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# JOURNAL



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# Construction Delay Damages – Liquidated Damages Claims

By Jeremy P. Brummond

The damages an owner suffers when a project is delayed are different than a contractor's damages, and thus, owner delay claims involve distinct issues. If a project is delayed, an owner can suffer many different damages: loss of use, lost profits, additional financing costs, loss of goodwill, and continued cost to monitor and devote its resources to the project, among others.

Calculating these types of damages can be very difficult. For this reason, many construction contracts include "liquidated damages" provisions intended to compensate a project owner for its damages when a project is delayed. Such "liquidated damages" clauses meant to compensate for project delay typically require a contractor to pay a per diem amount for every business or calendar day that the project fails to achieve either substantial or final completion (or both). Liquidated damages clauses can be used for other purposes. For example, a construction contract can also stipulate to certain damages (or "liquidate" damages) based on failure of a project to achieve performance criteria. A construction contract can also "liquidate" the damages payable to the contractor if there is a contract termination. This article, however, focuses only on liquidated damages provisions meant to address project delay, including challenges to enforcing such provisions, and other issues relating to liquidated damages provisions meant to compensate for project delay.

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## I. The general rule – provisions designed to penalize a contractor for delay are not enforceable.

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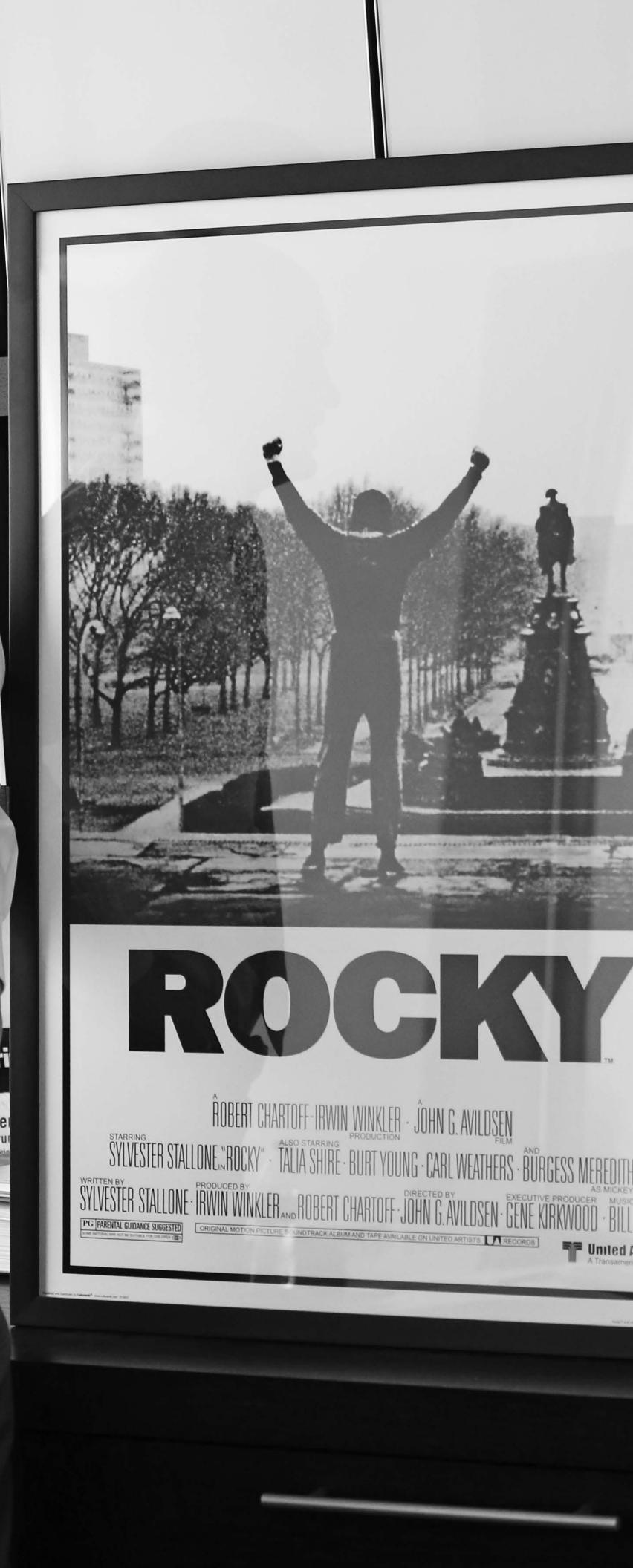
"Liquidated damages clauses are valid and enforceable; penalty clauses are not."<sup>1</sup> To determine whether a clause is a valid liquidated damages clause or a penalty clause, Missouri follows the approach in the Restatement of Contracts and Restatement (Second) of Contracts, both of which follow a similar approach.<sup>2</sup> The Restatement recognizes that a liquidated damages provision is generally

