

## Liquidated Damages & Construction Contracts: How Much Is Too Much Under Nebraska Law?

07.26.2022

As all too many building owners and contractors know, construction projects frequently run into unexpected issues that delay completion of the project. When an unexpected issue inevitably arises and the project is not completed by its deadline, many construction contracts include a provision stating that the contractor will owe the owner a specified amount as liquidated damages for the harm caused by the delay. These liquidated amounts can quickly add up to significant sums of money making it vital that owners and contractors have a general understanding of when these liquidated damages are enforceable to avoid any surprises that can arise long after the project was completed.

Liquidated damage provisions are contract provisions that attempt to predict the amount of damage that will be caused if a contract is breached. Such provisions effectively eliminate the need for the damaged party to provide evidence of the harm suffered by the delay. These provisions are frequently drafted as a variation of the following: If completion of the Project is delayed beyond the Completion Date, then Contractor will pay Owner \$1,000.00 per day until the Project is completed. Additionally, when a provision like above is included in the contract between an owner and a general contractor, a similar provision is often added to subcontracts on the project.

As a general rule, Nebraska courts have consistently upheld liquidated damages provisions similar to the above example when the contractually agreed upon amount of damages are

### ATTORNEYS

Taylor M. Hayes  
Casandra M. Langstaff  
J. Daniel Weidner

### PRACTICE AREAS

Construction

## Liquidated Damages & Construction Contracts: How Much Is Too Much Under Nebraska Law?

reasonable under the circumstances and are a reasonable estimate of the damages actually incurred. This is particularly true when the parties are experienced in business, the damages are compensation for monetary losses, and the parties had a fair opportunity to review the agreement before signing. That being said, liquidated damages provisions will *not* be upheld when the sum of damages is so large that it becomes a penalty.

When presented with a question regarding whether a contract contains an enforceable liquidated damages provision or an unenforceable penalty, Nebraska courts evaluate two factors:

1. whether it would have been difficult to determine future damages during negotiations; and
2. whether the amount agreed upon is either (a) a reasonable estimate of the damages that might result from a breach or (b) reasonably proportionate to the damages which were actually caused by the breach.

In other words, Nebraska courts will not enforce a liquidated damages provision if the damages are easily ascertainable or if the damages are clearly intended to do more than compensate the damaged party for their losses. Whether the parties have labeled the agreed upon amount as “liquidated damages” or as a “penalty” does not determine whether the liquidated damages provision is enforceable. For example, courts have found that damages for lost profits, missed opportunities, and reputational harm are difficult to quantify and thus can often form the basis for a valid liquidated damages provision, even if the provision is labeled as a penalty in the contract. But, courts have also found that when actual damages total less than half of the liquidated damages contemplated by the agreement, the provision was an unenforceable penalty.

Applying this general test to a provision in a construction contract, Nebraska courts look to the facts and circumstances presented to determine whether the damages provision at issue will be enforced. An award of liquidated damages will likely occur when the evidence supports the damages as a reasonable estimate of a difficult-to-determine amount of damages. Specifically, the Nebraska Supreme Court has held that “when the parties are experienced in business, the damages are economic, and the parties had fair opportunity to consider the agreement,” then Nebraska courts should be reluctant to deviate from the deal that was struck between the parties in their agreement.

As a result, contractors and subcontractors on Nebraska projects will have a difficult time overcoming liquidated damages and proving that they are an unenforceable penalty because damages on a construction project are seemingly always difficult to fully determine at the time a contract is being signed. This underscores the importance of taking the necessary time to negotiate the details of a liquidated damages provision before executing a contract. Because there are many nuances to drafting, negotiating, and litigating a liquidated damages provision in

## Liquidated Damages & Construction Contracts: How Much Is Too Much Under Nebraska Law?

a construction contract, the advice of an experienced attorney can often prove invaluable to contractors and owners alike. For that reason, do not hesitate to contact one of the members of Koley Jessen's **Construction Industry Practice** area if you have any questions concerning liquidated damages.