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BUT DID YOU DIE? DETERMINING RESPONSIBILITY AND NEGOTIATING DAMAGES IN CONSTRUCTION DISPUTES

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INTRODUCTION

Construction contracts involve intricate risk allocations, especially when it comes to delays, defects, or disruption-related damages. The American Institute of Architects (AIA) publishes widely adopted standard-form construction contracts, notably AIA A201-2017, General Conditions of the Contract for Construction. These contracts contain detailed provisions that allocate financial responsibility and legal exposure for various forms of damages between owners, contractors, and subcontractors.

In high-stakes projects, these clauses may determine the fate of multimillion-dollar disputes. This article examines four key types of damages clauses within AIA contracts: mutual waivers of consequential damages, delay and time extension provisions, liquidated damages clauses, and indemnity obligations. We analyze recent and seminal case law from various U.S. jurisdictions and offer strategic recommendations to lawyers and clients engaged in contract drafting, negotiation, or litigation. In doing so, this article highlights trends in judicial reasoning, state legislative interventions, and industry responses to emerging risks. Additionally, this article incorporates insights from recent scholarship and practitioner commentary to contextualize the evolving treatment of construction damages clauses under U.S. law.

Mutual Waiver of Consequential Damages

Consequential damages, also known as special or indirect damages, include losses such as lost profits, diminution of business value, lost financing, and reputational damage. Section 15.1.7 of AIA A201-2017 reflects a mutual waiver of such damages, protecting both contractor and owner from the unpredictable ripple effects of a breach. The clause represents a deliberate effort to reduce litigation uncertainty and allocate damages risk in a more predictable manner.

These waivers are enforceable in most jurisdictions, provided they are unambiguous and not unconscionable. For instance, in *Bartram, LLC v. C.B. Contractors, LLC*, the U.S. District Court for the Northern District of Florida enforced a mutual waiver to bar the owner's claims for lost rental income and profits stemming from delayed condominium delivery, emphasizing that such provisions are generally enforceable when they are clear, unambiguous, and agreed upon by sophisticated parties in an arm's-length transaction.¹ The court noted that the waiver was a negotiated term of the contract and reflected the parties' intent to allocate risks and limit liability for consequential damages.² This court's

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analysis reflects broader principles of contract law, which allow parties to limit or exclude consequential damages unless such limitations are unconscionable.

Similarly, in *Travelers Cas. & Sur. Co. v. Dormitory Auth. Of State of N.Y.*, an insurer equitably subrogated the rights of a contractor regarding a construction project for a college and asserted claims for damages.³ The court agreed that the insurer could not recover for breach of contract because it was neither in privity of contract with the architect nor was it a third-party beneficiary of the contract.⁴ It further reinforced that even significant consequential losses do not justify overriding explicit contractual terms, absent bad faith or unconscionability.

Morgan County v. Minnesota Mining & Mfg. Co. provides a useful contrast. Here, the Minnesota Supreme Court declined to apply a waiver to shield a party from liability for gross negligence.⁵ The court recognized the limitation of liability clause did not extend to claims involving willful and wanton negligence, intentional misconduct, fraud, or misrepresentation.⁶ Therefore, the party at issue was allowed to pursue these claims, as such conduct fell outside the scope of enforceable contractual limitations. This distinction reaffirmed a foundational principle that parties cannot contractually shield themselves from liability for egregious or intentional misconduct.

Yet, the picture changes in consumer or residential settings. In *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, a California appellate court enforced a waiver of consequential damages in a commercial drilling contract, but the court emphasized that such waivers must be evaluated for fairness, particularly in cases involving adhesion or lack of bargaining power.⁷ This reasoning suggests that while waivers are typically enforceable in commercial contexts, California courts remain sensitive to the potential for overreach when consumers or less-sophisticated parties are involved. This pattern is echoed in other jurisdictions, such as Illinois and Maryland, which enforce consumer protection statutes that may override contractually bargained-for damage limitations in residential or individual consumer contexts.⁸

Courts may also refuse to enforce mutual waivers if one party was unaware of the clause or lacked bargaining power. While this principle appears most frequently in consumer protection contexts, it also applies to commercial agreements where the waiver is part of a contract of adhesion or where enforcement would result in unconscionability. In fact, courts may invalidate clauses if they are imposed without

negotiation or where enforcement would be unjust given disparities in sophistication or leverage between the parties.⁹

