

## STATEMENT FROM STUART S. ZISHOLTZ

Previously, I wrote about liquidated damages and their enforceability. Generally, a Court will not enforce a liquidated damage clause if it is deemed a penalty and not a fair calculation of damages.

In a recent decision, a General Contractor commenced an action against an Owner for nonpayment. The Owner filed a counterclaim seeking approximately \$50,000 in damages per a liquidated damage clause. The clause entitled the Owner to \$250 per day in liquidated damages until the Project was completed.

The General Contractor argued that the liquidated damage clause was a penalty and disproportionate to the actual alleged damages sustained by the Owner.

The Court stated that a liquidated damage provision is normally enforceable if the provision provides for a reasonable measure of anticipated harm and the damages are difficult to calculate or ascertain. The Court, after reviewing the liquidated damage clause, found that the sum of \$50,000 was disproportionate to the actual losses sustained by the Owner. Nevertheless, while the Owner could not enforce the liquidated damage clause in this particular action, the Court did permit the Owner to enforce actual damages it sustained in having the work completed by other parties.

The key aspect to learn is that liquidated damages can be enforceable and should not be overlooked in your contract. Here, the liquidated damage provision was incorporated into a Rider attached to a typical AIA contract. It is vital that you fully understand and comprehend the terms and conditions set forth in the contract.

Never let your lien time run out!

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