# BREACH OF CONTRACT CLAIMS IN CONSTRUCTION CASES

By Lonnie D. Johnson*

In construction cases, there are three general categories of contract damages: 1) damages for defective workmanship 2) schedule related damages, and 3) damages for failure to perform. This article reviews the cases and basic legal principles applicable to these three types of construction contract claims.

## I.
## Principles of Contract Law

In construction contract cases, damages are awarded pursuant to traditional common law principles of contract law. At common law, a contract is simply a promise or set of promises that the law will enforce or at least recognize in some manner.[1] As a promise, one's solemn word, is at the heart of contract, it would seem only logical that compelling performance of a promise – forcing promisors to keep their words – should be a primary goal of the common law. However, quite to the contrary, common law remedies are not directed at the compulsion of promisors to prevent breach, but rather are aimed at providing relief to promisees to redress breach.[2] This aim is consistent with free-market economic theory.

According to free-market theory, bargained-for contracts allocate resources in the most socially efficient manner; the premise of the theory being that each good or service

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[1] RESTATEMENT (SECOND) OF CONTRACTS § 1.

[2] E. ALLEN FARNSWORTH, CONTRACTS, § 12.1 (1982).

must be consumed by the person who values it the most and each production factor must be employed in a manner which produces the most valued output.[3] Therefore, voluntary contracts reached through bargaining by which individuals exchange their assets with others who value the assets more highly advances the social goal of economic efficiency. As economic theory assumes rationality, absent mistake or duress, parties to a contract will place a value on the other party's performance that is greater than their respective anticipated cost of performance. It logically follows that in instances where a party initially commits a miscalculation of value or experiences a change of circumstances, breaches of contract may well advance social utility. Therefore, the ultimate effect of common law contract remedies is to give a party reluctant to perform incentive to break the contract if, but only if, the party gains enough from the breach to compensate the injured party for its losses and yet still retain some of the benefits.[4]

As affording relief for broken promises is the primary goal of contract law, the equitable remedy of specific performance is not favored. Orders of specific performance, that is a court order actually requiring a party to perform as specified in the contract, are particularly disfavored in the context of construction law, as performance of construction contracts would require the court to supervise, and establish standards by which to evaluate the contractual performance. Therefore, the favored common law remedies for breach of contract are "substitutional" in nature, providing an award of money damages in substitution for performance of the actual promise. Likewise, as affording relief rather than forcing performance is the goal, the imposition of criminal sanctions and punitive damages is inconsistent with free-market economic theory and, accordingly, not favored.

[3] *Id.* at § 12.3.
[4] *Id.*

Although reluctant to order actual performance, the common law encourages reliance on promises by protecting the expectation that aggrieved parties had when contracting by placing them in as good a position as they would have been had the contract been performed. This interest to be protected is called the "expectation interest," and is said to provide the injured party with the "benefit of the bargain."[5] The expectation interest is based not on a party's subjective optimism or aspirations at the time of contracting but rather on the actual value the contract would have had if performed pursuant to its terms.

Contract damages are limited by two fundamental principles: foreseeability and reasonableness. The most important black letter rule of contract law originated in the famous English case of *Hadley v. Baxendale*, which holds that the measure of damages for breach of contract are either those damages as may fairly and reasonably be considered as arising naturally from the breach or as may reasonably have been within the contemplation of the parties at the time the contract was made.[6] To be reasonable, a damage award must be referenced to some fairly defined standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances, so long as it is supported by the evidence.[7] As with any damage award, damages for breach of a construction contract must be supported by probative evidence and cannot be based on mere speculation, conjecture, or surmise.[8] Thus, in appropriate cases, an injured party may recover not only the loss in value of the

[5] *Id.* at § 12.1.
[6] *See* Appel v. LePage, 15 P.3d 1141, 1144-45 (Idaho 2000), Lassen v. First Bank Eden Prairie, 514 N.W.2d 831, 838 (Minn. Ct. App. 1994); 5 ARTHUR CORBIN, CORBIN ON CONTRACTS § 1000 (1964), Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1854).
[7] *See* Abbey Villas Development Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 101 (Ind. Ct. App. 1999).
[8] *See* 4-D Buildings, Inc. v. Palmore, 688 N.E.2d 918, 921 (Ind. Ct. App. 1997).

contract but when foreseeable and reasonable, other losses sometimes referred to as consequential damages so as to be made whole.[9]

Furthermore, to ensure reasonableness, it is axiomatic that a party injured by a breach of contract may recover the benefit of his bargain, but his recovery is limited to the loss actually suffered so as to prevent plaintiff from recovering an economic windfall.[10] Thus, only a party's actual, not desired, "expectation interest" is protected.[11] The injured party is not entitled to be put in a better position than he would have enjoyed if the breach had not occurred.[12]

While protecting expectations is the most lofty of the common law goals, courts, at times, will protect a party's reliance as opposed to expectation interest. In such cases, the injured party has changed its position by relying on a contract, thereby incurring expenses in preparation for, or during performance of, the contract, and the court attempts to put the party back into the position which it would have been had the contract not been made. This so-called "reliance interest" encompasses not only "essential reliance," that is the price paid pursuant to the contract, but also "incidental reliance," which includes the cost of preparations for collateral transactions which a party intends to perform upon completion of the contract at issue.[13]

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[9] *See* Fairfield Development, Inc. v. Georgetown Woods Sr. Apartments Ltd. Partnership, 768 N.E.2d 463, 474 (Ind. Ct. App. 2002) ("Stating that, "the measure of damages for breach of contract is either such damages as may fairly and reasonably be considered as arising naturally from the breach itself, or as may be reasonably supposed to have been within the contemplation of the parties at the time they entered into the contract as a probable result of the breach," which is simply a recitation of the Hadley test.)

