

LIMITATION OF LIABILITY CLAUSES – NEW CASE DEVELOPMENTS

By: Nicholas D. Siegfried

Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A.

201 Alhambra Circle, Suite 1102

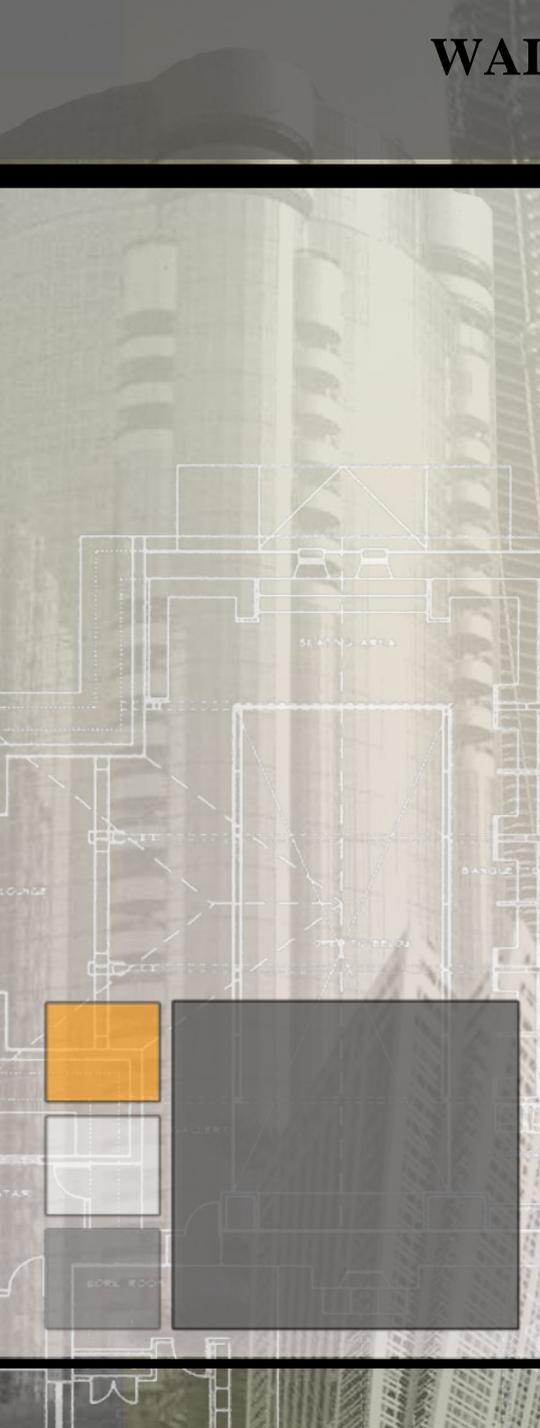
Coral Gables, FL 33134

LIMITATION OF LIABILITY CLAUSES – NEW CASE DEVELOPMENTS

- Types of Clauses.
 - Waiver of Consequential Damages
 - Liquidated Damages
 - No Damages for Delays
 - Exculpatory Provisions Expressly Limiting Liability
 - Indemnification Provisions



WAIVER OF CONSEQUENTIAL DAMAGES

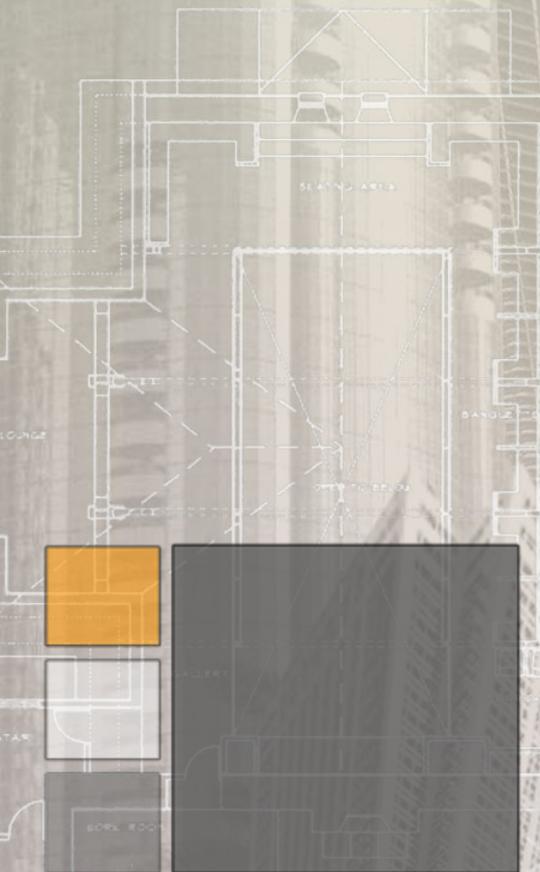
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- An architectural floor plan of a building is shown on the left side of the slide. The plan includes various rooms and corridors, with some areas highlighted in orange and grey. The orange highlight is a small square in the lower-left quadrant. A larger grey highlight covers a significant portion of the lower half of the plan, including several rooms and a central corridor. The background of the slide features a faint, stylized image of a city skyline with skyscrapers.
- What are consequential damages?
 - The AIA A201 (2007) defines consequential damages as follows:
 - Damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
 - Damages incurred by the Contractor for principle office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
 - New Case: Wal-Mart Stores, Inc. v. S.C. Nestel, Inc., 2010 WL 1190534 (S.D. Ind. 2010)

