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There are two types of damages available in construction litigation disputes

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Disputes that arise out of construction projects are all based on economic loss. Most disputes are essentially breaches of contract caused by failure to pay, failure to perform the work in a good and workmanlike manner, and delays in the performance of work. There are basically two types of damages available to all parties to a construction dispute which result from the breach of a contract. The most common damages are known as direct damages. In addition, in some circumstances the prevailing party may be entitled to consequential damages. A contractor or subcontractor may also have claims under the Lien Law for a mechanic's lien foreclosure or a diversion of trust funds.

Direct damages are those which compensate a party so that they suffer no economic loss for costs incurred to perform work and/or receive the benefit of the bargain in the form of lost profits. Direct damages for an owner would include all costs to complete a contractor's work if the contractor failed to complete its work or costs to repair deficient work. A contractor or subcontractor generally has claims for contract balances, costs for disputed extra work, and delay damages. Contractors and subcontractors may also recover direct damages under the Lien Law. While the amount claimed may be the same and based on the same economic loss as the breach of contract claim, the Lien Law affords other remedies for those economic losses.

Contractors and subcontractors may file mechanic's liens against the interest of the fee owner of the project. The non-existence of a written contract or even an oral contract does not bar a mechanic's lien claim. A subcontractor does not have to be in privity with the owner to bring a mechanic's lien claim. A mechanic's lien provides security for a claim when the owner has no assets to pay a claim other than the real property upon which the work was performed. If the contractor can prove that it is entitled to be compensated for its economic loss, he may foreclose upon the real property and be paid out of the proceeds from the sale. The subcontractor benefits in the same way in that if the contractor has no assets, the property may serve as collateral to pay any judgment. The lien would also prevent the owner from paying the contractor any funds due the contractor which could be used to compensate the subcontractor for the contractor's non-payment. Article 3-A of the Lien Law provides another type of remedy. This statute imposes personal liability on those individuals who knowingly use money paid for work performed at a project to pay debts incurred on another project or to pay other non-project costs while there are sums due or to become due to those to whom payment must be made for work performed on their behalf on the project for which the funds were received. The individual cannot hide behind the corporate veil.

Consequential (a/k/a special or indirect) damages, as opposed to direct damages, are those which do not usually flow from the breach of the contract but which were foreseeable and contemplated by the parties when they entered into the contract. For the owner, consequential damages include loss of rental income, excess financing costs, and losses due to termination of leases. Consequential damages for a contractor usually are based on a delay or inefficiency claim. The contractor may have excess general conditions costs such as supervision on the project due to delays to the work caused by design issues and change orders.

While consequential damages for a contractor are based on actual costs, consequential damages for an owner can be calculated by identifying the actual damages incurred or by utilizing liquidated damages. Liquidated damages are a form of consequential damages. A party would not be entitled to both consequential and liquidated damages. Sometimes it is difficult to measure the exact loss an owner may sustain if a contractor delays the completion of its work. In order to avoid the difficulty of calculating consequential damages due to a contractor's failure to complete its work on or before the agreed upon completion date, many owners include a liquidated damages clause in the contract. However, liquidated damages will not be upheld if they are used as a penalty or if the contractor fails to achieve substantial completion. In those situations the owner would be required to prove its actual damages.

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