[10] *See* Whitaker v. Brunner, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004) ("When injured by a breach of contract, a party's recovery is limited to the loss actually suffered. Such party may not be placed in a better position than he or she would have enjoyed if the breach had not occurred."); Abbey Villas Development Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 102 (Ind. Ct. App. 1999); Sheppard v. Smith, 749 N.E.2d 609 (Ind. Ct. App. 2001).

[11] *See* Goolesby v. Koch Farms, LLC, ___ So.2d ___, 2006 WL 2925327, *3 (Ala. 2006).

[12] *Id*.

[13] FARBSWIRTGM CONTRACTS, § 12.16.

The amount of damages that a party is entitled to recover is a question of fact.[14] However, the proper measure of damages in a particular case is a question of law.[15]

## II.
## Damages for Defective Performance

The overwhelming majority of claims for breach of construction contract involve cases where a contractor fully performs the contract but the work allegedly contains defects. Construction defect claims give rise to a variety of recoverable damages depending on the scope of the project, the nature and extent of the defect, and the extent to which the defect deprives the owner of use of its property or interrupts the owner's business. Construction projects vary enormously in scope, from a simple residential remodeling project on the one end, to massive multi-billion dollar public works projects on the other end. Regardless of the type or scope of construction project involved, construction defect damages consistently fall within either one of two categories: (1) direct damages, composed of the *loss in value* to the non-breaching party of the other party's performance caused by its failure or deficiency; and (2) consequential damages caused by the breach.[16] In rare cases, punitive damages are recoverable, but only when the breach of contract is accompanied by a violation of traditional common law duties, such as fraud or conversion.[17]

### *A. Direct Damages*

In construction defect cases, as with any defective performance case, the difference between the value to the injured party of the performance that it should have

[14] *See* GSB Contractors, Inc. v. Hess, 179 S.W.3d 535, 541 (Tenn. Ct. App. 2005).
[15] *Id.*
[16] *See* Ambrogio v. Beaver Road Assocs., 836 A.2d 1183 (Conn. 2003); RESTATEMENT (SECOND) OF CONTRACTS § 347(a) and (b) (1981).
[17] FARNSWORTH, CONTRACTS, § 12.8.

received and the value of what, if anything, it actually did receive is recognized by contract law as the *loss in value*.[18] *Loss in value*, also known as direct damages, are all those losses sanctioned by the first branch of the *Hadley* test which arise naturally from a breach of contract. Direct damages are the most common form of damages sought in construction defect cases. With direct damages, a party injured by the breach of a construction contract may recover either (1) the difference between the value of the building or work as completed and what the value would have been had the work been done in accordance with the contract, or (2) the reasonable cost of correcting the defects to make the work conform to the contract.[19]

Generally, the primary measure of damages for breach of a construction contract is the cost of repairing or remedying the defect.[20] However, if repairing the defect is infeasible or impracticable, an acceptable alternative measure of damages is the loss in value of the property caused by the breach, i.e., the difference between the fair market value of the property without the defect and the fair market value of the property with the defect.[21] The factor that determines which of the alternative measures of damages applies is whether the defects may be remedied without demolishing and reconstructing a substantial part of the building, or whether the defects could be repaired at a reasonable cost, or, as it is often stated, whether construction and completion in accordance with the contract would involve unreasonable economic waste; however, economic waste will be

[18] FARNSWORTH, CONTRACTS, § 12.8.
[19] Clark's Park Farms, 563 NE 2d at 1298.
[20] J.E. Pierce, 607 N.E.2d at 729; Gough Construction Company, Inc. v. Tri-State Supply Company, 493 N.E.2d 1283, 1284-85 (Ind. Ct. App. 1986); Sanborn Electric Company v. Bloomington Athletic Club, 433 N.E.2d 81, 87 (Ind. Ct. App. 1982).
[21] *Id.*

found only in "extreme cases."[22] The breaching contractor has the burden of proving that curing defects would cause economic waste and any reasonable doubt will be resolved against the contractor.[23] In rare cases, where a non-breaching party will enjoy the benefit of the bargain only where a defective structure is totally rebuilt, costs to rebuild rather than repair may be a reasonable measure of damages.[24]

*Pre-Judgment Interest*

Generally, pre-judgment interest is recoverable in construction defect cases just as it is in contract cases generally. The award of prejudgment interest is based on the rationale that there has been a deprivation of the plaintiff's use of money or its equivalent and that unless interest is added, the plaintiff cannot be fully compensated.[25]

*Attorney's Fees*

The issue of whether a prevailing party may recover attorney's fees in a construction defect claim is an issue that arises in nearly every action. Indiana follows the American Rule that a litigant may only recover attorneys' fees against an opponent pursuant to a contract or a statute authorizing such recovery.[26] Thus, if the construction contract addresses attorney's fees, it will control the issue. In the absence of a contractual agreement pertaining to attorney's fees, in some situations, a plaintiff in a construction defect claim may be entitled to attorney's fees by statute. Contract language addressing attorney's fees in a residential construction contract has been interpreted to authorize an

[22] *See* J.E. Pierce, 607 N.E.2d at 729; Willie's Construction Company, Inc. v. Baker, 596 N.E.2d 958, 962 (Ind. Ct. App. 1992); Gough Construction, 493 N.E.2d at 1284-85 (Waste exists when, "compliance with original contract would require that a substantial portion of the work be 'undone'"); James I. Barnes Construction Co. v. Washington Township of Starke County, 184 N.E.2d 763, 766 (Ind. Ct. App. 1962).
[23] *See* Willie's Constr. Co. v. Baker, 596 N.E.2d 958, 962 (Ind. Ct. App. 1992).
[24] *See* City of Westminster v. Centric-Jones Constructors, 100 P.3d 472, 478 (Colo. App. 2003).
[25] *See* 4-D Buildings, Inc. v. Palmore, 688 N.E.2d 918, 920 (Ind. Ct. App. 1997).
[26] *See* Willie's Const. Co. v. Baker, 596 N.E.2d 958, 963 (Ind. Ct. App. 1992).