WAL-MART STORES, INC. V. S.C. NESTEL, INC., 2010 WL 1190534 (S.D. IND. 2010)

• ***ARTICLE 17 LIMITATION OF LIABILITY***

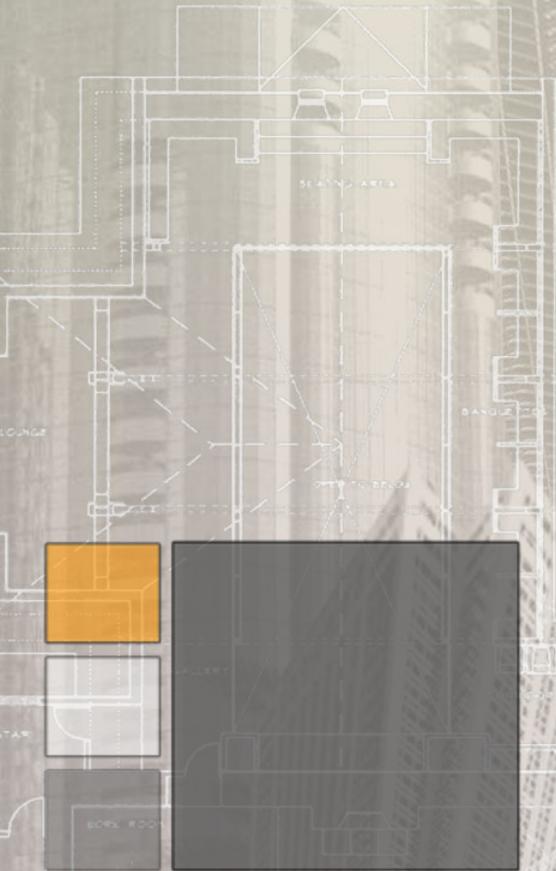
- 17.1 THE CONTRACTOR AND OWNER WAIVE CLAIMS AGAINST EACH OTHER FOR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATING TO THIS CONTRACT. This mutual waiver includes (1) damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons, and (2) damages incurred by the Contractor for principal office expenses including the compensation of personal stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. This mutual waiver is applicable, without limitation, to all consequential due to either party's termination of the Contract in accordance with the provisions of the Contract documents; provided, however, that nothing contained in this Article shall be deemed to preclude (a) an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents, (b) an award for damages for direct costs to repair third party property in accordance with the requirements of the Contract Documents, or (c) any Damages resulting from any violation by Contractor of the Environmental Laws of the Storm Water Requirements.

- Issue: The parties dispute whether Article 17 of the parties' construction contract prohibits Nestel from seeking consequential damages in this case.
- Wal-Mart's Argument: The limitation of liability provision clearly waives all claims for consequential damages.
- Nestel's Argument: Since the termination was not in accordance with the contract documents, the waiver of consequential damages provision is not applicable.



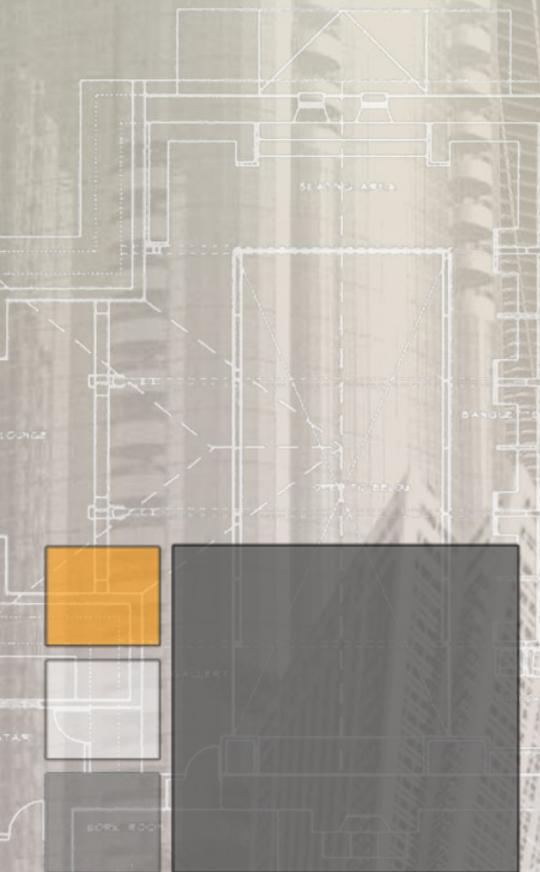
WAL-MART STORES, INC. V. S.C. NESTEL, INC., 2010 WL 1190534 (S.D. IND. 2010)

- Holding: In reviewing the provision, the Court concluded, that the text of Article 17 is unambiguous regarding whether or not the parties reasonably contemplated that Nestel could assert a claim for lost profits from lost bonding capacity and thus any evidence regarding Nestel's alleged consequential damages is irrelevant.



