# Foreseeability of Breach of Construction Contract Damages

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Damages recoverable for breach of a construction contract are supposed to put the injured party "in as good a position as it would have been in had the contract been performed" (Rest.2d Contracts § 344). But damages are only recoverable when the breaching party had "reason to foresee [them] as a probable result of the breach when the contract was made" (Rest.2d Contracts§ 351(1)).

Reasonable foreseeability is limited by an objective constraint: The damages must "follow[] from the breach (a) in the ordinary course of events" (Rest.2d Contracts § 351 (2)(a)). That constraint can be circumvented by subjective facts: when the damages follow from "special circumstances, beyond the ordinary course of events, that the party in breach had reason to know" at the time the contract was made (Rest.2d Contracts§ 351 (2)(b)).

Why the characterizations "objective" constraint and "subjective" facts?

The objective constraint is determined from outside the parties' particular knowledge. It is determined by what would have been foreseeable as flowing from the breach, in the ordinary course of events, by the reasonable person who enters into the particular kind of contract under the circumstances involved. This objective, reasonable-person-in-the-circumstances standard is used, because the purpose of damages is to protect only the reasonable expectation interest of the injured party.

As for the subjective facts that can expand liability beyond the objective constraint, they are measured by what the breaching party "had reason to know" at the time the contract was made. The inquiry is into information actually available to the breaching party (although there is

an objective component, in that the subjective facts must be interpreted as they would have been understood by a reasonable person in those circumstances).

Determining whether the claimed breach of contract damages are recoverable is relatively straight forward using the objective constraint and subjective facts. The proof will be:

(1) What the contract says;

(2) What were the circumstances under which the contract was made;

(3) What the reasonable person who typically enters into the particular kind of contract under the circumstances involved would foresee as potential damages from the kind of breach; and

(4) If the damages do not qualify under point (3), then what information the breaching party had at the time the contract was made that would render those damages reasonably foreseeable to a person in the breaching party's position.

These tests use foreseeability at the time the contract was made, not at the time of the breach, (1) as the measure of the "expectation interest" of the parties (Rest.2d Contracts § 344), and (2) as the risk reasonably undertaken by the breaching party upon entering into the contract. They make foreseeability a fact question that is subject to limited review in post-trial motions and on appeal.

The objective constraint and subjective facts leave the parties – instead of a judge – in control of the risk the parties are undertaking. If the parties want to restrict potential damage recovery, they negotiate such limitations and put them in the contract, e.g., limiting what are often called "consequential" damages, limiting damages to the dollar value of the contract. If they want to expand potential damage recovery, they assure that proof exists of the other party's knowledge of the subjective facts at the time the contract is made, by documenting communications of those facts to each other.

While acknowledging "foreseeability" as the measure of the "expectation interest," judges often turn to other tests that allow them – not the parties – to determine whether certain damages are recoverable.

The objective constraint is sometimes used to bar damages that a judge believes were not "direct and inevitable" damages from a breach, or were not within the injured party's anticipated "benefit of full performance." Those decisions usually are made without considering (or at least explaining) any evidence, or lack of evidence, of what a reasonable person in the circumstances of the breaching party could have foreseen, at the time the contract was made, as reasonably potential damages from the kind of breach that occurred.

Judges also sometimes bar damages that they believe to be "too remote or speculative." Barring such damages would be appropriate if it is justified by an analysis of the circumstances under which the contract was made, the subjective facts, and what a reasonable person entering into the particular type of contract under those circumstances would have understood to be the risks under those subjective facts. However, the decision is usually just a fiat.

Finally, judges sometimes rely upon outmoded, pre-discovery era, 19th century pleading rules for "general damages" and "special damages" to prescribe what damages are recoverable. Besides the fact that modern discovery should adequately disclose the details of a claim characterized as one for special damages, it is interesting to note that the seminal case in this area (*Hadley v. Baxendale* ( 1854) 156 Eng.Rep. 145) makes no distinction between what are today called general and special damages.

Courts cannot limit breach of contract damages as not being foreseeable to the reasonable contractor or the reasonable public entity at the time they enter into a contract for a huge 21st century public works engineering project, without receiving and weighing evidence of the peculiar circumstances of the contract, including the typical necessary experience of both

parties, the typical conditions and complexity of such projects, and what is revealed about risks in the bidding and contract documents. The same should obtain for breach of a contract for construction of a skyscraper.