The purpose of a liquidated damages provision in a construction contract is to establish in advance a fair amount of compensation to the injured party for a breach of contract to avoid spending time and money fighting over uncertain actual damages after they occur. Generally, to be enforceable, a liquidated damages provision must satisfy three criteria: (1) the damages resulting from a breach of contract must be uncertain when the parties enter the contract; (2) the parties must clearly express their intent to liquidate damages in advance; and (3) the amount stipulated for liquidated damages must be reasonable and commensurate with the actual damages it is meant to represent. Failure to satisfy any of these criteria could render the provision unenforceable.

The recent Connecticut Appellate Court decision in New Milford v. Standard Demolition Services, Inc., 212 Conn. App. 30 (2022), indicates that courts might be reluctant to read a liquidated damages clause broadly, and raises concerns regarding the proper drafting of such a provision. The Appellate Court held that
when a liquidated damages provision in a construction contract is expressly limited to damages resulting from delay, it will not operate to prevent the recovery of actual and consequential damages caused by the non-breaching party for a reason other than delay.

The contract at issue in New Milford included a typical liquidated damages provision: “Failure of the Contractor to meet this established timeframe will result in liquidated damages being assessed in the amount of $2,000/day for each and every calendar day beyond the contract time limit.” The Court noted that the liquidated damages provision was clearly linked to a Contractor’s untimely performance and that the provision did not expressly state that liquidated damages are the exclusive remedy. Moreover, other provisions in the contract expressly permitted the Town to recover “damages and losses,” arising from other types of breach by the Contractor, so the Court determined the liquidated damages provision did not preclude the Town from recovering additional actual and consequential damages caused by other breaches of the contract unrelated to delays. To find otherwise would be to render the other remedial provisions superfluous, which courts avoid when interpreting contracts.

A Court generally will not construe a contract to limit remedial rights unless there is a clear intention that the enumerated remedies are exclusive. If a contracting party intends to make liquidated damages the exclusive remedy for all actual and consequential damages for a breach of contract, that intent should be expressly stated and there should be no references to other damages elsewhere in the contract.

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