a penalty unless two requirements are satisfied. First, the amount to be paid in the liquidated damages provision must be "a reasonable forecast of just compensation for the harm that is caused by the breach."<sup>3</sup> Second, the contemplated harm for which the liquidated damages provision is meant to compensate must be "incapable or very difficult of accurate estimation."<sup>4</sup>

Addressing these requirements in reverse order, there are relatively few Missouri construction cases wherein a contractor challenges a liquidated damages provision because, according to the contractor, the owner's delay damages were easily calculable.<sup>5</sup>

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1. *Taos Constr. Co., Inc. v. Penzel Constr. Co., Inc.*, 750 S.W.2d 522, 525 (Mo. Ct. App. E.D. 1988) (citing *Grand Bissell Towers, Inc. v. Joan Gagnon Enterprises, Inc.*, 657 S.W.2d 378, 379 (Mo. Ct. App. E.D. 1983)).
  2. *Id.* at 525–526. *Taos* relied on the Restatement of Contracts. More recent Missouri decisions involving attacks on liquidated damages provisions cite the Restatement (Second) of Contracts. See *Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc.*, 59 S.W. 3d 505, 510 (Mo. *en banc* 2001) (citing the Restatement (Second) of Contracts in reference to the approach taken by recent Court of Appeals decisions when addressing the validity of liquidated damages provisions).
  3. *Corrigan Co. Mech. Contractors, Inc. v. Fleischer*, 423 S.W.2d 209, 213–214 (Mo. Ct. App. 1967) (quoting RESTATEMENT (FIRST) OF CONTRACTS § 339 (1932)).
  4. *Id.* at 214.
  5. *But cf. City of St. Louis v. Parker-Washington Co.*, 196 S.W. 767, 771 (Mo. *en banc* 1917) (liquidated damages provision in pipe supply contract held to be unenforceable penalty when defendant contractor was able to easily track damages caused by delay of its supplier).
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**Jeremy P. Brummond's** practice focuses on engineering and construction. Clients include property owners, engineers, general contractors, and specialty contractors and he represents clients in contract negotiation and drafting, claim resolution, and construction-related litigation including cases involving claimed construction and design defects, delay and lost productivity, and mechanic's lien and payment bond claims. Jeremy is a member of the ABA's Forum on the Construction Industry and a member of BAMSL's Construction Law Committee. Jeremy was selected for inclusion in Missouri & Kansas Rising Stars® 2010-2014 and in Missouri & Kansas Super Lawyers® for 2015-2018. He was recognized by The Best Lawyers in America® in 2019.





In most cases, by failing to advance the argument, it seems contractors agree calculating an owner's damages like the loss of use of the space or lost profits incurred because of delay would be difficult (indeed, in many liquidated damages provisions there is an express stipulation by the contractor that calculating the owner's damages would be difficult). Instead, most of the cases where liquidated damages provisions in construction contracts were challenged involve other attacks on the provisions, including challenges relating to the requirement that the damages be a reasonable forecast of just compensation for anticipated harm.

