAL DAMAGES

- Due to the inherent nature of consequential damages (not flowing directly from a breach), recovery is more difficult.
 - **Any loss was (or should have been) within the reasonable contemplation of the parties**
 - Loss was not remote, contingent or conjectural
 - Damages are reasonably certain
- **Check for a waiver of consequential damages in the contract.**
 - Valid and enforceable under FL law
 - Must be clearly and unambiguously drafted

TYPES OF DAMAGES SUFFERED BY AN OWNER

- **Delays/Liquidated Damages**
- **Defective and/or incomplete work**
 - Reasonable Costs of Construction
 - Economic Waste

DELAYS/LIQUIDATED DAMAGES

- **Where a contractor fails to complete a project timely, the owner may be entitled to delay damages, including:**
 - Out-of-pocket costs directly associated with the project (e.g., extended project office, administrative staff, architectural, engineering and/or inspection costs)
 - Owner may also suffer loss of use damages, which may take several forms:
 - Extended rental / lease costs for another facility until construction is complete;
 - Loss of income from the uncompleted project;
 - Loss of toll income;
 - Loss of income from a sports stadium / arena;
 - Loss of rental income for an office building or apartment complex; and
 - Increased financing costs
 - Extended construction loan period (at higher rate than permanent loan); or
 - Increased rate due to expiration of guaranteed rate period
 - Depending on the circumstances, the delay damages incurred may be consequential (rather than direct) damages

DELAYS/LIQUIDATED DAMAGES

- Due to the uncertainties with the types / amounts of delay damages, parties often agree to liquidated damages (LD) rate
- Florida law is well-settled –parties may agree in advance on an amount to be paid as LD's
- Two-part test for whether LD's clause will be upheld (or stricken as an unenforceable penalty):
 - **The damages due to a breach must not be readily ascertainable.**
 - **The LD rate must not be so grossly disproportionate to any damages that might reasonably flow from a breach**

DELAYS/LIQUIDATED DAMAGES

- **LD's provisions are creatures of contract**
 - May specify varying assessments of LD's for different types of failures
 - Distinct LD's can be set for failure to meet:
 - Specified interim milestones,
 - Substantial completion, and/or
 - Final completion
- **A party cannot recover both LD's and actual damages for the same harm**
 - However, an LD's provision may be designed to cover only certain categories of delay damages
 - And leave other categories to be assessed based on actual costs incurred
 - Example, a toll road owner could specify that contractor-caused delays would result in:
 - Assessment of actual damages for extended administrative, engineering and inspection costs, AND
 - LD's for the anticipated loss of toll income resulting from delayed completion
 - KEY: counsel drafting such provisions must ensure they are unambiguous

DEFECTIVE AND/OR INCOMPLETE WORK

- **The Florida Supreme Court case:**

- *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982)
 - Establishes the measure of an owner's damages where the contractor's breach involves defective or unfinished construction. Contractor infamously built a mirror image of the house purchased by the Hourihans
 - Hourihans sued for specific performance (i.e., tearing down and rebuilding the home facing the proper direction)
 - Trial court found that the contractor breached the contract, but refused to require specific performance.
 - It would be economically wasteful

DEFECTIVE AND/OR INCOMPLETE WORK

- **On review, the Florida Supreme Court adopted Subsection 346(1)(a) of the Restatement (First) of Contracts:**

(1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:

DAMAGE: *GROSSMAN HOLDINGS*

For defective or unfinished construction he can get judgment for *either*

- the *reasonable cost of construction and completion* in accordance with the contract, if this is possible and *does not involve unreasonable economic waste; or*
- the *difference between the value* that the product contracted for would have had and the value of the performance that has been received by the plaintiff, *if construction and completion* in accordance with the contract *would involve unreasonable economic waste*

ECONOMIC WASTE

- **Florida Supreme Court expressly found that the doctrine of economic waste is not limited to commercial construction**
 - Applies to residential construction as well.
 - *See Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982)

REASONABLE COSTS OF CONSTRUCTION

- **General rule:**
 - Non-defaulting party must show actual expenditures incurred due to the breach
 - Defaulting party may present their evidence to prove waste, extravagance and lack of good faith
- **Actual costs may include items reasonably necessary to accomplish the work, such as engineering and architectural fees, among other things.**
- **The proper measure of damages for construction defects is the cost of correcting the defects, except in certain instances where the corrections involve an unreasonable destruction of the structure and a cost which is grossly disproportionate to the results to be obtained.**
- **No betterment**