award of attorney's fees in an action brought by a house purchaser against the seller relating to the purchase agreement.[27]

Furthermore, Ind. Code § 32-27-3-10 provides that a court may award a homeowner attorneys fees and costs in an action against a home builder for a construction defect if the builder unreasonably disputes a homeowner's claim, fails to remedy the claim, or fails to repair the construction defect within a reasonable time. Consequently, in appropriate circumstances, a party may be entitled to attorneys' fess by contract or statute in a construction defect suit. An attorney's fees provision in a contract or statute may also be the basis of an award of appellate attorney's fees, where the provision merely provides for an award of attorney's fees.[28]

*B. Consequential Damages*

An award of damages at common law in a contract action is designed to place non-breaching parties in the position they would have enjoyed had the contract been performed. To this end, in addition to damages for *loss in value*, a party may be entitled to recover losses other than *loss in value*, and this *other loss* is often referred to as "incidental" or "consequential" damages.[29] The recovery of consequential damages is sanctioned by the second branch of the *Hadley* test which allows any damages that may reasonably have been within the contemplation of the parties at the time the contract was

[27] *See* Reum v. Mercer, 817 N.E.2d 1267, 1274 (Ind. Ct. App. 2004), *see also* Harrison v. Thomas, 761 N.E.2d 816, 821 (Ind. 2002) (upholding attorney's fees award where contract allowed attorney's fees to prevailing party in action brought in "relation to" the contract), Weiss v. Harper, 803 N.E.2d 201, 208 (Ind. Ct. App. 2003) (affirming attorneys' fees award as not excessive in construction defect case).
[28] *See* Mullis v. Brennan, 716 N.E.2d 58, 67 (Ind. Ct. App. 1999).
[29] FARNSWORTH, CONTRACTS, § 12.9.

made.[30] There is no explicit limitation on the type of damages which may be awarded as consequential, but rather all claimed damages must pass the rigorous test of forseeability.

*Lost Revenue*

Loss of revenue is a common *other loss* sought as consequential damages. Lost profits resulting from a breach of contract are well-recognized as being recoverable so long as they are established to a reasonable degree of certainty.[31] The general rule regarding establishing a claim for lost profits was aptly summarized by the Texas Supreme Court:

> In order that a recovery may be had on account of loss of profits, the amount of the loss must be shown by competent evidence with reasonable certainty. Where the business is shown to have been already established and making a profit at the time when the contract was breached or the tort committed, such pre-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profits lost. It is permissible to show the amount of business done by the plaintiff in a corresponding period of time not too remote, and the business during the time for which recovery is sought. Furthermore, in calculating the plaintiff's loss, it is proper to consider the normal increase in business which might have been expected in the light of past development and existing conditions.[32]

Indiana follows this general rule by awarding lost profits, albeit cautiously. Indiana recognizes that an injured party may seek as consequential damages such lost profits caused by the breach, assuming "evidence is sufficient to allow the trier of fact to estimate the amount with a reasonable degree of certainty and exactness".[33] Lost profits need not be proven with mathematical certainty, the evidence must be, however,

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[30] *See* Ambrogio v. Beaver Rd. Assoc., 836 A.2d 1183, 1187 (Conn. 2003); Hadley v. Baxendale, 9 Ex. at 354, 156 Eng. Rep. 145.

[31] *See* Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc., 877 S.W.2d 276, 279-80 (Tex. 1994); *Ambrogio*, 836 A.2d at 1187; Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 266 (Minn. 1980); 24 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 64:10 (2002).

[32] Southwest Battery Corp. v. Owen, 115 S.W.2d 1097, 1098-99 (Tex. 1938).

[33] *See* Clark's Pork Farms v. Sand Livestock Systems, Inc., 563 N.E.2d 1292, 1298 (Ind. Ct. App. 1990) (May receive damages for the lost profits as well as cost to bring structure into accordance with contract); *See* Berkel, 814 N.E.2d at 659; Orto, 413 N.E.2d at 278.

sufficient to allow a trier of fact to estimate the actual amount of profits lost with a reasonable degree of certainty and exactness.[34]

*Miscellaneous Losses*

In addition to loss of revenue and delay damages, the law recognizes a variety of miscellaneous losses as recoverable consequential damages in construction defect cases. Consequential damages for a breach of contract may include loss of goodwill, including the loss of customers and harm to business reputations.[35] Consequential damages may also include overhead costs in appropriate cases.[36] When injured parties spend their own time repairing defects or arranging for others to repair defects, they may recover damages for any lost time resulting from the builder's breach of contract.[37] Court's recognize that such lost time naturally arises from the builder's breach of contract and it cannot be said that such damages were not in the parties' minds at the time they entered into the contract.[38] The numerous types of consequential damages need not be calculated with mathematical certainty, so long as they are susceptible to ascertainment in a manner other than mere speculation.[39] If the damages award is within the scope of the evidence, the determination of damages is within the discretion of the trial court.[40]

Again, it must be emphasized that there is no limitation on the types of consequential damages that may be recovered. Recovery is limited only by what a

