

## NATURE OF DAMAGES IN SUITS AGAINST DESIGN PROFESSIONALS

Occasionally, an aggrieved owner of a construction project which has not been constructed on schedule believes the design professional is responsible for the delay. Usually the owner blames the contractor for late performance, but there are circumstances where the design professional is the liability target.

Delays attributable to the design professional include (1) failure to complete the design within the time provided for in the contract between the owner and the design professional, (2) delays caused by design defects, (3) delays in designing or approving changes in the original design, (4) delays in performing on-site inspections, or (5) delays in providing the owner with completion certificates. Such delays by a subconsultant of a design professional may also expose the design professional to liability, although the design professional may in turn be able to recover from the subconsultant damages which are judged to be owed by the design professional to the owner.

Occasionally, a contractor who is delayed in the performance of its work will blame the design professional for those delays for any one or more of the above-mentioned reasons, and as a result of the design professional not responding to complaints from the contractor regarding restraints and interferences encountered on the job site between and among contractors competing for work space or the sequencing of work.

It is helpful to the design professional to anticipate the nature and extent of damages that might be recoverable by the owner or by the contractor who complains about delay caused by the design professional.

Owners who have been damaged by delay usually seek recovery of the owner's direct losses caused by an inability to use the improved property as planned. For example, if property is

being constructed for purposes of producing rental income, delayed performance may result in lost rents for which the owner seeks recovery. If the property being improved is devoted to a manufacturing use, delays in completing construction will cause the owner to seek recovery of lost profits. Other commercial purposes for the real estate improvement may also result in a claim by the owner for the recovery of lost profits. Normally the courts will not award lost profits unless there is some evidence that profits could reasonably be anticipated by the owner. Therefore, an owner who has no history of producing profits in the course of operating a commercial venture may have a difficult time providing sufficient proof to justify the recovery of lost profits. On the other hand, owners with a successful track record of profitable operations may find it quite easy to recover lost profits.

Damages that are sought by contractors are usually more indirect, although lost profits may be sought by the contractor as well. When the contractor is delayed in the performance of its work and job site and home office expenses continue during the period of delay, the contractor will pursue recovery of those onsite and general and administrative overhead expenses. In addition, if the contractor's labor costs increase as a result of increases in the labor rate or because of labor inefficiencies produced by the delays, those labor costs which can sometimes be substantial will constitute a primary effort of recovery by the contractor. In addition, delays may cause idle equipment, the cost of which would be usually measured by the cost of equipment rental fees, whether or not the equipment was owned or rented by the contractor, as well as additional costs for equipment maintenance and insurance.

Occasionally contractors will attempt to claim recovery for loss of other business, arguing that but for the delay other customers would have been served, but proving such losses is difficult.

Frequently, design professionals will not have insurance to cover the claims associated with delays because they are based on theories of breach of contract rather than negligent conduct. Although design professionals may be sued in both contract and tort for deficient performance, claims against design professionals for delay are usually brought in contract. It is therefore important for design professionals to respond to claims of the owner or the contractor that the design professional is responsible for project delays, by attending promptly and thoroughly to demands for assistance by both owner and contractor. It is also important for the design professional to keep careful records of such complaints and document the efforts made in responding to them.