

Damages and Remedies in Construction Disputes

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Damages Concepts

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Proof of Damages

- Claimant has the burden of proof
- Claimant is not required to prove exact amount of damages
 - Estimates are acceptable
- Need to place claimant in reasonable “should-have-been” cost position
- Sufficient to have a reasonable basis of computation, even though the result may only be approximate
- Uncertainty that defeats recovery relates to whether damage occurred, rather than the amount of damage suffered

Agenda

- Damages Concepts
 - Proof of Damages
 - **Types of Damages Suffered by a Contractor**
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Types of Damages Suffered by a Contractor

- Traditional terms: “Direct” and “Indirect Costs”
 - Direct costs: the labor, material and equipment expenses necessary to physically build the work
 - Indirect costs: overhead, often associated with delay (e.g., jobsite and home office overhead)
 - These classifications are overly broad and can be inaccurate

Types of Damages Suffered by a Contractor

- Contractors often incur increased overhead costs, direct costs and project-wide support costs performed in the field due to extended performance
- Creates confusion for classification
- Additionally, using contrasting terms like direct vs. indirect costs can create confusion and unnecessary debates regarding legal concepts that are not strictly limited to construction disputes
- Whether a particular set of claimed damages are direct, as opposed to consequential, in nature.
- “Activity-related” and “Time-related” costs are more accurate classifications

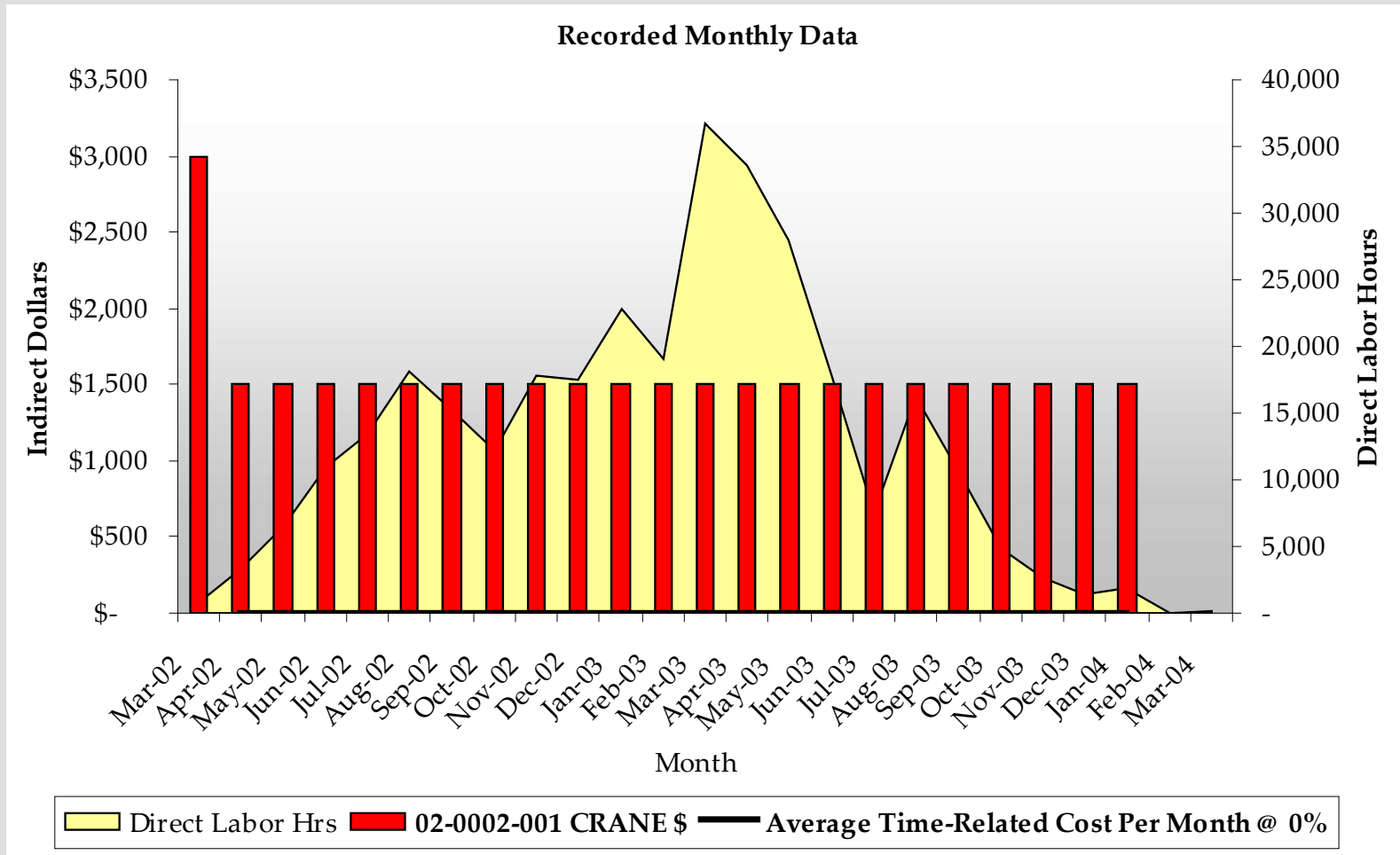
Types of Damages Suffered by a Contractor