In assessing whether liquidated damages are a reasonable forecast of harm, "courts should consider the nature of the contract, the public detriment to be contemplated by the delay, and the difficulty in approximating damages as a result of the delay."<sup>6</sup> The more difficult it is to prove damages with certainty, the more likely the amount fixed will be deemed a "reasonable" forecast.<sup>7</sup> "Although the Restatement speaks in terms of a 'reasonable forecast of just compensation,' actual damages are relevant to a determination of reasonableness."<sup>8</sup>

Contractors have argued the liquidated damages contemplated were not a "reasonable forecast" of just compensation for harm anticipated but instead were a penalty because the damages claimed were excessive compared to the compensation to be paid to the contractor. In *Taos Constr. Co., Inc. v. Penzel Constr. Co., Inc.* a highway contractor passed on \$9,200.00 in liquidated damages assessed against the highway contractor to its seeding and fertilizing subcontractor.<sup>9</sup> The subcontractor's entire contract, however, was only \$13,900.00.<sup>10</sup> On appeal, the subcontractor urged the court to take a "hindsight" approach and find the liquidated damages clause provided for a penalty based on the relative value of the subcontractor's contract. The court refused, holding the subcontractor was looking at the wrong benchmark: the damages incurred or anticipated should be evaluated to

determine if a liquidated damages provision provided for a "reasonable forecast" of harm – "not the dollar amount of the subcontract."<sup>11</sup>

## II. Missouri's approach – some showing of actual harm is required to recover liquidated damages.

Missouri follows a minority approach and not only requires an enforceable liquidated damages provision for an owner to recover liquidated damages, but also requires some showing of actual harm or loss by the owner before liquidated damages can be awarded.<sup>12</sup>

In 1914, the St. Louis Court of Appeals discussed the requirement in *Ward v. Haren*.<sup>13</sup> A contractor sued for the balance due for a building meant for the Louisiana Purchase Exposition or "World's Fair", and the owner counterclaimed for liquidated damages when the building was not completed by April 15, 1904 as stipulated in the contract.<sup>14</sup> In reply, the contractor argued liquidated damages should not be assessed because the building was ready by April 26, 1904, in time for the intended occupancy on April

30, 1904, and thus, the owner had no actual harm.<sup>15</sup> The court agreed with the contractor, stating "even though the contract [can] be construed as providing for liquidated damages, where no damages whatsoever have been sustained by the breach, we do not see how there could be a recovery of anything more than nominal damages."<sup>16</sup> *Ward v. Haren* quoted its earlier decision in *Werner v. Finley* (which is not a construction case) noting "[t]he law undoubtedly is that, before any liability to pay liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement, a breach which has resulted in more than mere nominal damage to the other party. 'This rule is so manifestly just that no discussion of it is necessary.'"<sup>17</sup>

The court of appeals has been careful to note the burden to show actual harm or loss to trigger a right to recover liquidated damages is not a high burden. Indeed, the court of appeals has seemed to suggest that something short of a preponderance of the evidence would be sufficient to sustain the burden. In its opinion in *Taos Constr. Co., Inc. v. Penzel Constr. Co., Inc.*,<sup>18</sup> while discussing and quoting its prior opinion in *Grand Bissell*

6. *Sides Constr. Co. v. City of Scott City*, 581 S.W.2d 443, 446 (Mo. Ct. App. S.D. 1979).

7. See RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt. b (1979) (cited with approval in *Grand Bissell Towers, Inc.*, 657 S.W.2d at 379 n. 3).

8. *Taos*, *supra* note 1 at 527 (citing *Grand Bissell Towers*, *supra* note 1 at 379); see also *Ward v. Haren*, 167 S.W. 1064, 1069 (Mo. Ct. App. 1914).

9. *Taos*, *supra* note 1 at 525.

10. *Id.* at 523.

11. *Id.* at 527. Under the holding in *Taos*, owners can argue evidence of the overall contract value is irrelevant to the enforceability of a liquidated damages provision, if that provision is designed to compensate an owner for project delay. But see *Sides Constr. Co.*, *supra* note 6 at 447 (noting the liquidated damages were minimal compared to the contract amount in finding the damages were not a penalty); but see also *Arcese v. Daniel Schmitt & Co.*, 504 S.W.3d 772, 783 (Mo. Ct. App. E.D. 2016) (overall contract value relevant when liquidated damages intended to compensate for breach of a contract to purchase goods).

12. See *Corrigan Co. Mech. Contractors, Inc.*, *supra* note 3 at 214 (rejecting contractor's claim for liquidated damages when no actual harm was incurred) (citing *Ward v. Haren*, *supra* note 8 at 1070).

13. *Supra* note 8.

14. *Id.* at 1065–1066.

15. *Id.* at 1066.

16. *Id.* at 1070.