[34] *See* Uebelhack Equip., Inc. v. Garrett Bros., Inc., 408 N.E.2d 136, 140 (Ind. Ct. App. 1980).
[35] *See* Toltec Fabrics, Inc. v. August, Inc., 29 F.3d 778, 780 (2nd Cir. 1994); Westric Battery Co. v. Standard Elec. Co., Inc., 522 F.2d 986, 987-88 (10th Cir. 1975).
[36] *See* Clark-Fitzpatrick, Inc./Franki Found. Co. v. Gill, 652 A.2d 440, 449 (R.I. 1994).
[37] *See* Hogan Exploration, Inc. v. Monroe Eng'g Assoc., Inc., 430 So.2d 696, 704 (La. Ct. App. 1983).
[38] *Id.*
[39] *Id.*
[40] *Id.*

plaintiff can actually prove to a reasonable degree of certainty and what was reasonably foreseeable or contemplated by the parties at the time of contract.[41]

## III.
## Schedule Related Damages

Timely completion of large construction projects depends upon the correct sequencing and interfacing of the work of numerous contractors and trades. As the adage goes, time is money, and when a project strays from the critical path, delays and attempts to regain schedule slippage alter time and foil cost estimates, causing companies to incur losses. Likewise, when performance is wrongfully extended beyond the contract date, an owner may sustain losses caused by the delay, and bring suit to recover damages. Delay claims are filed by contractors to recover the additional expenses of performing on the job site longer than estimated due to the fault of the owner, architect or another contractor. At the other end of the spectrum, changes in the scope and timing of the project may compel contractors to perform at a quicker pace than anticipated. So called "acceleration claims" allow a contractor to recover the costs associated with performing at a more rapid pace than estimated; there are two types of acceleration claims: actual and constructive.

### *A. Owner Delay Claims*

If a contractor is at fault for a delay in construction of the project, the owner may seek redress under several damage theories. Generally, an owner's consequential damages arising from delay by a defaulting contractor cover:

1. Extended contract inspection and administration costs;
2. Lost revenue arising from delayed availability of completed facilities;

[41] 24 WILLISTON ON CONTRACTS, § 64:12 (4th ed.).

3. Loss of use of new facility (e.g. cost of continued to rent or own a pre-existing facility) that must be retained because the new place was not ready on time, and;

4. Diminished value of completed facility due to late completion.[42]

Delay claims are so common that contracts for even minor construction projects increasingly include provisions that specifically address delay claims.

Indiana follows general contract principles in awarding an owner delay damages. If the breach of the contract stems from a delay of the completion time, damages are measured as value of the use of the structure during the time the plaintiff was deprived of it, generally arising as the fair rental value of the structure for the time the injury existed:

> The general rule of law is well settled that the measure of damages for breach of a construction contract is the reasonable cost of completion, and that in event of long and unreasonable delay damages for loss of use may, under some circumstances, also be awarded.[43]

Additionally, a party may recover damages amounting to those costs arising directly from the delay, such as the rental of alternate premises or equipment.[44] These costs must be, "susceptible of ascertainment in some manner other than by mere conjecture, speculation or surmise."[45] Likewise, as with defect cases, an owner can recover profits lost due to delay.[46] However, if the specific contracted item is unusable at

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[42] W. ALEXANDER MOSLEY, CONSTRUCTION DAMAGES AND REMEDIES, p. 11 (2004).

[43] *See* Johnson-Johnson, Inc.**,** 108 N.E.2d at 639; Cleveland, C., C. & St. L. Ry. Co. v. Joyce, 103 N.E. 354, 357 (Ind. Ct. App. 1913); Jay Clutter Custom Digging v. English, 393 N.E.2d 230, 233 (Ind. Ct. App. 1979); Berkey & Gay Furniture Co. v. Hascall, 24 N.E. 336, 338 (Ind. 1890) (Damages limited to "actual loss", which is the loss of use of a contracted object for the time of the breaching delay); Singer v. Farnsworth, 2 Ind. 597, *2 (1851) (Damages limited to use of product for the time delay occurred).

[44] Chicago College of Osteopathic Medicine v. George A. Fuller Co.**,** 776 F.2d 198, 205 (7th Cir. 1985) (Assuming they could show costs with adequate specificity, subcontractor would have been able recover for the rental value of tools and equipment left unused during delay caused by main contractor.); *Cleveland, C., C. & St. L. Ry. Co.*, 103 N.E. at 357.

[45] *See* Jay Clutter, 393 N.E.2d at 233.

[46] *See* Uebelhack Equipment, 408 N.E.2d at 140.

the time of the delay, damages for delay of completion are limited to the interest bearing ability of the funds already paid for the completion of the project, as rental or usage values are nil.[47]

Delays in completion of construction projects may result in various consequential damages that are not amenable to proof. To avoid the uncertainty and conjecture implicit in proving consequential damages resulting from a delay, construction contracts typically provide a liquidated damages provision that sets forth the amount of damages the owner is entitled to assert against a contractor for each day of delay in completion of a project that is attributable to the contractor.[48] Contractual liquidated damages provisions avoid the difficulty in proving such damages by providing a stipulated amount of damages for each day of delay. Courts typically enforce liquidated damages provisions, so long as they do not amount to an unreasonable penalty, because they serve a "worthy purpose."[49] In such cases, where delays in completion occur that are attributable to the contractor, the owner is usually entitled to recover an amount of damages equal to the number of days of delay multiplied by the amount of liquidated damages per day provided for in the contract.[50]

### *B. Contractor Delay Claims*

A delay claim is the most common action asserted by contractors to recover additional costs incurred on a project. A contractor may bring a traditional delay claim