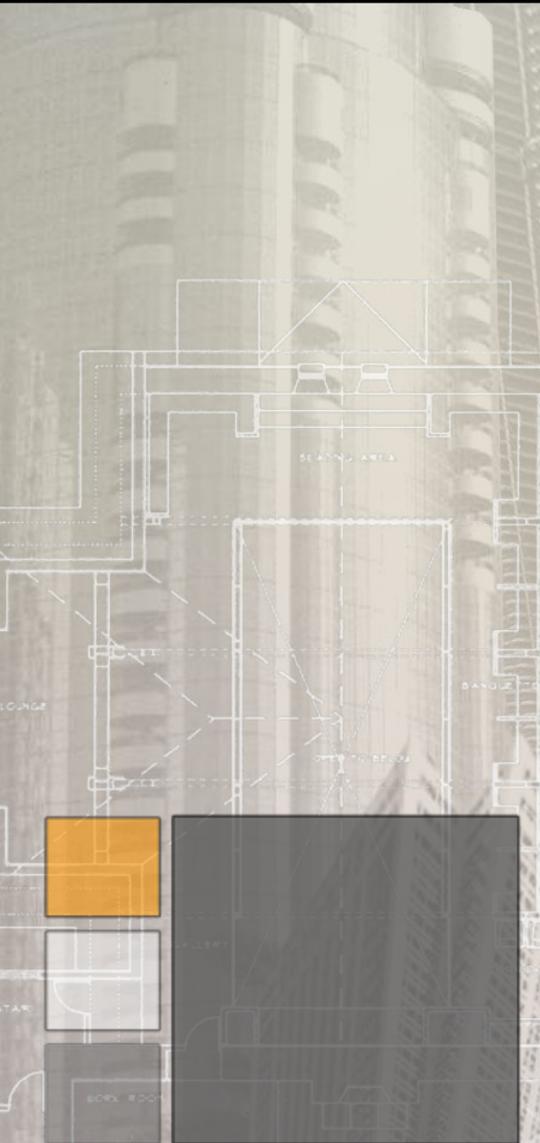
LIQUIDATED DAMAGES

- What are liquidated damages?
- S. Elec. Corp. v. Utilities Bd. of City of Foley, Ala. d/b/a Riviera Utilities, 643 F. Supp. 2d 1302, 1307 (S.D. Ala. 2009). To avoid a court construing a liquidated damages provision to be a penalty, avoid testimony to the effect that “the \$500 per day of liquidated damages “was just a number that we generated to get the job completed.” Instead, include an analysis as to how much damage the party would suffer for every day of delay.



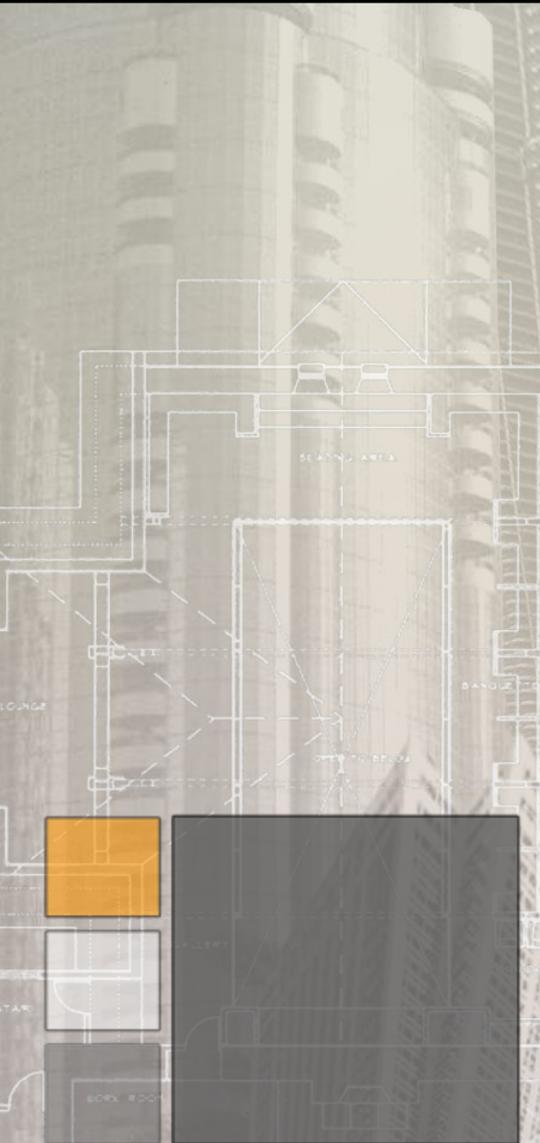
S. ELEC. CORP. V. UTILITIES BD. OF CITY OF FOLEY, ALA. D/B/A RIVIERA UTILITIES, 643 F. SUPP. 2D 1302, 1307 (S.D. ALA. 2009).