Temple Beth Sholom & Jewish Ctr., Inc. v. Thyne Constr. Corp., 399 So. 2d 525, 526 (Fla. Dist. Ct. App. 1981)

•

Damages Concepts Regarding Specific Causes of Action

BREACH OF CONTRACT

- **Establish liability for a breach**
- **Injured party is entitled to compensatory damages**
 - Sufficient to return to as good a position as he or she would have enjoyed had the breaching party fully performed
- **Recoverable damages:**
 - Flow naturally from the breach
 - Were foreseeable by the breaching party at the time the contract was entered
- **Typically measure damages from the date of the breach**

BREACH OF CONTRACT

- **Substantial Performance:**

- Not full performance, but nearly equivalent to what was agreed
 - **Subject to recovery of damages caused by the failure to render full performance**
 - Ex: An Owner may deduct the reasonable costs of correction or completion, where contractor substantially (but not fully) performs
- Normally whether substantial performance is achieved is a question of fact for the jury.

BREACH OF CONTRACT

- **Partial Performance:**

- A contract that has not been fully or substantially performed.
- If one party directs other not to perform, the non-breaching party has potential claim.
- Measure of recovery is either in quantum meruit or the reasonable cost of partial performance plus lost profits.

- *Quantum Meruit:*

- The reasonable value of the labor performed and materials supplied
- Designed to restore the contractor to the same position he would have been in, prior to making the agreement

- **Lost Profits:**

- Lost profits plus the reasonable cost of labor and material expended in partial performance
- Lost profit can be established by subtracting the total costs for services and materials necessary to complete the contract from the contract price
 - Must also deduct the actual supervisory salary it paid and any other non-reimbursable operating expenses and costs (*e.g.*, home office expenses and overhead)
- Must establish lost profit to a reasonable degree of certainty
- Cannot be based on mere speculation or conjecture.

- *Marshall Constr. V. Coastal Sheet Metal & Roofing*, 569 So. 2d 845 (Fla 1st DCA 1990).

NEGLIGENCE

- **Plaintiff must prove the extent of injuries, and that they were proximately caused by the Defendant's negligence**
- **Must generally allege a bodily injury or property damage**
- **Negligence claims for purely economic losses are recognized only in limited circumstances**

NEGLIGENCE

- **Economic Loss Rule:**
 - Judicially created
 - Prior to *Tiara*, there were distinct applications of the ELR:
 - ***Products liability economic loss*** rule: If a product physically damages **only itself**, causing additional economic loss, no recovery is permitted in tort.
 - ***Contract economic loss*** rule: If parties have entered into a contract, the contract's obligations cannot be used to establish a tort claim for the recovery of purely economic damages...
 - There must be a separate, 'independent tort.'
 - ***Negligence economic loss*** rule: Negligence will not be expanded to protect economic interests in the absence of personal injury or property damage.

NEGLIGENCE – ELR (CONT.)

- In 2013, the Florida Supreme Court expressly limited the economic loss rule to products liability cases
- *Tiara Condominium Ass’n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013).
- The Court reasoned that “[o]ur experience with the economic loss rule over time, which led to the creation of exceptions to the rule, now demonstrates that expansion of the rule beyond its origins [as only applying to product liability cases] was unwise and unworkable in practice.”

NEGLIGENCE AND ELR (CONT.)

- Trial Courts around the state continue to apply *Casa Clara* and hold that a construction project (like a condo) is a product.
- Courts then apply *Tiara* and bar the Negligence claim against the builder or subcontractor.
- Plaintiff would have to rely upon statutory or warranty claims.

PROFESSIONAL NEGLIGENCE- ELR (CONT.)

- Even before *Tiara*, claims for professional malpractice or professional negligence were not limited by the ELR, regardless of whether the parties were in privity
- An aggrieved party may file a tort action for professional malpractice *and* pursue a cause of action for breach of the contract pursuant to which the professional services were performed.
- The Florida Supreme Court declared that Florida law recognizes a cause of action against an individual for professional negligence whether or not the individual practices through a corporation
 - *See Moransais*, 744 So. 2d 973 at 977-982

NEGLIGENT MISREPRESENTATION

- **Restatement (Second) of Torts § 552B describes the damages recoverable for negligently supplying false information for the guidance of others**
 - (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including
 - (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
 - (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.
 - (2) the damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.
- **No Florida cases have specifically adopted section 552B**
 - However, several Florida cases have cited section 552 with approval when discussing negligent misrepresentation generally