[47] Wood v. Joliet Gaslight Co., 111 F. 463 (7th Cir. 1901) (Holding that when an item at issue is only usable during winter months, in the absence of evidence of special damages, defendant is entitled to recoup, as damages against the unpaid balance of the contract price, a sum at least equal to the legal interest on the monies and property invested in the project for those times when the object would have been unusable).
[48] *See, e.g.* Hunts Point Multi-Service Ctr., Inc. v. Terra Firma Constr. Mgmt. & Gen. Contracting, LLC, 5 A.D.3d 183 (N.Y. App. Div., 2004).
[49] *See* New Pueblo, 696 P.2d at 193.
[50] *See* A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1161-63 (Pa. Commw. Ct. 2006).

against another contractor or owner whose acts or omissions caused the contractor's work to be delayed.[51] Proof that the defendant caused the delay is the crucial element of a delay claim.[52] If the plaintiff can carry the burden of proving its performance was wrongfully delayed by the defendant, then plaintiff can recover the accumulated additional cost of performance occurring as of the date that the delay commenced.[53]

Generally, a contractor is entitled to recover any damages for any delay caused by the owner.[54] In pursuing a delay claim, a contractor generally can recover overhead costs attributable to the operation of a field office during the period of delay.[55] In certain circumstances, home office overhead can be recovered when properly attributable to a specific construction project.[56] There are various methods utilized by courts to calculate and allocate overhead expenses, with the so-called *Eichleay* formula being the general rule.[57] Contractors have been able to recover, as a consequential damage, loss of ability to obtain performance bonds, stemming from a breach of contract.[58] However, as with any breach of contract action, the contractor has a duty to mitigate damages and must take other work, if able, to minimize the potential damages caused by a construction delay.[59]

### *C. Acceleration Claims*

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[51] Indiana & Michigan Elec. Co. v. Terre Haute Indus., Inc., 507 N.E.2d 588, 602 (Ind. Ct. App. 1987).
[52] *See Id.*; *see also* Amp-Rite Elec. Co. v. Wheaton Sanitary Dist., 580 N.E.2d 622, 673 (Ill. App. Ct. 1991); S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014, 1026 (S.D.N.Y. 1984); McNamara Constr. of Manitoba, Ltd. v. United States, 509 F.2d 1166, 1169 (Ct. Cl. 1975).
[53] Indiana & Michigan Electric Co., 507 N.E.2d at 602; *see* also Amp-Rite Elec. Co., 580 N.E.2d at 673; Peter Scalamandre & Sons, Inc. v. Village Dock, Inc., 589 N.Y.S.2d 191, 191 (N.Y. App. Div. 1992) ("A contractor wrongfully delayed by its employer must establish the extent to which its costs were increased by the improper conduct, and its recovery will be limited to damages actually sustained").
[54] Indiana & Michigan Elec. Company, 507 N.E.2d at 588.
[55] *See* Guy James Constr. Co. vs. Trinity Indus., Inc., 644 F.2d 525 (5th Cir. 1981).
[56] *See* Complete Gen.l Constr. Co. vs. Ohio Depart. of Transp., 760 N.E.2d 364 (Ohio 2002).
[57] *See* Aetna Cas. & Surety Co. vs. Doleac Elec. Co., Inc., 471 So.2d. 325 (Miss. 1985).
[58] *See* U.S. Fidelity & Guar. Co. v. Peterson, 540 P.2d 1070, 1072 (Nev. 1975).
[59] Complete General, 760 N.E.2d at 370.

Inducement is the cornerstone of a claim for acceleration, and absent inducement, a mere acceleration does not entitle a party to recover damages.[60] Acceleration claims arise when an owner or contractor acts in such a manner as to induce a contractor to complete the project ahead of the scheduled completion date.[61] The mere existence of acceleration in performance is insufficient to establish that the other party acted to induce the acceleration, and absent evidence to the contrary, the acceleration is presumed to be a voluntary action.[62]

With actual acceleration claims, the period for performance relied upon in cost estimating is compressed because either the original target date for completion is advanced, the start date is delayed with the completion date remaining fixed, or the scope of the work to be performed within the fixed period is expanded. An order to accelerate may be explicitly stated in the form of a command to complete the project at a time ahead of that provided by the contract, or may be a constructive order.[63] A constructive order occurs when an owner or contractor behaves in such a way as to convey the message of acceleration to a contractor without the use of a direct command.[64] The determination of whether a contractor's actions constitute a constructive order is a question of law.[65] For example, in *Tombigbee Constructors*, a government "request" to perform a task in a manner different from that agreed on in the terms of the contract was deemed to be equivalent to an order that the scope of the project be altered.[66]

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[60] *See* Dep't of Transp. v. Anjo Constr. Co., 666 A.2d 753, 757 (Pa. Commw. Ct. 1995).
[61] *Id.*
[62] Stelko Elec., Inc. v. Taylor Comm. Sch. Bldg. Corp., 826 N.E.2d 152, 158 (Ind. Ct. App. 2005).
[63] Anjo Constr. Co., 666 A.2d at 757.
[64] Norair Eng. Co. v. United States, 666 F.2d 546 (Ct. Cl. 1981).
[65] *Id.*; *See also* Pennsylvania Liquor Control Bd. v. City of Philadelphia, 333 A.2d 497 (Pa. Cmmw. Ct. 1975).
[66] Tombigbee Constructors v. United States, 420 F.2d 1037, 1046 (Ct. Cl. 1970).

Every actual legal theory or claim has its "constructive" counterpart. Constructive acceleration claims provide relief for contractors where both the initial time-frame and the scope of work to be performed have remained the same but circumstances beyond the contractor's control support a finding that performance was constructively accelerated. A constructive acceleration claim differs from constructive acceleration orders discussed above, which may be imposed to trigger an actual claim. While inducement is the cornerstone of an actual acceleration claim, the wrongful refusal of a rightful request for an extension for time to complete work is the hallmark of a constructive acceleration claim.

