



EJCDC: RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

September 2009

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Issue	Citation	Summary	Contract Document Implications
1. Clause in public contract limiting damages for delay	<i>Martin Bros. Contractors, Inc. v. Virginia Military Institute</i> (Supreme Court of Virginia, 2009)	Renovation of a university dining hall. Contract allowed recovery for unreasonable delays caused by owner, but limited damages on change orders to specified site expenses—for example, no home office overhead damages. Virginia statute expressly voids clauses in public contracts that purport to bar damages for unreasonable delays. Virginia Supreme Court held that the change order provisions, though cross-referenced by the delay clause, could not be construed as limiting delay damages. The change order provisions applied only to extra work, not to delay damages. Provisions would bar legitimate delay damages and court therefore deemed them void as applied to delay damages.	<p>Statutes barring no-damages for delay clauses are not common. Court correctly perceived that the change order provisions that detailed what would be included in an increase in price for additional work (including percentage mark-ups) did not logically apply to determination of damages for delay.</p> <p>EJCDC C-700 indicates that for owner-caused delays Contractor is entitled to “equitable” increase in Contract Price; this clause would be legal and enforceable under Virginia law.</p>

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2. Differing Site Conditions—pre-bid duty to investigate conditions	<i>Appeal of Tri-State Contractors</i> (Armed Services Board of Contract Appeals, 2008)	Corps of Engineers dredging, transport, and filling contract on the New Jersey shore. Currents, scouring, and surge made work very difficult for dredges of the size selected by contractor. Contractor brought a differing site condition claim based on assertions of conditions of an unusual nature, differing from what is ordinarily encountered. Under Federal case law, prevailing on such a claim requires showing that contractor inquired with experienced local contractors to determine likely conditions. Contractor in this case had failed to do so, and evidence indicated local contractors were aware of the specific difficult conditions.	EJCDC C-series documents are consistent with Federal perspective. Bidders must take into account information commonly known to local contractors.

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3. Termination for Convenience	<i>Questar Builders, Inc. v. CB Flooring, LLC</i> (Court of Appeals of Maryland, 2009)	Private construction project. General Contractor terminated flooring subcontractor under a termination for convenience clause. Under the specific termination terms sub was not entitled to lost (anticipated) profits. Sub protested that the general contractor merely wanted to enter into a more advantageous subcontract with another flooring sub, and that right to terminate was subject to good faith and fair dealing limitations. Court reviewed history of termination for convenience clauses, going back to the Civil War. Court held that there was no right to terminate on a whim, that good faith and fair dealing principles applied, and suggested the need for a showing that it would be “economically unfeasible” to continue with the contract.	Since the 1970s termination for convenience right has generally been conceded to be very broad. This case is counter to that position and suggests greater limits on ability to use termination for convenience. Note that public entities may have broader right to terminate for convenience than private parties.
4. Limitation of liability clause	<i>Blaylock Grading Co., Inc. v. Smith</i> (North Carolina Court of Appeals, 2008)	Grading contractor retained surveyor to establish benchmarks for construction. Surveyor negligently set benchmarks 1.7 feet too high, resulting in the need for expensive fill to attain established levels. Surveyor’s contract contained limitation on liability clause, restricting damages for error to \$50,000. Court held that such a clause is enforceable in North Carolina, as long as there are no special factors such as one party being a public service provider.	EJCDC professional service agreements include limitation on liability clauses, either as an option or in main text. Risk for niche professionals such as surveyors may be disproportionate to any possible gain from the contract, often making a limitation a defensible provision.

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5. Subcontractor recovery from owner under mechanic's lien (construction lien) law	<i>Weather-Tite, Inc. v University of St. Francis</i> (Supreme Court of Illinois, 2009)	Owner paid general contractor in full, but general was unable to pay sub final \$130,000 because contractor's bank lawfully seized the funds. Owner was aware that sub was owed \$130k, and court held that under such circumstances the owner should have withheld that amount to avoid possibility of sub not getting paid. Sub's mechanic's lien claim was filed properly and owner was forced to pay sub the \$130k.	Possibility of owner paying twice is a fundamental feature of lien process when subs and suppliers are involved. Protective devices such as lien waivers should be used—see C-700, Paragraph 14.07, Final Payment.
6. Indemnifying a party against that party's own negligence	<i>Kempski v. Toll Bros., Inc.</i> (U.S. District Court, Delaware, 2008)	Claim by an injured subcontractor employee against general contractor, Toll Brothers. Delaware law clearly does not allow indemnification clauses that force indemnification of a party (here Toll) for its own negligence—which Toll's standard subcontract purported to do. However, Delaware law would allow the void wording to be severed and require a sub to indemnify a general for the sub's own negligence, but in this case Toll's wording was such that no such "editing" was possible. The court therefore voided the entire indemnification clause.	EJCDC indemnification clauses are narrowly drafted and would be enforceable in Delaware. The case does provide a roadmap for drafting a broad indemnity clause that could be severed if necessary.

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7. Scope of indemnity provision	<i>Atlantic City Associates LLC v. Carter & Burgess Consultants, Inc.</i> (U.S. District Court, New Jersey, 2008)	Dispute between owner of commercial/retail project in Atlantic City and the project architect concerning various delays. Issue of interest is the applicability of an indemnification clause to the dispute. There were no third-party claimants, and indemnity is typically viewed as the mechanism for responding to third parties. Court stated that the concept is broader and applied here to the owner's own direct claims and damages resulting from delays caused by architect.	Scope of indemnity clause was relevant because of interplay with other clauses (limitation of liability; waiver of consequential damages). Court's holding would affect virtually any indemnification clause and presents drafting issues.
8. Impact of 10-year statute of repose on defective construction claim	<i>Gundogku v. King Mai, Inc.</i> (Calif. Court of Appeals, 2009)	King Mai built a house in 1995 and then retained ownership of it until 1997. The purchasers immediately complained about numerous defects, but King Mai avoided taking any corrective action. The homeowner finally filed suit in 2007, within ten years of purchase but more than ten years after substantial completion. The California statute of repose for construction-related claims is ten years from substantial completion. Without any persuasive rationale the homeowners contended that if the builder retains possession the repose period does not begin until the building is sold. The court held that the statute was clear and rejected the claim.	Homeowner here had knowledge of problems for years and had ample time to bring a claim.

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9. License requirements for construction manager	<i>The Fifth Day, LLC, v. James P. Bolotin</i> (Calif. Court of Appeals, 2009)	Office park owner hired both a general contractor and a construction manager. Owner refused to pay CM on the grounds that CM was not a licensed contractor and hence had no standing to enforce its claim for payment. Trial court agreed, but appeals court took a narrow view of the definition of contractor and held that this CM was not a “builder” but merely an administrator and manager, and hence did not need to be licensed as a contractor. CM could therefore recover the fees it was owed.	Facts of the case show that CM had many duties that would ordinarily be undertaken by the GC—coordination of construction, on-site response to construction issues, maintenance of insurance records. Most of the consumer-protection and public policy reasons that support contractor licensing would apply equally to this CM.