- Activity-related costs vary with productive effort for performing construction or demolition work in the field, or design effort for design-build projects
 - Labor, materials, equipment, subcontractor and subconsultant
 - May also include items classically characterized as “indirect” costs, like fuel for onsite equipment
 - In practice, is often included as part of a contractor’s calculation of jobsite overhead or “general conditions” costs
 - *Example:* the costs of forming, pouring and placing a concrete slab

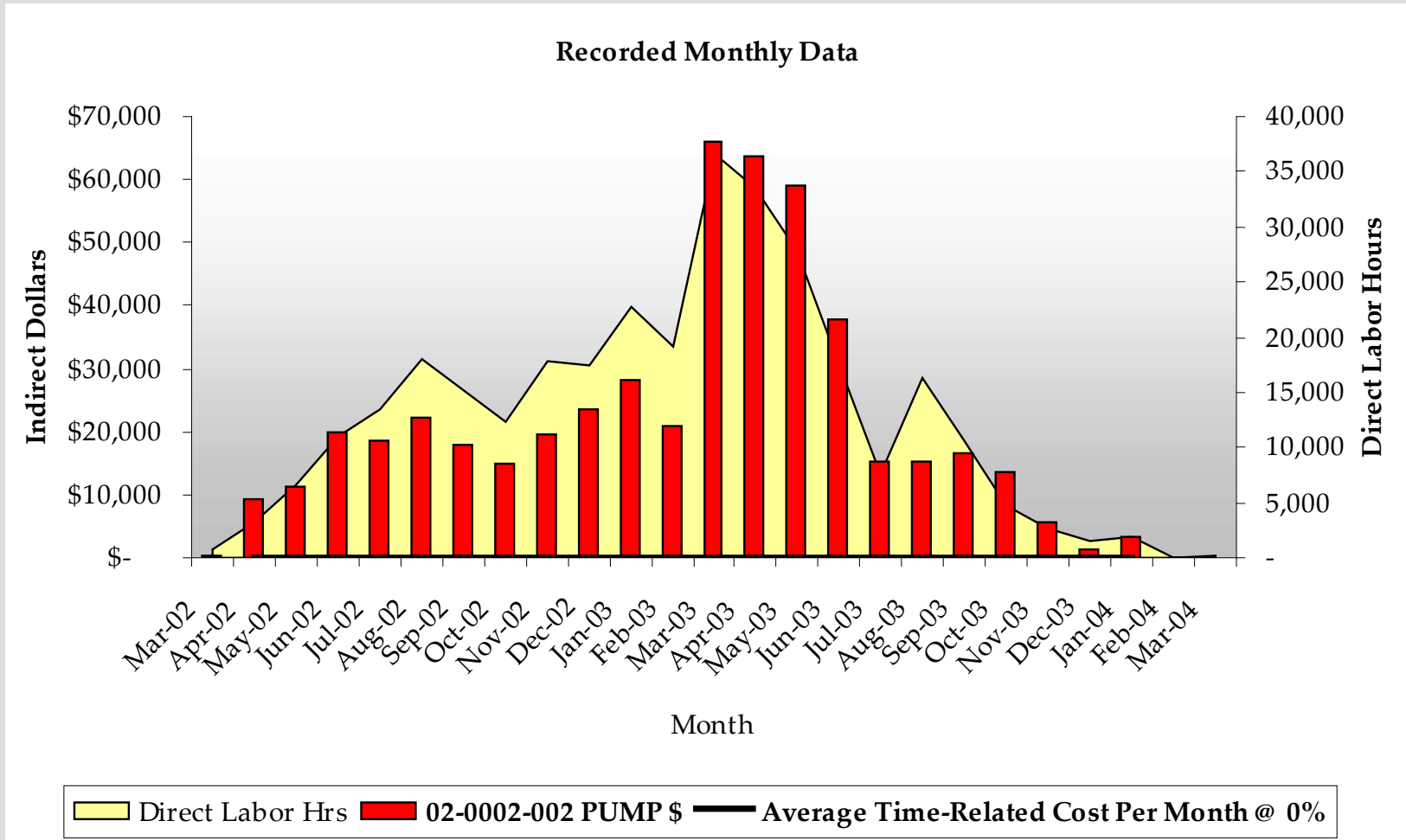
Types of Damages Suffered by a Contractor