Typical construction contracts allow a contractor faced with unavoidable delays an extension of the contract performance date.[67] The failure of the owner or prime contractor to grant a justified extension, instead holding to the original timeline of the project, gives rise to a constructive acceleration claim.[68] The five elements for a successful constructive acceleration claim are:

(1) the contractor experienced an excusable delay entitling it to a time extension;
(2) the contractor properly requested the extension;
(3) the project owner failed or refused to grant the requested extension;
(4) the project owner demanded that the project be completed by the original completion date despite the excusable delay, and;
(5) the contractor actually accelerated the work in order to complete the project by the original completion date and incurred costs as a result.[69]

**Excusable Delay Entitling a Contracting Party to a Time Extension**

Excusable delays in the context of a constructive acceleration claim are creations of *force majeure* contract clauses which allow a contracting party to avoid contract damages

[67] Sherman R. Smoot Co. v. Ohio Dept. of Adm. Serv. 736 N.E.2d 69, 78 (Ohio Ct. App. 2000).
[68] *Id.*; Murdock & Sons Constr., Inc. v. Goheen Gen'l Constr., Inc., 461 F.3d 837 (7th Cir. 2006).
[69] *Id.*; Envirotech Corp. v. Tenn. Valley Auth., 715 F.Supp. 190, 192 (W.D.Ky. 1988).

where unavoidable circumstances necessitate the project taking longer to complete than initially estimated.[70] The most obvious and common subject of these clauses is the so-called "act of God" delay, which a contracting party has no ability to control, avoid, or foresee. The existence of an unavoidable delay is a question of law.[71] The burden of proving the existence of such a delay is on the party alleging its existence.[72]

It is important to emphasize that excusable delay clauses do not shift the burden of the losses incurred by such a delay to the other party.[73] Instead, such clauses only allow the delayed party an extension of the completion date in an effort to avoid potential breach of contract liability for failure to complete the job on the original contract schedule.[74] Such clauses do not include delays that, while unavoidable, are foreseeable. It is anticipated that a prudent contractor will construct estimates with these foreseeable delays in mind. If a contractor bears the risk of loss over a subject in the contract, that subject cannot be the basis for an unavoidable delay by that party.[75] Thus, for example, lower than estimated productivity in and of itself is not considered an unavoidable delay, as a contractor is deemed to have control over its own employees and construction methods such that it bears the risk of low productivity.[76] *Force majeure* clauses are triggered by a "cause" not an "effect." Thus, to be entitled to relief, the contractor must identify a specific "cause" of the performance difficulty which is recognized as clearly beyond the contractor's control.

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[70] Tombigbee Constructors, 420 F.2d at 1046.
[71] Norfolk Southern Corp., Norfolk Southern Tower v. Main Fin. Assoc., L.L.C. 2001 WL 34038611, *3 (Va. Cir. Ct. 2001).
[72] *See* In re Bushnell, 273 B.R. 359, *364 (Bankr. D.Vt. 2001).
[73] *Id.* at 1037; Mcnamara Contr. of Manitoba, 509 F.2d at 1170.
[74] Tombigbee Constructors, 420 F.2d at 1037.
[75] *See* Mt. Olivet Baptist Church, Inc. v. Mid-State Builders, Inc., 1985 WL 10493 (Ohio Ct. App. 1985).
[76] *Id.* at *5.

**Proper Request for an Extension**

A party experiencing an excusable delay has the burden to affirmatively seek an extension from the other contracting party. In the event that a contractor accelerates performance on the project to meet the initial start date despite an excusable delay without requesting relief, the acceleration is deemed voluntary and the costs of the acceleration are not recoverable.[77] Moreover, construction contracts usually require a written request for an extension. If this request is unambiguously expressed in the contract, then the failure of a delayed party to submit a written request bars a constructive acceleration claim.[78]

**Wrongful Refusal of a Proper Request**

A wrongful refusal can only stem from a proper request for an extension, with the sufficiency of the request measured at the time of request, not at the time of trial.[79] If an extension is not requested or is requested in a manner inconsistent with the terms of the contract, a refusal of the extension, is not wrongful.[80]

Lastly, it must be emphasized that it is a well-settled legal principle that efforts to induce performance of the contract by the original target date do not give rise to an

[77] *See generally* Nello L. Teer Co. v. Washington Metro. Area Transit Auth., 695 F. Supp. 583 (D.C. 1988); *see also* Envirotech Corp., 715 F. Supp. at 190; 5 Phillip L. Bruner & Patrick J. O'Connor, Jr., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 15:94 (2004).

[78] *See* Johnson Controls, Inc. v. Nat'l Valve & Mfg. Co., 569 F. Supp. 758, 761 (E.D. Okla. 1983) (granting summary judgment against subcontractor on acceleration claim because of failure to comply with requirement of written request, even where general contractor caused subcontractor's delays); *see also* A. Beecher Greenman Constr. Corp. v. Incorporated Vill. of Northrop, 619 N.Y.S.2d 293 (N.Y. App. Div. 1994) (finding liquidated damages could be assessed against contractor for later completion where contractor had not satisfied contractual requirement of written request for extension of time).

[79] *See* e.g., Nello L. Teer Co., 695 F.Supp. at 590-91 (owner's refusal of extension request that contained only insufficient data at the time of request deemed not a wrongful refusal, as the information contained in the request did not allow the owner to make a proper determination concerning the extension at that time).