17. *Ward*, *supra* note 8 at 1070 (quoting *Werner v. Finley*, 129 S.W. 75, 75 (1910)).

18. *Supra* note 1.

*Towers, Inc. v. Joan Gagnon Enterprises, Inc.*, the court of appeals stated: “although proof of actual loss is not a prerequisite to collecting liquidated damages, a showing of some actual harm or damage is necessary. ‘The showing of harm or damage necessary to trigger the liquidated damages clause need not be a precise dollar amount but simply a showing that some harm or damage did in fact occur. (Emphasis in original).’”<sup>19</sup>

In *Corrigan Co. Mech. Contractors, Inc. v. Fleischer*, Corrigan brought a claim for money owed on a power project, and Fleischer counterclaimed for money owed on a different project to convert three boilers for the St. Louis Housing Authority.<sup>20</sup> Corrigan denied any money was owed Fleischer for the Housing Authority project because Fleischer was late on that project which caused the Housing Authority to assess liquidated damages against Corrigan.<sup>21</sup> According to the specifications for the project, to prevent harm to the Housing Authority, two of the three boilers were always to be in operation.<sup>22</sup> Notwithstanding the project was delayed, this part of the specification was met, meaning two boilers continued to operate and no residents suffered loss of heat or hot water.<sup>23</sup> The court of appeals rejected the liquidated damages claim holding the Housing Authority (and in turn, Cor-

rigan) could not impose liquidated damages when no actual harm to the owner was shown.<sup>24</sup>

Some authority exists, however, for the proposition that a different approach should be applied in the public works context—an approach that does not require a public owner show any actual harm to recover liquidated damages. In *Manufacturers Casualty Ins. Co. v. Sho-Me Power Corp.*, a contractor hired to construct a transmission line for an electric utility company (a public corporation) brought an action to recover its contract balance which was being withheld by the utility to satisfy liquidated damages because the project was completed late.<sup>25</sup> The contractor argued it was improper for the utility to claim liquidated damages because the utility had no actual harm; other work by the utility necessary for operation of the line was not completed when the contractor completed its work.<sup>26</sup> The utility could not have used the line earlier even if the contractor had met the original completion date.<sup>27</sup> Purporting to apply Missouri law, the United States District Court for the Western District of Missouri ignored the utility’s apparent failure to show actual harm, stating: “Plaintiff can hardly maintain its position that no damage should be allowed in this case because other work was not completed when this line was

actually finished and the line could not be used. Neither the intention of the parties nor the construction of the contract can depend upon what happened afterwards which was not reasonably contemplated at the time of the execution of the contract.”<sup>28</sup>

In 1979, the Missouri Court of Appeals (Southern District), *in dicta*, implied the approach taken by the Federal District court in *Manufacturers Cas. Ins. v. Sho-Me Power Corp.* may have been the correct approach when addressing whether a public entity can recover liquidated damages.<sup>29</sup> In *Sides Constr. Co. v. Scott City*, a contractor brought an action against the City to recover a balance withheld because the contractor failed to complete a swimming pool timely.<sup>30</sup> The City produced ample evidence that it had been harmed, so the court of appeals did not need to address whether a public owner must show actual harm to recover liquidated damages. Notwithstanding, in its opinion, it noted that it “doubt[ed]” “that any proof of actual damages was necessary to bring the liquidated damages provision to life . . . .”<sup>31</sup> Almost ten years later, the Missouri Court of Appeals (Eastern District) in *Taos Constr. Co., Inc. v. Penzel Constr. Co., Inc.* cited the discussion from *Sides Constr. Co. v. Scott City* with approval, noting the Southern District’s “view” in *Sides Constr. Co.* that for a public works contract, “the public entity may recover liquidated damages solely upon proof of a violation of the contract.”<sup>32</sup>

### III. Liquidated damages when the contractor is not the cause of the delay.

Some Missouri cases addressing an owner’s right to liquidated damages focus on whether the owner has suffered actual harm, but instead focus on whether the contractor can be liable for liquidated damages when it is not the cause of the delay or when the delay is caused by extra work. In some of these cases, contractors have been able to avoid liability for liquidated damages by showing the

19. *Supra* note 1 at 526 (quoting *Grand Bissell Towers*, *supra* note 1 at 379 n. 3.).