Recent commentary from surety law experts further emphasizes the importance of waiver clarity. As noted in Douglass Wynne and Ruth Ann Reeves's 2025 article on consequential damages and surety liability, poorly drafted waiver provisions have been construed to allow consequential damages claims against sureties under certain performance bonds, underscoring the need for explicitness.¹⁰ Their discussion of the OH 126th Street Housing case demonstrates that, where bonds incorporate construction contracts with consequential damages waivers, courts may still permit claims if the waiver is not explicitly extended to the surety's own breach.¹¹

To avoid enforcement challenges, practitioners should ensure that:

- Both parties are sophisticated and have equal bargaining power.
- The waiver language is tailored and specific.
- The agreement reflects clear mutual consent and understanding.
- The waiver is consistent with the broader purpose of the agreement and supported by consideration.

Moreover, including a waiver of consequential damages directly in any surety bond (not just in the construction contract) may help guard against judicial interpretations that treat the surety's obligations as independent.

Delay Provisions and Extensions of Time

Section 8.3.1 allows contractors to request extensions of time for delays outside their control. It is a crucial provision that interacts with both damage waivers and liquidated damages clauses. The distinction between excusable and compensable delays – i.e., delays that excuse performance versus those that justify monetary relief – is vital in construction law. Without this distinction, parties may be exposed to unexpected costs or responsibilities for events beyond their control.

In *Coghlin Elec. Contrs., Inc. v. Gilbane Bldg. Co.*, the Massachusetts Supreme Judicial Court adopted a balanced approach to project delay responsibility, recognizing that both the owner and the construction manager may contribute to delay. The court emphasized

the critical role of project-specific scheduling documentation and articulated a duty-to-coordinate standard for multi-causal delay events.¹² It also reaffirmed the Spearin doctrine: when an owner furnishes plans and specifications, it impliedly warrants their adequacy for the intended purpose.¹³ However, in design-build projects – where the contractor contributes to the design – the court held that this implied warranty may be limited or altered based on contractual language and the contractor’s design role.¹⁴ This case illustrates how courts, even when faced with no-damages-for-delays clauses, may scrutinize the factual circumstances and the parties’ conduct to determine whether equitable remedies or time extensions are warranted.

This need for careful delay allocation is reinforced in *George Sollitt Construction Co. v. United States*, where the Court of Federal Claims explained that when delays are concurrent, liquidated damages may not be assessed for the overlapping period.¹⁵ Even if a contractor is not entitled to a compensable time extension due to shared fault, the government must clearly apportion responsibility for delay to impose liquidated damages.¹⁶ Without precise apportionment, recovery is barred. Moreover, while the contractor bears the burden of proving when it could have performed work to recover certain costs (such as overhead), the government bears the burden of proving that the contractor alone caused the delay when seeking to enforce liquidated damages.¹⁷ These principles reflect a broader judicial trend toward scrutinizing delay disputes in context, especially when parties invoke broad no-damages-for-delay clauses. Courts will often look beyond the clause to evaluate equity, causation, and coordination failures.

Colorado courts, for example, disfavor strict enforcement of “no damages for delay” clauses where delays result from owner interference. Courts make this clear when they find that such clauses do not bar delay claims if the owner or contractee “actively interfered” with the contractor’s performance, even in public works settings.¹⁸ A Florida federal court recently reinforced this principle, holding that a “no damages” clause was inapplicable because the contractor had mismanaged sequencing, misallocated personnel, and hindered the subcontractor’s ability to complete work, thus actively interfering with performance.¹⁹ Similarly, in *John Spearly Constr., Inc. v. Penns Valley Sch. Dist.*, the Pennsylvania Commonwealth Court affirmed that active interference by a public owner defeated enforcement of a “no damages for delay” clause.²⁰ Several other states, including Washington, Illinois, and Virginia, permit exceptions to no-damages-for-delay clauses in instances of fraud, concealment, gross negligence, or willful misconduct. These exceptions are grounded in public policy concerns that contractual risk-shifting

should not immunize egregious behavior or structural unfairness.

AIA contract users must note the trend toward scrutinizing delay language for procedural and substantive fairness. Courts often examine whether notice requirements were met, whether delay documentation was maintained contemporaneously, and whether the delay was critical to project completion.

As the surety-focused literature suggests, poor documentation of delays can also complicate bond claims. The 2025 Surety Claims Institute article emphasizes that sureties may resist liability for delay-related costs when contractors fail to meet formal notice or procedural requirements.²¹

To mitigate these risks, practitioners should:

- Investigate state-by-state enforceability of delay limitations.
- Include savings clauses or limited carveouts for bad faith, fraud, or gross negligence.
- Require and adhere to detailed scheduling and delay tracking protocols.
- Define clearly what constitutes a compensable delay and the procedure for asserting it.

