

*Houston Construction News*  
**Legal Column**

*“Damage Claims in Construction Defect Cases”*

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Parties to a construction contract may incur damages resulting from another party's acts and/or omissions. In most construction defect lawsuits, the injured party expected to gain some benefit from a bargain, which it claims it did not receive. Moreover, the injured party may have changed its financial or business position in reliance upon the anticipated performance of the construction contract. The principles of compensatory damages attempts to redress these alleged injuries by requiring the breaching party to compensate the injured party in such an amount as is necessary to place the injured party in as good a position as it would have been, had the contract been fulfilled. Compensatory damages are not meant to punish the breaching party, but rather, compensate the injured party for what was lost as a result of the breach.

Parties involved in construction defect cases may focus on their theories of liability and defenses to liability without fully considering or analyzing the plaintiff's claim for damages. There are two major categories of damages: *direct damages and consequential damages*. Direct damages are those which directly relate to or arise out of a contract for construction. Consequential damages are those damages which are indirectly related to the contract. The AIA Form 201(1997) contract specifically addresses consequential damages in Paragraph 4.3.10.

Paragraph 4.3.10 of AIA Form 201 is entitled, “Claims for Consequential Damages,” and states as follows:

**4.3.10. Claims for Consequential Damages. 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 loss 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 personnel stationed there, for losses of financing, business and reputation, and the loss of profit except anticipated profit arising directly from the work.**

AIA Form 401 is a form which can be used as a subcontract between a general contractor and a subcontractor, and provides as follows in Paragraph 15.4:

**The contractor and subcontractor waive claims against each other for consequential damages arising out of, or relating to this subcontract, including without limitation, any consequential damages due to either party’s termination in accordance with Article 7. Costs of repair, costs of remediation, costs of additional materials for repair, costs of additional labor for repairs, and costs for replacement are examples of direct damages. Lost profits, harm to a business reputation and mental anguish are examples of consequential damages.**

While the AIA document known as the “General Conditions of the Contract for Construction” (A201) waives claims for consequential damages and then lists the claims that are included in the waiver, many subcontracts between a general contractor and subcontractor do not contain such a waiver. A consideration then of whether the owner can recover directly against the subcontractor for claims that it cannot recover against the general contractor should be considered in any construction defect litigation.