- The liquidated damages provision:
 - It is mutually agreed between the parties hereto that time is the essence of this CONTRACT, and in the event the construction of the Work is not completed within the time specified in the Proposal, it is agreed that from the compensation otherwise to be paid to the CONTRACTOR, the OWNER may retain the sum of \$500 per day for each day thereafter, Sundays and holidays included, that the Work remains uncompleted.



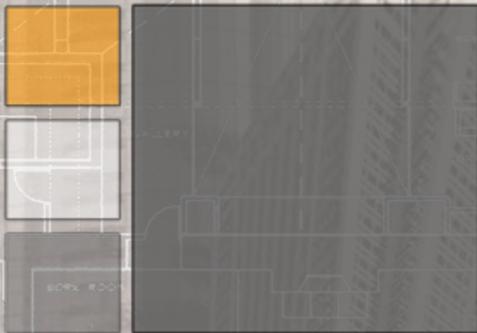
LIQUIDATED DAMAGES

- Comstock Potomac Yard, L.C. v. Balfour Beatty Const., LLC, 694 F. Supp. 2d 468, 486 (E.D. Va. 2010).
- *West Tower:*
 - Floors 1–3:\$1,500 per day
 - Floors 4–6:\$3,000 per day
 - Floors 7–9:\$4,500 per day
 - Floors 10–11:\$6,000 per day
- *East Tower:*
 - Floors 1–3:\$1,500 per day
 - Floors 4–6:\$3,000 per day
 - Floors 7–9:\$4,500 per day
 - Floors 10–11:\$6,000 per day
- Cap of \$12,000/day



**COMSTOCK POTOMAC YARD, L.C. V. BALFOUR BEATTY CONST.,
LLC, 694 F. SUPP. 2D 468, 486 (E.D. VA. 2010).**

- Issue: What happens if the Contract’s benchmark for ending the imposition of liquidated damages—the issuance of certificates of Substantial Completion—never occurred.
 - If the Court is to impose liquidated damages, it must ascertain a “begin” and “end” date for the running of these damages.
- Owner: Comstock suggests that calculation of liquidated damages should begin at the new milestone dates established in CO15 previously referenced and end on December 1, 2008. Comstock supports December 1, 2008 as the cutoff for liquidated damages based on Comstock President Gregory Benson’s estimation that it should have taken an extra ninety days to complete the punchlist work from the date Balfour ceased its work on the Project in August of 2008.



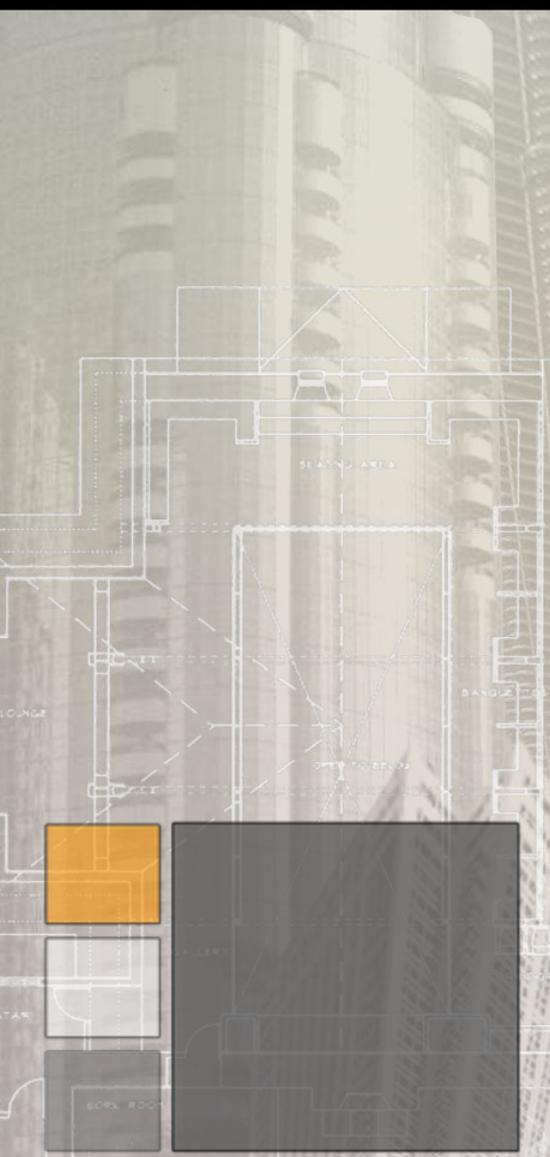
COMSTOCK POTOMAC YARD, L.C. V. BALFOUR BEATTY CONST., LLC,
694 F. SUPP. 2D 468, 486 (E.D. VA. 2010).