[80] *Id.*

acceleration claim when the cause of the delay is solely the actions of the performing party.[81]

Damages for acceleration claims are limited to the additional costs incurred to complete the project pursuant to the shortened schedule beginning on the date the acceleration order was issued or when a proper request for an extension was denied.[82] These costs may include such amounts as the hiring costs and salaries of additional workers, overtime pay increases, additional costs of materials due to the shortened time span, etc.[83] Consequential damages are not recoverable in an acceleration claim.[84] Damages may be measured either through a "total cost" measurement, where the award is the difference between the actual costs of the project and the projected costs, or by a measurement of the precise amount of new costs incurred as a result of the acceleration.[85] "Total cost" damages can only be awarded if the party requesting the damages can show that its initial estimates of costs were accurate.[86]

## IV.
## Damages for Failure to Perform

Failure to perform cases arise from several scenarios. An owner may contract with a general contractor only to later change its mind and give the job to another company; or the general contractor may do the same to a subcontractor. Likewise, a contractor may contract with an owner or another contractor to perform work, but then refuse to begin or fully complete the project.

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[81] Siefford v. Hous. Auth. of the City of Humboldt, 223 N.W.2d 816, 819 (Neb. 1974).
[82] Anjo Constr. Co., 666 A.2d at 757.
[83] Siefford, 223 N.W.2d at 820.
[84] Sherman R. Smoot Co., 736 N.E.2d at 81.
[85] John F. Harkins Co., Inc. v. Sch.Dist. of Philadelphia, 460 A.2d 260, 265-66 (Pa. Super. 1983).
[86] *Id.*; s*ee also* Wunderlich Contracting Co. v. United States, 351 F.2d 956, (Ct. Cl. 1965); (total cost damages are valid, but the reasonableness of the contractor's estimate is a question of fact in each case); Exton Drive-In, Inc. v. Home Indem. Co., 436 Pa. 480, 261 A.2d 319, 324 (1970) (approving of total cost damages even in absence of mathematical certainty, so long as the measurements are reasonable).

Failure to perform cases are governed by classic principles of contract law. Indiana law follows the venerable rule that damages for a breach of a construction contract should provide a plaintiff with the "benefit of the bargain".[87] In failure to perform cases, such a benefit is determined by the reasonable cost of completion of the contract or those damages actually suffered, and reasonable expenses incurred as a natural consequence of the breach, including, "damages for delays…, for economic loss resulting from breach of contract…, for loss of full use and enjoyment of property occasioned by breach."[88] These costs can include any fairly defined and reasonably measurable standards, such as, "market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances."[89] As with defect and schedule related-claims, a party injured by non-performance may recover damages for lost profits caused by the non-performance, if proven "with a reasonable degree of certainty and exactness."[90]

In general, the court acts to return the injured party to the position it would be in had the breach not occurred, but may not act to place the party in a "better position than it would have enjoyed had the breach not occurred."[91] Pursuant to the second branch of the

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[87] Berkel & Co. Contractors, Inc. v. Palm & Assocs., 814 N.E.2d 649, 660 (Ind. Ct. App. 2004); INS Investigations Bureau, Inc. v. Lee, 784 N.E.2d 566 (Ind. Ct. App. 2003).

[88] Orto v. Jackson, 413 N.E.2d 273, 278 (Ind. Ct. App. 1980); *see also* Fowler v. Campbell, 612 N.E.2d 596, 603 (Ind. Ct. App. 1993); Pierce v. Drees, 607 N.E.2d 726, 729 (Ind. Ct. App. 1993); Johnson-Johnson, Inc. v. Farah, 108 N.E.2d 638, 639 (Ind. Ct. App. 1952); Merrillvill Conservancy Dist. v. Atlas Excavating, 764 N.E.2d 718, 724 (Ind. Ct. App. 2002).

[89] Fowler, 612 N.E.2d at 603.

[90] Clark's Pork Farms v. Sand Livestock Sys., Inc., 563 N.E.2d 1292, 1298 (Ind. Ct. App. 1990) (holding that a party may receive damages for the lost profits as well as cost to bring structure into accordance with contract); *see also* Berkel, 814 N.E.2d at 659; Orto, 413 N.E.2d at 278; Uebelhack Equip., Inc. v. Garrett Bros., Inc., 408 N.E.2d 136, 140 (Ind. Ct. App. 1980).

[91] *See* Whitaker v. Brunner, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004) ("When injured by a breach of contract, a party's recovery is limited to the loss actually suffered. Such party may not be placed in a better position than he or she would have enjoyed if the breach had not occurred."); Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 102 (Ind. Ct. App. 1999); Sheppard v. Stanich, 749 N.E.2d 609 (Ind. Ct. App. 2001).

*Hadley* test, these damages are measured according to an objective test of what a reasonable person would foresee as the potential liability stemming from the contractual relationship.[92] However, an injured party must act to mitigate any damage incurred to the extent reasonable.[93] Failure to mitigate must be proven by the breaching party by a preponderance of the evidence as an affirmative defense. [94]

When legal damages are insufficient to genuinely remedy the injury caused by the breach, specific performance is a possible, but extremely rare, remedy.[95] However, specific performance is considered an equitable remedy, which may not be granted when an adequate method of relief exists in law which serves to compensate the injured party.[96] Thus, only in rare cases where legal damages fail to adequately or effectively remedy the harm caused by the breach may the court impose a remedy of specific performance.[97]

## V.
## Punitive damages

As the aim of the common law, consistent with free-market economics, is to encourage parties not only to bargain and voluntarily enter into contracts but also to breach contracts when economically advantageous, it stands to reason that a party to a contract who chooses not to perform for financial reasons should not be punished. As generally recognized by contract scholars, punitive damages should not be awarded for breach of contracts because they would encourage performance when breach would be