INTENTIONAL INTERFERENCE WITH CONTRACT/BUSINESS RELATIONSHIP

- **Measure of damages is the loss of either property or personal benefit caused by the interference**
- **Objective is to put the plaintiff in the same economic position it would have been in had the contract not been interfered with**
- **Plaintiff is entitled to damages “reasonably flowing” from the interference**

FRAUD

- **Damages are determined by the “benefit of the bargain” rule or the “out-of-pocket” rule**
 - Benefit of bargain: awards the difference between the actual value of the property and its value had the alleged facts regarding it been true
 - Out-of-pocket rule: awards the difference between the purchase price and the real or actual value of the property
- **Punitive damages may also be recoverable**
- **Fraud in the inducement claims provides two alternative remedies:**
 - Rescind the contract (*if* the parties can be returned to the positions they previously occupied)
 - Ratify the contract and seek damages

RESCISSION

- Rescission is an equitable remedy devised by courts where monetary damages are inadequate or where one party, having a right, *elects* that remedy
- **Concept is to restore the *status quo***
 - Placing the parties in the positions they occupied before contracting with each other
- **Rescission extinguishes the contract for all purposes**
 - Precludes the recovery of the contract price
 - Also prevents the recovery of damages for breach of the contract
- **The party rescinding may, however, have a right to restitution for any performance on his part.**

COPYRIGHT LAW: 17 U.S.C. 504(A) – (B)

- **Particularly relevant to design professionals**
- **A copyright owner may recover:**
 - Actual damages, and
 - Any additional profits of a copyright infringer not taken into account in computing the actual damages; or
 - Statutory damages
- **Copyright owner is required to present proof only of the infringer's gross revenue**
 - Infringer must prove deductible expenses and the elements of profit attributable to factors other than the copyrighted work
- **Instead of actual damages, the copyright owner may elect to recover an award of statutory damages for all infringements involved in the action with respect to any one work**
 - Not less than \$750 to not more than \$30,000
 - Election may be made any time before final judgment is rendered

COPYRIGHT LAW: 17 U.S.C. 504(A) – (B)

- If the infringement was willful, the court, in its discretion, may increase the statutory damages to not more than \$150,000
- Where the infringer was not aware and had no reason to believe that his or her acts constituted an infringement, the court, in its discretion, may reduce the statutory damages to not less than \$200
- Other than against the United States or an officer thereof... , full costs (including reasonable attorneys' fees) may be recovered
- Punitive damages are generally not allowed.

INTEREST

- **Prejudgment interest is an element of compensatory damages**
- **The loss theory of prejudgment interest is the law in Florida**
 - A plaintiff's loss of the use of funds is itself a wrongful deprivation
- **As interest is merely another element of pecuniary damages, once determined that a defendant is liable for calculated damages, interest should follow as a matter of law**
 - From the date of loss
- **The State's CFO sets (quarterly) the rate of interest payable on judgments and decrees**
 - On December 1, March 1, June 1 and September 1 for the following quarter
 - Does not affect the interest rates established by written contract
- **Post-judgment interest: judgment shall bear, on its face, the rate of interest that is payable on the judgment**
 - When a judgment is obtained, the interest rate is established
 - The interest rate is adjusted annually on January 1 to the interest rate in effect on that date as set by the State's CFO until the judgment is paid

PREJUDGMENT INTEREST (CONT.)

- Prejudgment interest *may* be recoverable by a party even without out of pocket expenses under a loss theory.
- Once the date of loss is determined by the jury or court.
- Big issues are: When did loss occur? Date of remedial estimate?
- Generally handled post-trial.

ATTORNEYS' FEES AND COSTS

- Attorneys' fees incurred prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing recovery
- “[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney’s fees.”
 - Note, however, that the Florida Supreme Court has held, in the context of a lien-foreclosure action, that a court may determine that neither party prevailed (*Trytek*)
- The “prevailing party” standard is not the standard for cost awards.
 - Section 57.041(1), Florida Statutes, provides that the *party recovering judgment* must be awarded costs

Michael J. Childers
mchilders@boydjen.com

BOYD & JENERETTE P.A.
EST 1952

904-353-6241 WWW.BOYDJEN.COM

BOCA RATON | JACKSONVILLE | ORLANDO | SAVANNAH