- Contractor: Balfour argues that the Court should instead look to: the County’s issuance of Temporary Certificates of Occupancy (“TCO”) or Certificates of Occupancy (“CO”); Comstock’s “use” and sale of individual condominium units.



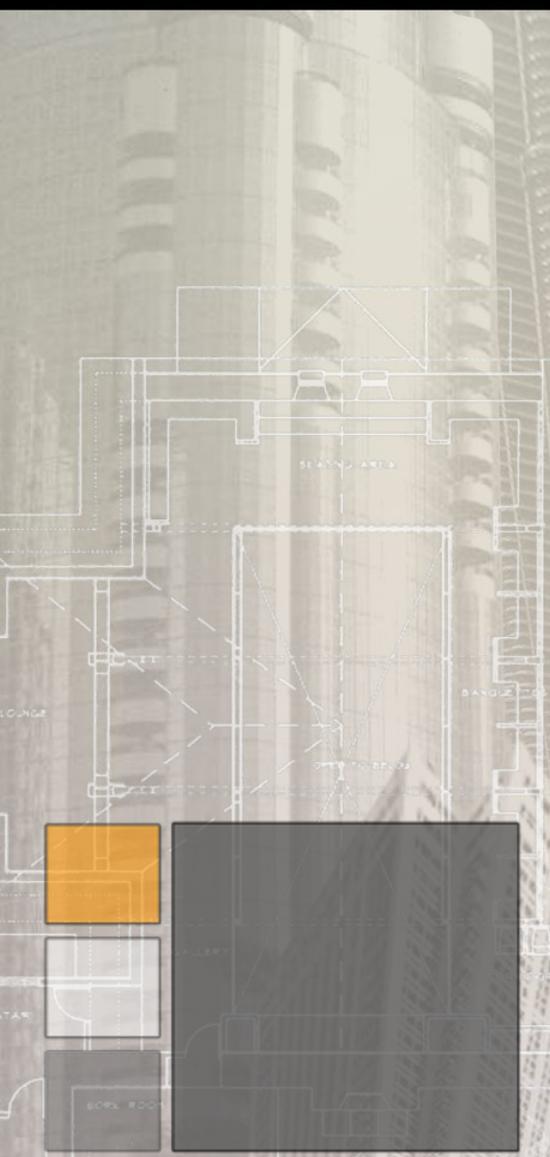
COMSTOCK POTOMAC YARD, L.C. V. BALFOUR BEATTY CONST., LLC,
694 F. SUPP. 2D 468, 486 (E.D. VA. 2010).

- Analysis:
 - Regarding Comstock’s use and sale of some of the individual condominium units in the West Tower, the Contract provides for Comstock’s occupancy of the Project without forgoing its entitlement to liquidated damages.
 - The Contract’s explicit prerequisites for Substantial Completion also include that the punchlist be reasonably capable of completion within 30 days and that 90% of the units be complete for turnover/delivery to unit owners.
 - Balfour’s suggestion that the Court cease the running of liquidated damages at the issuance of TCOs/COs or Comstock’s “use” and sale of some of the individual condominium units would disregard these contractual prerequisites.



COMSTOCK POTOMAC YARD, L.C. V. BALFOUR BEATTY CONST., LLC,
694 F. SUPP. 2D 468, 486 (E.D. VA. 2010).

- Analysis:
 - The fact that Comstock was able to “occupy” and sell some units does not indicate to the Court that Comstock was able to put the relevant portions of the Project to its “beneficial use.”
 - Though Balfour notes that Comstock was able to sell a number of units by December 31, 2006 for a profit of some \$46 million, Comstock justifiably points out that it lost some \$70 million in sales revenue.
 - In the end, regardless of the limited extent to which Comstock was able to use some of the condominiums, the conditions regarding substantial completion still had to be satisfied.
- Award: Court ultimately awarded \$8,769,000 to Comstock in liquidated damages.