[92] *See* Fairfield Dev., Inc. v. Georgetown Woods Sr. Apartments Ltd. P'ship, 768 N.E.2d 463, 474 (Ind. Ct. App. 2002) ("Generally, the measure of damages for breach of contract is either such damages as may fairly and reasonably be considered as arising naturally from the breach itself, or as may be reasonably supposed to have been within the contemplation of the parties at the time they entered into the contract as a probable result of the breach.").
[93] *See* Berkel, 814 N.E.2d at 660; J.E. Pierce, 607 N.E.2d at 729.
[94] *Id.*
[95] *See* Kesler v. Marshall, 792 N.E.2d 893, 896 (Ind. Ct. App. 2004).
[96] *Id.* at 897, Porter v. Bankers Trust Co. of California, N.A., 773 N.E.2d, 901, 908 (Ind. Ct. App. 2002).
[97] *Id.* ("Where substantial justice can be accomplished by following the law, and the parties actions are clearly governed by rules of law, equity follows the law.").

socially more desirable; therefore, so called "willful" breaches should not be distinguished from other breaches.[98] As Oliver Wendell Holmes, Jr. noted, "If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach."[99]

Therefore, punitive damages are not typically recoverable purely for a breach of contract; instead it is generally recognized that in order for a plaintiff to recover punitive damages in a breach of contract action, the plaintiff must establish a tort, such as fraud, independent of the breach of contract.[100] In accordance with this general principle, Indiana recognizes that only if the plaintiff proves that the conduct of the breaching party independently establishes the elements of a common law tort for which punitive damages are allowed may the plaintiff receive punitive damages.[101] Punitive damages are generally awardable in a tort action only if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a "mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing."[102]

## VI.
## Other Damage Considerations

*Mixed Goods/Services Contracts*

[98] *See* FARNSWORTH, CONTRACTS, § 12.3, p. 818; for discussions regarding the economic foundation for contract law and the limitations of applying economic analysis to breach of contract damages, s*ee* Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 Harv. L. Rev. 1655 (1974); Symposium, *Efficiency as a Legal Concern*, 8 Hofstra L. Rev. 485 (1980); *A Response to the Efficiency Symposium*, 8 Hofstra L. Rev. 811 (1980). Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 Va. L. Rev. 1443 (1980); Leff, *Injury, Ignorance and Spite – The Dynamics of Coercive Collection*, 80 Yale L.J. 1 (1970); *see also* Carroll, *Four Games and the Expectancy Theory*, 54 S. Calif. L. Rev. 503 (1981); Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 Econ. J. 549 (1939); Hicks, *The Foundations of Welfare Economics*, 49 Econ. J. 696 (1939).
[99] Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903).
[100] *Id*.
[101] *See* Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E. 2d 975, 984 (Ind. 1993).
[102] Budget Car Sales v. Stott, 662 N.E.2d 638, 639 (Ind. 1996).

Construction projects necessarily involve the provision of both goods and services pursuant to the contract. Occasionally in construction defect claims, the issue arises as to whether a particular defect pertains to a good—the materials themselves, or a service—the work performed by a contractor. The distinction is important because Article 2 of the Uniform Commercial Code, adopted and incorporated into law by many states, provides certain remedies with respect to warranties and remedies for defective goods, but the UCC does not apply to service contracts. Thus, whether a defect at issue pertains to a good or a service can be a central issue in a construction defect dispute.

In contracts involving the sale of both goods and services, courts generally employ the "predominant factor test" to determine whether the UCC applies.[103] Under the predominant factor test, if the predominant purpose of the contract is the sale of goods, then the UCC governs; if the predominant purpose is the provision of services, the UCC does not govern.[104]

*Performance Bonds*

Contracts for public works projects usually require contractors to obtain performance bonds from a surety that protect the project owner in the event of nonfulfillment or nonperformance of the contractor's obligations on the contract.[105] The terms of such bonds vary. Performance bonds typically provide the owner with a source of protection for losses or expenses arising from defective performance by a contractor. Bonds typically also insure against unpaid claims from parties supplying labor or materials to the project who assert claims against the owner. Some bonds require the

[103] *See* McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn. 1987); Heuerman v. B&M Constr., Inc., 833 N.E. 2d. 382, 386 (Ill. Ct. App. 2005).
[104] *Id*.
[105] *See* Scott v. Red River Waterway Comm'n, 926 So.2d 830, 835 (La. Ct. App. 2006).

surety to step in and complete the project in the event the contractor fails to finish the project. Thus, performance bonds provide owners on public works projects an extra layer of protection in guaranteeing recovery of damages against breaching contractors.

*Pass-Through Claims*

On complex construction projects, subcontractors occasionally incur damages directly attributable to a breach by the owner of its contract with a prime contractor. Although the subcontractor in such cases usually is not in privity of contract with the owner, the subcontractor may nonetheless prosecute a "pass-through claim" for recovery of damages against the owner through the prime contractor.[106] A pass-through claim is allowed in furtherance of the principle that a subcontractor is entitled to enjoy the benefit of its bargain when its subcontract is terminated because the owner has breached its contract with the prime contractor.[107]

## VII.
## Conclusion

In construction cases, breach of contract damages typically arise from defective workmanship, alterations in constructions schedules, or a failure to perform on the part of a contractor or owner. These three basic contract claims in construction cases are governed by general principles of contract law. Most notably, the *Hadley* rule that the measure of damages for breach of contract are either those damages: 1) as may fairly and reasonably be considered as arising naturally from the breach, or 2) as may reasonably have been within the contemplation of the parties at the time the contract was made.[108] Given the panoply of common law contract principles, damage claims and defenses in

[106] *See* Clark-Fitzpatrick, 652 A.2d at 449.
[107] *Id*.
[108] *See* Appel, 15 P.3d at 1145.

construction cases are limited only by an attorney's knowledge of contract law and creativity.