Liquidated Damages Clauses

Liquidated damages clauses serve as pre-agreed compensation for delay or non-performance. In AIA contracts, these clauses typically appear in the A101 form rather than A201. Courts across the country examine their validity through a reasonableness lens rooted in the doctrine against penalties.

Under the prevailing common law test, courts consider whether:

1. The harm caused by the breach is difficult to estimate accurately; and
2. The liquidated amount represents a reasonable forecast of actual damages at the time of contract formation.

In *Double AA Builders, Ltd. v. Grand State Constr.*, the Tenth Circuit upheld a \$500/day liquidated damages clause. The court emphasized that both parties had negotiated at

arm's length, and that the amount reflected a rational estimation of potential loss. The clause passed the two-part test and did not resemble a penalty, as it was a reasonable approximation of anticipated damages and not excessive or punitive in nature.²² Conversely, in *Kvassay v. Murray*, the Kansas Court of Appeals invalidated a liquidated damages clause because the stipulated amount was grossly disproportionate to the actual or anticipated harm.²³ The court emphasized that under Kansas law, liquidated damages must bear a reasonable relationship to the damages that are difficult to prove and should not function as a penalty.²⁴ These two cases underscore the importance of ensuring that liquidated damages provisions are reasonable and supported by a documented basis for the amount.

A landmark case, *Perini Corp. v. Greate Bay Hotel & Casino*, vividly illustrates the risk of omitting a liquidated damages clause altogether. There, the contractor was held liable for over \$14.5 million in lost profits due to delay, with the absence of a pre-agreed remedy opening the door to enormous consequential damages.²⁵ The case had a lasting influence on the construction industry, reinforcing the dual necessity of mutual waivers and well-drafted liquidated damages clauses.

Similarly, in *Wassenaar v. Panos*, the Wisconsin Supreme Court emphasized that an enforceable liquidated damages clause must reflect a reasonable forecast of actual harm at the time of contract formation.²⁶ The clause must not be punitive, but rather a good faith estimate grounded in objective factors like project size, historical cost impacts of delays, and industry norms.²⁷ Courts will assess whether the clause reasonably approximates probable loss, not whether it results in a windfall or undercompensation.

Texas courts provide a particularly strict analysis. In *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, the Texas Supreme Court held that a fixed formula based on fluctuating market prices was unenforceable where it did not reflect reasonably anticipated damages. The court emphasized that liquidated damages provisions must meet two criteria to be enforceable: (1) the harm caused by the breach must be incapable or difficult to estimate, and (2) the amount of liquidated damages must be a reasonable forecast of just compensation.²⁸ These criteria are evaluated from the perspective of the parties at the time of contracting, not at the time of a breach. The court further clarified that even if a liquidated damages provision appears reasonable at the time of contracting, it may still be invalidated if there is an "unbridgeable discrepancy" between the liquidated damages and the actual damages incurred at the time of breach.²⁹ This strict approach ensures that liquidated damages provisions do not operate as penalties, which are unenforceable under Texas law.

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The Surety Claims Institute article further stresses the need to align liquidated damages clauses with bonded obligations. If the surety is expected to guarantee liquidated damages payments, the bonded contract must clearly delineate the calculation method and limit.³⁰ It is not uncommon for ambiguous or excessive terms to lay the grounds for contested surety liability.

To strengthen liquidated damages provisions, drafters should:

- Include a recitation of the difficulty of forecasting damages.
- Clearly document the reasoning behind the chosen rate.
- Ensure alignment with project size, scope, and duration.
- Avoid duplicative remedies (e.g., combining liquidated damages with consequential damages).
- Coordinate with surety language to prevent ambiguous exposure.

Indemnity Provisions

Section 3.18 of AIA A201-2017 governs indemnification obligations for third-party claims involving bodily injury and property damage arising out of the contractor's performance. While the provision seems straightforward on its face, courts often interpret it in light of broader doctrines surrounding negligence, fault allocation, and state anti-indemnity statutes.

In *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, a Texas federal court upheld a contractor's indemnification rights against a subcontractor based on the terms of the parties' contract and insurance policy, without applying Texas's anti-indemnity statute. Specifically, the court addressed the issue of indemnification in the context of an insurance policy held by the subcontractor, Empire Steel Erectors, and determined that the insurer owed a duty to indemnify the contractor, Gilbane Building Company. The court noted that the indemnity clause included a savings provision explicitly limiting its enforceability to the extent permitted by the Texas Insurance Code § 151.102.³¹ Although the statute was not directly analyzed, the clause's alignment with statutory carve-outs enabled partial enforcement, illustrating how careful drafting can preserve indemnity rights.