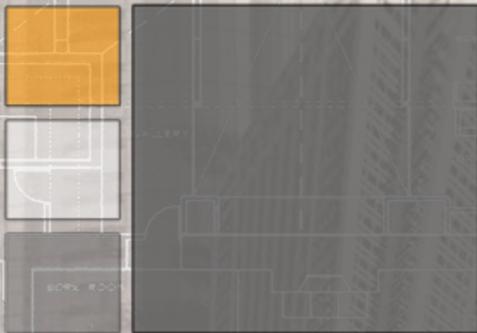


PROVISIONS LIMITING THE AMOUNT OF LIABILITY

- Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033 (Fla. 3d DCA 2010) review dismissed, 44 So. 3d 108 (Fla. 2010)
- Facts:
 - La Gorce began exploring options to irrigate its golf course using a reverse osmosis water treatment system as an alternative to the municipal water supply.
 - In January 2000, La Gorce met with ITT regarding the water treatment project.
 - ITT introduced Witt, a professional geologist licensed in Florida. La Gorce and ITT eventually entered into a design-build contract for the reverse osmosis system (the “ITT Agreement”) and Witt’s Company, Gerhard M. Witt and Associates, Inc. (“GMWA”), entered into various contracts with La Gorce for consulting services and the overall project coordination (collectively the “GMWA Agreements”).

WITT V. LA GORCE COUNTRY CLUB, INC., 35 SO. 3D 1033 (FLA. 3D DCA 2010) REVIEW DISMISSED, 44 SO. 3D 108 (FLA. 2010)

- GMWA and La Gorce each contained a limitation of liability clause limiting the liability of GMWA and its subconsultants to the total dollar amount of the approved portions of the scope for the project.
 - In recognition of the relative risks and benefits of the project to both La Gorce and [GMWA], the risks have been allocated such that La Gorce agrees, to the fullest extent permitted by law, to limit the liability of [GMWA] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [GMWA] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [GMWA's] total fee for services rendered on this project, whichever is greater. Such claims and causes include, but are not limited to, negligence, professional errors or omissions, strict liability, breach of contract or warranty.

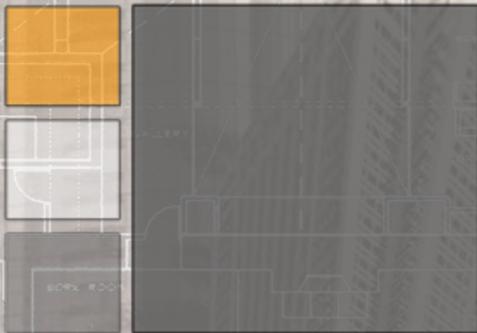


**WITT V. LA GORCE COUNTRY CLUB, INC., 35 SO. 3D 1033 (FLA. 3D
DCA 2010) REVIEW DISMISSED, 44 SO. 3D 108 (FLA. 2010)**

- Witt was not entitled to protection under the limitation of liability clause.
 - Relying on the case of *Moransais v. Heathman*, 744 So.2d 973 (Fla.1999), the Court questioned whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting.
 - Florida Statutes expressly state that even though a licensed engineer practices through a business organization, the engineer is not relieved from personal liability for negligence, misconduct, or wrongful acts committed by him or her.
 - The Court determined that claims of professional negligence operate outside of the contract and that the limitation of liability provision was, as a matter of law, invalid and unenforceable as to Witt..

EXCULPATORY PROVISIONS EXPRESSLY EXCLUDING LIABILITY

- Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1158 (11th Cir. 2009).
 - This case concerns an injury to a sea captain and the subsequent settlement of his claims by the third-party plaintiffs – Meridian Yachts.
 - Third-Party Defendants – Ship Builder and Ship Designer.
 - Limitation of Liability Provision.
 - [T]he Builder shall have no liability whatsoever for any loss or damage directly arising from the defectiveness or deficiency of parts ... except if resulting from intentional conduct or gross negligence of the Builder or his servants. Liability of the Builder for loss of business, loss of profits, consequential damages or other (indirect) damage, however, is always excluded



- ‘[Exculpatory] clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away.’
- Court determined that the exculpatory language was clear and unequivocal.



NO DAMAGES FOR DELAY

- Beware of state statutes barring enforcement of these provisions as void against public policy.
 - Martin Bros. Contractors, Inc. v. Virginia Military Inst., 277 Va. 586, 592, 675 S.E.2d 183, 186 (2009)(enforcing a statutory prohibition against a “no damages for delay” clause in a public works contract, and ruling that a clause denying a contractor's recovery of home office expenses claims fell within the statutory prohibition.)
 - Acme Contracting, Ltd. v. TolTest, Inc., 370 Fed. Appx. 647 (6th Cir. 2010) (holding a “no damages for delay” clause void and unenforceable as against public policy as required by Ohio statute.)