20. *Supra* note 3 at 210.

21. *Id.*

22. *Id.* at 213.

23. *Id.*

24. *Id.* at 214–15.

25. 157 F. Supp. 681, 682 (W.D. Mo. 1957).

26. *Id.* at 683.

27. *Id.* at 684.

28. *Id.* at 684.

29. *Sides Constr. Co.*, *supra* note 6 at 443.

30. *Id.*

31. *Id.* at 447.

32. *Taos Constr. Co., Inc.*, *supra* note 1 at 526.

delays were excused under the terms of the parties' agreement or as a matter of law.<sup>33</sup>

In *Ark Constr. Co. v. City of Florissant*, a sidewalk contractor brought suit against Florissant to recover a balance owed, and Florissant counterclaimed for liquidated damages because the contractor did not finish its work timely (by December 7, 1973) as required by the contract.<sup>34</sup> At trial, the contractor presented testimony that the city engineer ordered changes to the work orally that delayed the project.<sup>35</sup> A jury found for the contractor and Florissant appealed. The Missouri Court of Appeals affirmed the trial court's refusal to enter a directed verdict in Florissant's favor on its liquidated damages claim, stating "[a]lthough plaintiff failed to complete the work by December 7, plaintiff is not to be held liable for any damages for any delay caused by the conduct of the defendant's representative in changing the plans. When an owner hinders the performance of a building contract within a specified time, the delay is ordinarily excused and the contractor cannot be liable for liquidated damages."<sup>36</sup>

The contractor in *Ark Construction* was absolved of liability for liquidated damages even though it apparently did not submit a written request for additional time to perform past the December 7 date (as mandated by the contract).<sup>37</sup> This result is in stark contrast to other Missouri cases where liquidated damages awards have been allowed—even for that portion of the delay caused by the owner or architect—when the contractor fails to timely request an extension of time under the terms of the parties' contract.<sup>38</sup> In *Southwest Eng'g Co. v. Reorganized Sch. Distr. R-9*, a contractor on a school building project brought suit to recover liquidated damages withheld by the school district.<sup>39</sup> The trial court found the school district was entitled to liquidated damages for nine (9) days of delay, substantially less than the district was claiming, and the district appealed.<sup>40</sup> The Missouri Court of Appeals affirmed most of the trial

court's ruling, but as to the 15 days of delay where the contractor claimed it was caused by the architect's failure to promptly inspect the building, the court reversed, finding the contractor was not excused for that delay (and was liable for liquidated damages for those 15 days).<sup>41</sup> The parties' contract included provisions mandating that written requests for more time be submitted if the contractor was delayed for reasons beyond its control, including by acts or neglect of the architect.<sup>42</sup> According to the Missouri Court of Appeals, compliance with that provision was required for the contractor to successfully argue entitlement to extra time.<sup>43</sup>

In *Southwest Eng'g Co. v. Reorganized Sch. Distr. R-9*, the court of appeals was careful to distinguish the facts of that case from other cases where there was evidence the parties waived any requirement that requests for additional time be made in writing, and from those cases where the owner was unjustly withholding a "major part of the contract price as liquidated damages, even though [the owner] [sic] caused the delay."<sup>44</sup> Indeed, the Missouri Court of Appeals recently held that a contractor was not liable for liquidated

damages—even though no timely request for more time was submitted—when there was evidence the owner (a school district) indicated in conversations that it would be waiving liquidated damages.<sup>45</sup>

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#### IV. Liquidated damages when the owner fails to provide notice of a liquidated damages claim.

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Another issue that sometimes arises in construction cases where owners claim liquidated damages is whether the owner has provided sufficient notice to preserve the liquidated damages claim pursuant to the claim provisions in the contract. Many construction contracts have detailed claim provisions that require an owner or contractor to provide timely notice of any assertion that they are entitled to money or other relief under the contract, which may create a requirement to provide notice of a liquidated damages claim depending on the language in the agreement.

The standard AIA general conditions (AIA A201), as an example, contain provisions requiring notice

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33. See, e.g., *Massman Constr. Co. v. Kansas City*, 487 S.W.2d 470, 478 (Mo. 1972) (trial court found that city waived liquidated damages claim by ordering extra work after completion deadline, which finding was not challenged on appeal); *Hart & Son Hauling, Inc. v. MacHaffie*, 706 S.W.2d 586, 589 (Mo. Ct. App. E.D. 1986) (trial court properly denied liquidated damages when owner's conduct prevented performance).