While *Gilbane* illustrates how careful drafting can navigate statutory limitations on indemnity in a project-specific context, broader statutory regimes in other jurisdictions impose categorical limits regardless of the parties' intent. These statutory frameworks

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are particularly relevant in residential or public construction settings, where legislatures have taken steps to restrict the enforceability of indemnity clauses that shift liability for a party's own negligence.

California and New York reflect these policy protections. Under California Civil Code § 2782, clauses indemnifying a party for its own active or sole negligence in residential construction are unenforceable.³² In New York, General Obligations Law § 5-322.1 prohibits indemnity for a party's own negligence unless the clause is sufficiently narrow and mutual.³³ These statutes exemplify a broader national trend toward limiting indemnity where it undermines equitable risk allocation.

In contrast, states like Illinois allow limited indemnity, provided the contract clearly states the intent and scope of coverage. For example, in *Virginia Surety Co. v. Northrop Grumman Corp.*, the Ninth Circuit upheld an indemnity agreement under which a surety could recover under a performance bond because the contractual language unambiguously required indemnification for losses caused by the subcontractor's work.³⁴

Importantly, surety obligations under bonded construction contracts are often triggered by indemnity claims. The Surety Claims Institute has highlighted that sureties may face liability if an indemnity clause is broadly construed to include consequential damages or third-party obligations not reflected in the bond.³⁵ Courts are increasingly wary of expansive indemnity language being incorporated by reference into bond terms unless clearly stated.

Key considerations for drafting enforceable indemnity clauses in AIA-based contracts include:

- Confirming compliance with applicable anti-indemnity statutes.
- Including a savings clause to limit the clause's scope to permissible indemnification.
- Tailoring language to acts or omissions "to the extent caused by" the contractor or subcontractor.
- Coordinating indemnity terms with insurance coverage and bonding expectations.

Comparative Perspectives and Evolving Trends

While many of the core principles governing AIA damages clauses have remained stable over time, recent trends indicate a shift toward enhanced judicial scrutiny of

standardized terms and greater legislative intervention in construction risk allocation. Courts are becoming more willing to inquire into the context and fairness of form contract provisions, especially in public-private partnerships, design-build projects, and agreements involving small or minority-owned businesses.

From a policy standpoint, scholars and industry commentators have noted a trend toward more collaborative delivery methods – such as integrated project delivery (IPD) and early contractor involvement (ECI) – that de-emphasize adversarial dispute mechanisms in favor of proactive risk sharing. These developments may create ambiguity in damages allocation unless contract clauses are modified accordingly.

The Surety Claims Institute also underscores this point, warning that traditional bond interpretations may falter in newer project models unless the bond obligations are specifically tailored.³⁶ In complex delivery environments, clear delineation of liability, notice procedures, and damage limitations become even more essential.

Practitioners should consider:

- Whether AIA forms need supplemental language to comply with evolving statutory frameworks.
- Adapting clauses to reflect collaborative project models, including mechanisms for early dispute resolution.
- Documenting negotiation processes to establish mutual assent and avoid later enforceability challenges.
- Reviewing court decisions from the last five years for emerging jurisdictional divergences on consequential damages, indemnity, and delay remedies.

Final Thoughts

A proactive, detail-oriented drafting approach ensures that AIA contracts effectively allocate risk, reflect the parties' intent, and remain enforceable under judicial and legislative scrutiny. As construction projects grow in complexity and legal scrutiny intensifies, practitioners must view AIA damage clauses not as static boilerplate but as evolving tools of risk management. By aligning these clauses with jurisdiction-specific law, insurance frameworks, and emerging trends in project delivery, lawyers can help their clients achieve clarity, reduce disputes, and ensure financial predictability. Ultimately, effective drafting of damage provisions is not merely a matter of compliance – it is a

strategic imperative in modern construction law.