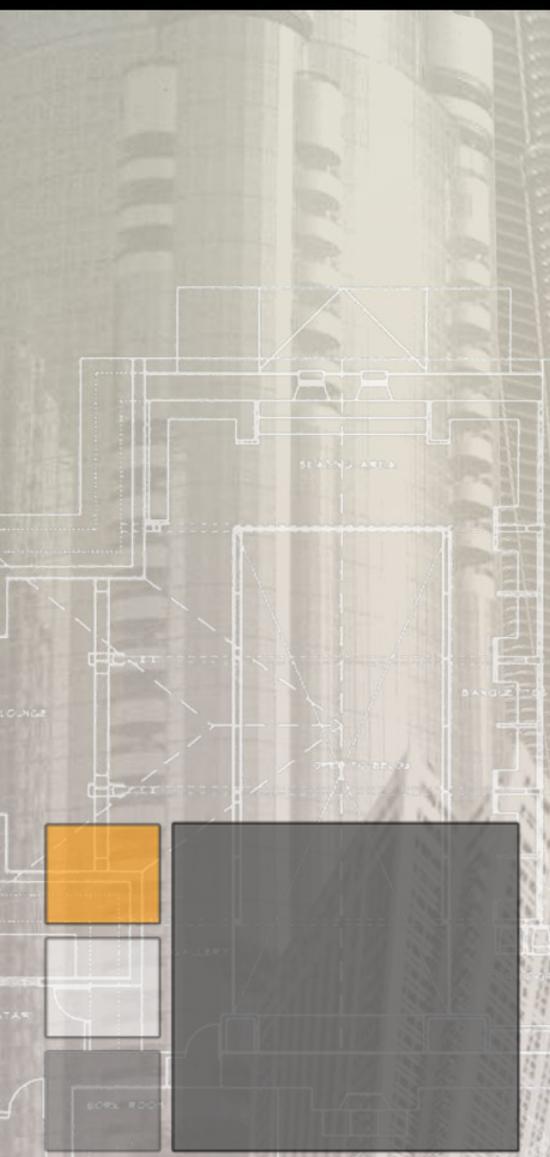
INDEMNIFICATION

- Ensuring compliance with state statutes governing indemnification provisions.
 - Cibellis Contracting, Inc. v. Hamilton Gardens Owners, Inc., 34 Misc. 3d 1224(A) (N.Y. Sup. Ct. 2012).
 - Griswold Ready Mix Concrete, Inc. v. Reddick, 37 Fla. L. Weekly D869 (Fla. 1st DCA 2012)



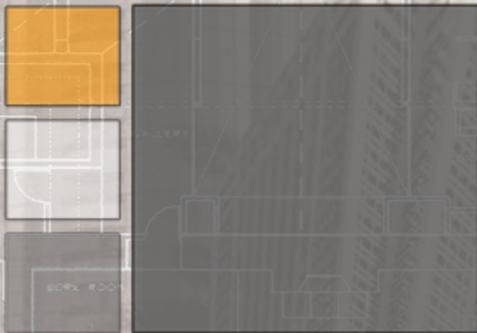
CIBELLIS CONTRACTING, INC. V. HAMILTON GARDENS OWNERS, INC., 34 MISC. 3D 1224(A) (N.Y. SUP. CT. 2012).

- The parties entered into a contract in which Cibellis was to perform certain excavation and construction work on the premises owned by Hamilton.
- The contract contained a provision that Cibellis is “Not responsible for anything underground such as electric, cable, phone ect [sic].”
- While Cibellis was performing excavation work, it struck an underground electrical wire, severed it and caused a complete loss of power to Hamilton’s building and property.
- Hamilton alleges that it had to incur costs of \$37,657.55 to repair the electrical damage caused by Cibellis.



CIBELLIS CONTRACTING, INC. V. HAMILTON GARDENS OWNERS, INC., 34 MISC. 3D 1224(A) (N.Y. SUP. CT. 2012).

- Cibellis contends that the clear provision in the contract quoted above absolves it of liability for the electrical damage.
- New York Statute on Indemnification (Indemnatee must be free of negligence):
 - A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.



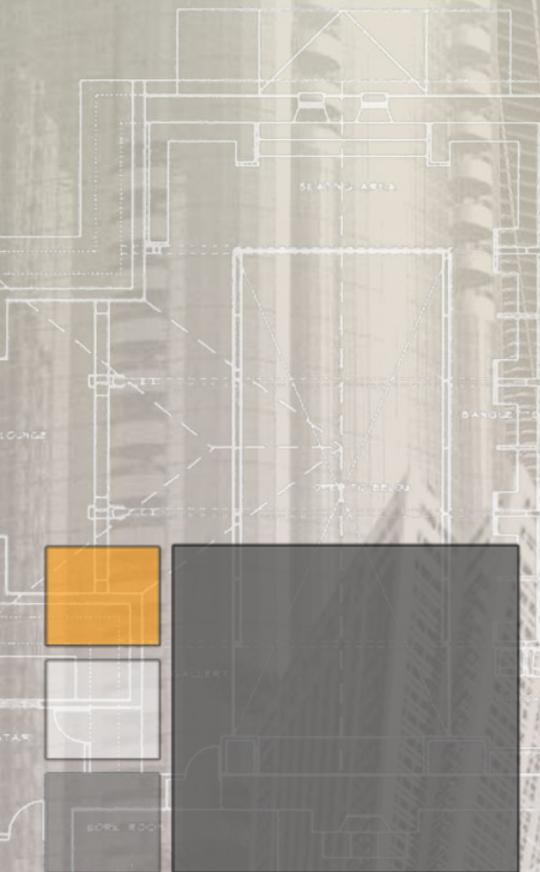
CIBELLIS CONTRACTING, INC. V. HAMILTON GARDENS OWNERS, INC., 34 MISC. 3D 1224(A) (N.Y. SUP. CT. 2012).