34. 558 S.W.2d 418, 421 (Mo. Ct. App. 1977).

35. *Id.* at 420.

36. *Id.* at 423.

37. See *id.* at 420 (the opinion references one written request for time up to December 7, 1973, which was granted, but discusses no other requests for additional time).

38. See, e.g., *Bloomfield Reorganized Sch. Distr. No. R-14 v. E.M. Stites*, 336 S.W.2d 95, 100 (Mo. 1960); *Southwest Eng'g Co. v. Reorganized Sch. Distr. R-9*, 434 S.W.2d 743, 745 (Mo. Ct. App. 1968).

39. 434 S.W.2d at 745–746.

40. *Id.* at 746.

41. *Id.* at 751.

42. *Id.* at 750–51.

43. *Id.*

44. *Id.* at 751.

45. *Textor Constr., Inc. v. Forsyth R-III Sch. Distr.*, 60 S.W.3d 692, 699 (Mo. Ct. App. S.D. 2001).



of claims be provided within twenty-one (21) days of the events giving rise to the claim or whenever the condition giving rise to the claim is discovered (whichever is later). At least two courts outside Missouri interpreting the pre-2017 AIA language ruled that the failure to provide timely notice of a liquidated damages claim barred the owner from recovering.<sup>46</sup> In, *A. Hedenberg and Co., Inc. v. St. Luke's Hosp. of Duluth*,<sup>47</sup> it was undisputed the contractor for the construction of an addition to a hospital did not complete the project timely.<sup>48</sup> The project's scheduled completion date was March 8, 1993, and the contractor did not substantially complete the project until August 27, 1993.<sup>49</sup> The owner, however, waited until September 7, 1993, after having received the contractor's final payment request, to provide written notice that it would be withholding \$90,000 as liquidated damages.<sup>50</sup> The court held the hospital's claim for liquidated damages arose the moment the scheduled completion deadline was not met, which was on

March 9, 1993.<sup>51</sup> According to the court, the hospital was thus barred under the terms of the contract from recovering liquidated damages because it waited six months after the "claim" arose to provide written notice to the contractor.<sup>52</sup>

Similarly, in *RCR Bldg. Corp. v. Pinnacle Hosp. Partners*,<sup>53</sup> a contractor did not substantially complete a Hampton Inn & Suites hotel until October 30, 2008, which was 158 days after the scheduled deadline of May 24, 2008.<sup>54</sup> The owner waited until March 29, 2009 to provide written notice that the contractor owed \$237,000 in liquidated damages for failing to complete the project on time.<sup>55</sup> The parties' contract incorporated by reference the AIA Document A201-1997, which has a twenty-one (21) day written notice of claim requirement.<sup>56</sup> The lower court ruled that the collection of liquidated damages was not a "claim" within the meaning of the contract because, it reasoned, liquidated damages should be automatic and the claims

procedure was intended to cover only changes or additions to the parties' contractual relationship.<sup>57</sup> But the Tennessee Court of Appeals rejected that conclusion and reversed. It found that, according to the definition of "Claim" in AIA Document A201-1997, any deduction or request for liquidated damages is a "Claim" because it is a "demand . . . by one of the parties seeking, as a matter of right . . . payment of money [or] adjustment of the Contract Sum ... or other relief with respect to the terms of the Contract."<sup>58</sup> The court ruled the owner's claim to liquidated damages was barred because the owner waited "nearly a year after the May 2008 substantial completion deadline" to provide written notice.<sup>59</sup>

## V. Liquidated damages after contractor termination.

A relatively unsettled question of Missouri construction law involves an owner's right to liquidated damages after a contract termination. It is common for an owner to consider terminating a contractor when a project is significantly delayed. Termination, however, may result in eliminating (or limiting) the claim against the contractor for liquidated damages.

