



BEST & FLANAGAN

# Future Outlook for Liquidated Damages Claims in Minnesota

*Presentation to MAPA*

## Future Outlook of Liquidated Damages Claims in Minnesota

- Liquidated damages are common on construction projects.
- Contractors often challenge whether they caused the delays resulting in the LD's, but rarely challenge whether LD's can be assessed on a project.
- Amount of LD's vary (i.e. \$500/day to \$20,000/day).
- Seven figure LD claims on construction projects can be common with ownership of the float, non-excusable weather delays, etc.
- Two new Minnesota cases from 2023 and 2024 require reassessing challenges to LD claims.

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- Liquidated damages require that the parties intended for it to be a fair compensation for an injury caused by a breach of contract and not a penalty for nonperformance. *Gorco Construction Co. v. Stein*, 256 Minn. 476 (1959).
- Determining whether a liquidated-damages clause is enforceable involves determining whether the actual damages are capable of accurate estimation or if the liquidated damages amount is a reasonable forecast of just compensation. *Capital Construction*, A23-1404 N.W.2d 1, at 2 (2024)

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- Fair compensation for breach or penalty for nonperformance and whether actual damages are capable of accurate estimation.
- Private, vertical construction projects – easier to calculate actual damages (i.e. finance charges, lost revenues, etc. and LD's not appropriate).
- Public highway projects - inability to reopen road to traffic by a specified time more difficult to calculate an accurate estimation of damages.

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- *San Ore-Gardner v. Missouri Pac. R. Co.*, 496 F. Supp. 1337 (E.D. Ark. 1980) – Bridge project in Arkansas - \$600/day LD provision was an unenforceable penalty where the RR failed to provide a rational basis for how they calculated the \$600/day.
- How does State calculate LD amounts on road/bridge projects?
- If no rational basis for calculation, then argument that LD's are an unenforceable penalty.

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- Where the party who is seeking to enforce a liquidated damages provision of a contract is responsible for the failure to perform *or has contributed in part to it*, the liquidated damages provision will not be enforced. See, e. g., *United States v. Kanter*, 137 F.2d 828 (8th Cir. 1943); *United States v. John Kerns Construction Co.*, 140 F.2d 792 (8th Cir. 1944).
- Some jurisdictions allow apportionment, but the better rule seems to be that where delays are occasioned by the mutual fault of the parties, the Court will not attempt to apportion but will refuse to enforce the provision for liquidated damages. *Gogo v. Los Angeles County Flood Control*, 45 Cal. App. 2d 334, 114 P.2d 65 (1941)

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- Did owner contribute to the delays? If so, then argument that the LD's are unenforceable.
- Common for work change directives, scope changes, delayed execution of change orders, etc. to contribute to the delays, which supports unenforceability of LD's.
- Proportionality can still be factored.

## Future Outlook of Liquidated Damages Claims in Minnesota

- Best defense is quality documentation showing you did not cause delays.
- Are damages capable of accurate estimation or is it a penalty for nonperformance?
- Is there a rational basis for the amount of LD's?
- Did owner cause or contribute to the delays?

Questions?

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Justin P. Short is a partner in the firm's Construction, Real Estate and Litigation practice groups where he represents contractors, real estate developers, and commercial landowners. Mr. Short specializes in construction claims pertaining to highway and bridge contracts, Department of Transportation claims, federal MATOC agreements, mechanic's liens, bond claims, bid protests, indemnity obligations, construction contract disputes and commercial and multi-family residential construction defects. He has represented contractors on these construction matters throughout Minnesota, North Dakota, South Dakota, Iowa, Illinois, Arizona, Texas, Colorado, Arkansas, New Mexico, Mississippi, Florida and North Carolina.

Justin is a frequent lecturer on construction and real estate industry topics through the State Bar Association, Thompson-West Corporation, HalfMoon Education Inc., as well as private seminars to contractors, real estate developers and commercial landowners.