- No reasonable argument that Cibellis was free from negligence and thus the Court denied Cibellis' Motion for Summary Judgment based upon the indemnification agreement.



GRISWOLD READY MIX CONCRETE, INC. V. REDDICK, 37 FLA. L. WEEKLY D869 (FLA. 1ST DCA 2012)

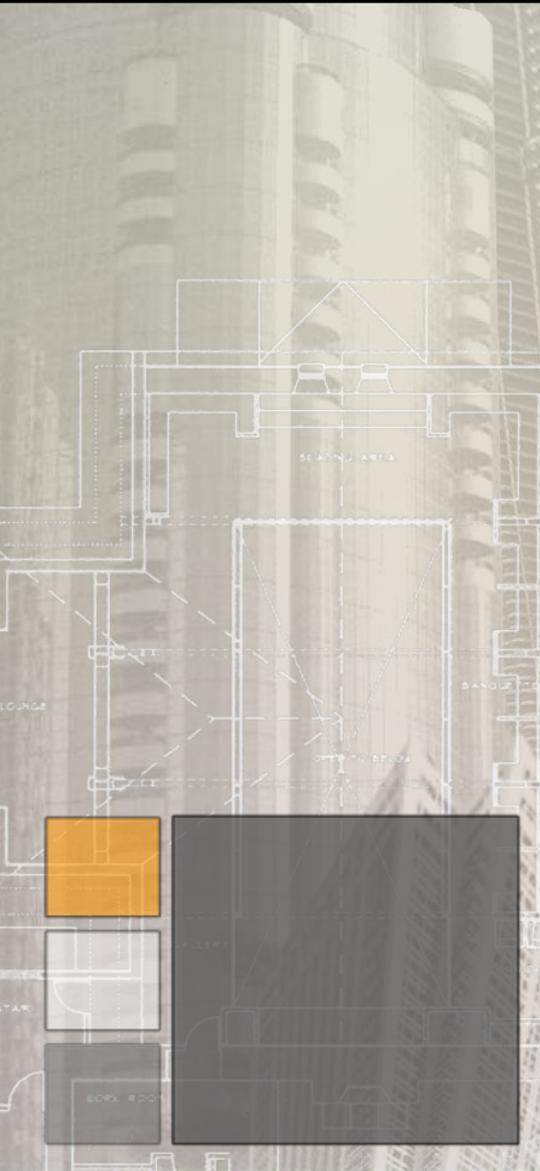
- Griswold Ready Mix Concrete, Inc. (“Griswold”), appeals a final judgment awarding Pumpco, Inc. (“Pumpco”) \$69,378.39 in attorney’s fees and \$65,000 as “additional costs” on its cross-claim against Griswold for contractual indemnity.
- The “additional costs” constitute the amount Pumpco paid to Tony Reddick (“Reddick”), to settle his negligence claims.



- Indemnification Provision:
 - 3. Lessee [Griswold] agrees to [at] its sole expense:
 - ...
 - (g) To assume all risks and liabilities for and to indemnify Lessor [Pumpco] and Lessor's agents against all claims, actions, suits, penalties, expenses and liabilities, including attorneys fees, whether or not covered by insurance, for (i) loss or damage to the Equipment; (ii) injuries or deaths of any persons; and (ii)[sic] damage to any property, howsoever arising or incurred from or incident to the use, operation or possession of the Equipment, unless such claims, actions, suits, penalties, expenses or liabilities are caused solely by the intentional conduct of the Lessor or its agents.

GRISWOLD READY MIX CONCRETE, INC. V. REDDICK, 37 FLA. L.
WEEKLY D869 (FLA. 1ST DCA 2012)

- Section 725.06, Florida Statutes
 - Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman *or any combination thereof* wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any.



**GRISWOLD READY MIX CONCRETE, INC. V. REDDICK, 37 FLA. L.
WEEKLY D869 (FLA. 1ST DCA 2012)**

- The indemnity provision at issue did not contain a dollar limit to Griswold's potential liability. For that reason, it was void and unenforceable under Florida Statute.



THE END

- Thank you.