NOTES

1. *Bartram, LLC v. C.B. Contrs., LLC*, No. 1:09-cv-00254, 2011 U.S. Dist. LEXIS 34972 at 1, 8 (N.D. Fl. Mar. 31, 2011).
2. *Id.*
3. *Travelers Cas. & Sur. Co. v. Dormitory Auth.*, 734 F. Sup. 2d 368, 381 (S.D.N.Y. 2010).
4. *Id.* at 388.
5. *Morgan Co. v. Minnesota Mining & Mfg. Co.*, 246 N.W.2d 443, 446 (Minn. 1976).
6. *Id.* at 448.
7. *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, No. B182892, 2006 Cal. App. LEXIS 1315, *2 (Cal. Ct. App. Aug. 29, 2006).
8. See e.g., 815 Ill. Comp. Stat. Ann. 505/2; Md. Code, Com. Law § 13-303.
9. 11 Williston on Contracts § 30:19 (4th ed.).
10. Douglass F. Wynne, Jr. & Ruth Ann Reeves, *Exposure to Consequential Damages: Understanding the Surety's Risks*, Surty Claims Inst. Newsletter, May 2025, at 12.
11. *Id.* at 17-18 (discussing OH 126th St. Hous. Dev. Fund Corp. v. Berkley Ins. Co., 222 N.Y.S.3d 33 (2024)).
12. *Coughlin Elec. Contrs., Inc. v. Gilbane Bldg. Co.*, 36 N.E.3d 505, 516-17 (Mass. 2015).
13. *The Spearin Doctrine: Determining Who Bears the Construction Risk of Design Errors*, SGR Law (2019), <https://www.sgrlaw.com/the-spearin-doctrine-determining-who-bears-construction-risk-of-design-errors/> (last visited Jun 9, 2025).
14. *Coughlin*, 36 N.E.3d at 509 (Mass. 2015).
15. *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229 (Fed. Cl. 2005).
16. 5 Government Contracts: Law, Admin & Proc. § 34.140

17 2 Federal Contract Management ¶13.03: Control of Contract Performance.

18 *Tricon Kent Co. v. Lafarge North Am., Inc.*, 186 P.3d 155 (Colo. App. 2008).

19 Darr, J. (2024) *The active-interference exception to the enforcement of no-damages-for-delay clauses*, Government Construction Law Update, <https://www.governmentconstructionlaw.com/2024/07/the-active-interference-exception-to-no-damages-for-delay-clauses/> (last visited Jun 9, 2025).

20 *John Spearly Constr., Inc., v. Penns Valley Sch. Dist.*, 121 A.3d 593 (Pa. Commw. Ct. 2015).

21 Douglass F. Wynne, Jr. & Ruth Ann Reeves, *Exposure to Consequential Damages: Understanding the Surety's Risks*, Surety Claims Inst. Newsletter, May 2025, at 16-17.

22 *Double AA Builders, Ltd. v. Grand State Constr. LLC*, 114 P.3d 835, 841 (Ariz. Ct. App. 2005)

23 *Kvassay v. Murray*, 808 P.2d 896, 900 (Kan. Ct. App. 1991).

24 *Id.*

25 *The Timeless Lessons of Perini Corp. v. Greate Bay Hotel & Casino*, McElroy Deutsch (2021), <https://www.mdmc-law.com/articles/timeless-lessons-perini-corp-v-greate-bay-hotel-casino-inc/> (last visited Jun 11, 2025).

26 *Wassenaar v. Panos*, 331 N.W.2d 357, 361 (Wis. 1983)

27 *Id.* at 364-66.

28 *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 69-70 (Tex. 2014); see also *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176; 14 Dorsaneo, Texas Litigation Guide § 210A.42

29 *FPL Energy*, 426 S.W.3d at 72 (Tex. 2014); see also *Cleven v. Mid-America Apt. Cmty., Inc.*, 20 F.4th 171 (5th Cir. 2021); 10 Texas Transaction Guide – Legal Forms § 55.27.

30 Douglass F. Wynne, Jr. & Ruth Ann Reeves, *Exposure to Consequential Damages: Understanding the Surety's Risks*, Surety Claims Inst. Newsletters, May 2025, at 19.

31 *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712, 718-19 (S.D. Tex.

2010).

32 Cal Civ Code § 2782.

33 NY CLS Gen Oblig § 5-322.1.

34 *Virginia Surety Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1248 (9th Cir. 1998).

35 Douglass F. Wynne, Jr. & Ruth Ann Reeves, *Exposure to Consequential Damages: Understanding the Surety's Risks*, Surety Claims Inst. Newsletters, May 2025, at 21.

36 Douglass F. Wynne, Jr. & Ruth Ann Reeves, *Exposure to Consequential Damages: Understanding the Surety's Risks*, Surety Claims Inst. Newsletters, May 2025, at 23-24.