- Time-related are driven by time
 - Time-related overhead
 - Classically labeled as “indirect” costs:
 - Jobsite overhead
 - District / regional office overhead
 - Extended / unabsorbed / under-absorbed home office overhead
 - Time-related direct costs
 - Labor, material (e.g., extended rental), equipment, subcontractor and subconsultant expenses that increase due to extended performance requirements
 - Project-wide support expenses (not limited to performing isolated work activities in the field):
 - Casting yard
 - Surveying
 - Maintenance & protection of traffic
 - Dewatering
 - Sedimentation / erosion control,
 - Quality control, quality assurance, and inspection, among others
 - *Example:* the costs of a mobile crane that supports an entire project rather than a specific activity

Time-related costs example

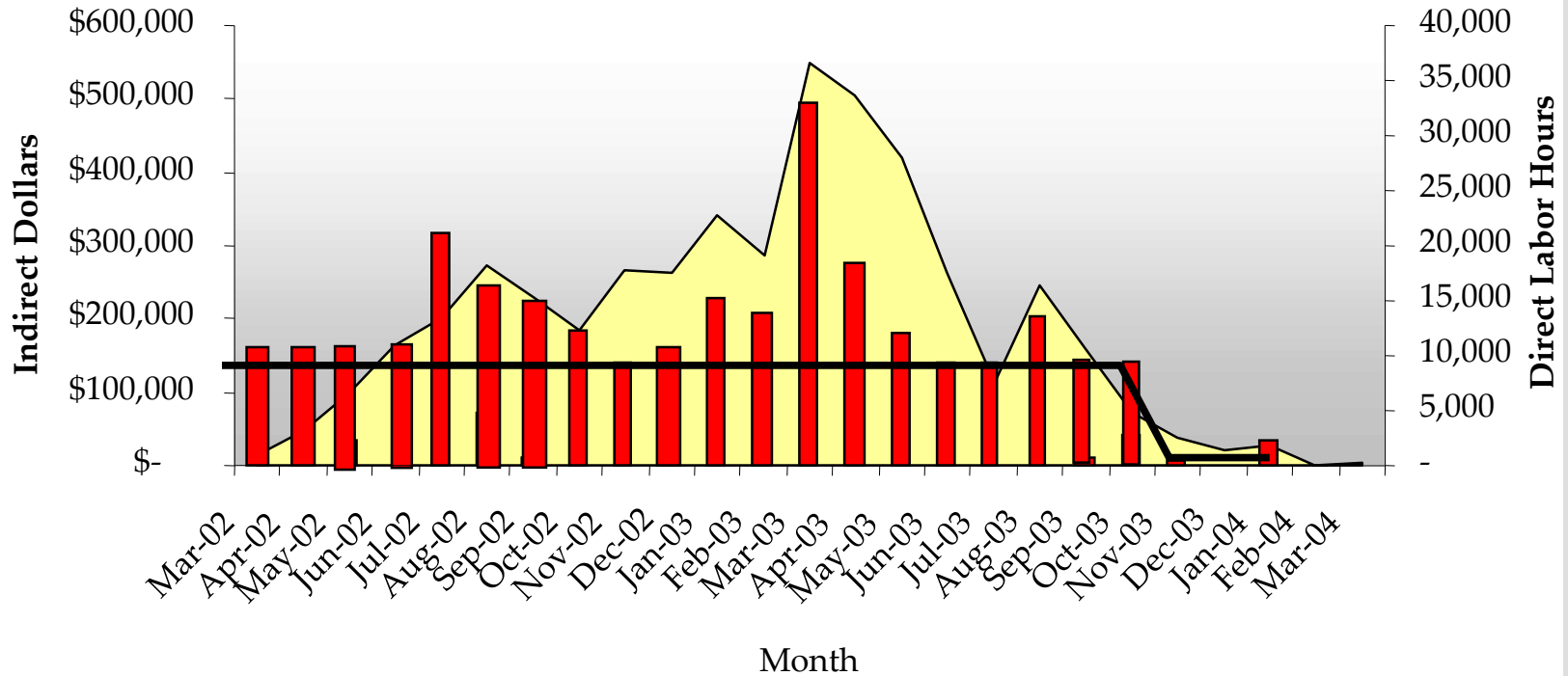


Activity-related example



Reality – Mixed Function Costs

Recorded Monthly Data



Direct Labor Hrs
 50-5000-009 FORMWORK \$
 Average Monthly Cost

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Extra or Additional Work

- Approaches:
 - Lump sum (forward-priced)
 - Unit price - to the extent the extra or additional work is within the scope of an established (or agreed) unit price
 - Time & materials, or “force account”
 - Standardized rates (e.g., Rental Rate Blue Book) for items like equipment may be specified
 - Contract provisions often include specified levels of markup (covering overhead, profit, insurance, bonds and/or supervision)

Extra Work Claims

- Costs may be effectively captured through separate cost codes
 - Provides contemporaneous documentation of increased costs
 - Need codes for all cost types
 - Must use codes properly
 - Only charge incremental increase of changed work