In 1983, the Missouri Court of Appeals addressed this issue in *Twin River Constr. Co. v. Public Water Distr. No. 6*.<sup>60</sup> Twin River involved a dispute between a water district and contractor relating to a contract to install extensions to an existing water main system.<sup>61</sup> Many disputes arose among the parties, culminating in a dispute about the punch list in October of 1976.<sup>62</sup> When the contractor refused to perform the punch list items, the district terminated the parties' contract on October 28, 1976.<sup>63</sup> The trial court allowed the district a setoff of \$18,450.00 in liquidated damages, which included liquidated damages from the required completion date (February 28, 1976) to the date the engineer certified the project as complete (March 4, 1977).<sup>64</sup> On appeal, the contractor argued it was improper to award any liquidated damages after the contract was terminated on October 28, 1976.<sup>65</sup> The

46. In 2017, aware of these rulings, the AIA revised the standard AIA A201 to exclude a liquidated damages claim from the categories of claims requiring prompt written notice. AIA Document A201-2017, § 15.1.1 (2017).

47. 1996 WL 146732, at \*1 (Minn. Ct. App. Apr. 2, 1996).

48. *Id.*

49. *Id.* at \*1.

50. *Id.*

51. *Id.* at \*2.

52. *Id.* at \*3.

53. 2012 WL 5830587, at \*1 (Tenn. Ct. App. Nov. 15, 2012).

54. *Id.*

55. *Id.* at \*1.

56. *Id.*

57. *Id.* at \*4.

58. *Id.* at \*9.

59. *Id.* at \*12.

60. 653 S.W.2d 682 (Mo. Ct. App. E.D. 1983).

61. *Id.* at 684.

62. *Id.* at 688.

63. *Id.*

64. *Id.* at 689.

65. *Id.* at 693.



court of appeals noted a split in authority, but ultimately agreed with the contractor.<sup>66</sup> The court relied on the Missouri Supreme Court's 1909 decision in *Moore v. Board of Regents for Normal Sch. in Dist. No. 2*<sup>67</sup> — which limited the liquidated damages which could be recovered to the time *before* the owner removes the contractor from the project —stating it was not inclined to hold otherwise “until a contrary rule is declared by our supreme court.”<sup>68</sup>

In 2012, the United States Court of Appeals for the Eighth Circuit addressed the same issue in *Weitz Co., LLC v. MacKenzie House, LLC*.<sup>69</sup> The Eighth Circuit, however, reached a different conclusion. It held that if presented with the issue today, the Missouri Supreme Court would hold differently than it did in *Moore v. Board of Regents*.<sup>70</sup> According to the Eighth Circuit “[i]f the Missouri Supreme Court were to address the issue today, it would allow liquidated damages for a reasonable time after abandonment by the contractor or termination by the owner.”<sup>71</sup>

## VI. Liquidated damages and actual damages.

One final issue relating to liquidated damages warrants discussion. In Missouri, liquidated damages and actual damages “may not be award-

ed as compensation for the same injury.”<sup>72</sup> Notwithstanding this general rule, actual damages and liquidated damages can be awarded in the same case and this often occurs. Liquidated damages for delay are intended to compensate an owner for delay. It is possible for an owner to recover actual damages arising from acts other than delays (need to finish a project, need to fix defective work) and liquidated damages for delay in the same case. *Twin River*, discussed above, is a good example where actual and liquidated damages were properly awarded. In that case, the trial court awarded liquidated damages for project delay and also awarded the district its actual costs incurred in finishing the project after it terminated the contractor.<sup>73</sup> The court of appeals affirmed that award noting the parties’ contract could “fairly be read to authorize both types of damages . . . .”<sup>74</sup>

66. *Id.* at 693–694.

67. 115 S.W. 6, 12–13 (Mo. 1909).

68. *Twin River Constr. Co., supra* note 60 at 694.

69. 665 F.3d 970, 976–77 (8th Cir. 2012).

70. *Id.* at 976.

71. *Id.* at 977.

72. *Twin River Constr. Co., supra* note 60 at 694.

73. *Id.*

74. *Id.*

## VII. Conclusion

Liquidated damages for construction delay are complex. A careful examination of the law, the construction contract, the cause of the delay, the parties, the actual damages (if any) caused by the delay, the difficulty in proving actual damages, whether the contract was terminated and the costs involved in asserting a delay claim are all required when dealing with a liquidated damages claim. Thoughtfulness and careful consideration are a must.