Extra Work Claims

Issues

- Common cost coding issues:
 - Open codes with no costs
 - New codes with exorbitant costs (“Dumping Grounds”)
 - Charges to codes outside time frame of issue
 - Subsequent shifting costs from one code to another
 - Difficulty matching cost code entries to source document (time cards or invoices)

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - **Disruption, Inefficiencies and Losses of Productivity**
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Disruption, Inefficiencies and Losses of Productivity

- Often intertwined with issues of delay
- Can be cause of delay or consequence of delay
- Should be evaluated separately from the delays
- Several approaches for pricing inefficiencies:
 - Measured mile
 - Industry studies
 - Planned vs. actual analysis
 - Total cost
 - Modified total cost

Measured Mile

- Preferred method, but can involve practical challenges
- Compares the productivity achieved during an un-impacted period with the productivity achieved for the same work during impacted period
- Important considerations:
 - Is the un-impacted period a representative sampling of performance?
 - Measured “mile or measured “inch”?
 - Is the work performed during both periods truly comparable
 - Or was the work was influenced by factors in addition to the specific, claimed impact?
 - Are there adequate, accurate records for identifying the productivity achieved during both periods?
- If a representative period of un-impacted work did not exist, may attempt to compare:
 - With productivities achieved on similar work activities on the same project, or
 - With the historical productivities achieved for the same work activities on prior projects

Industry Studies

- More generalized and more subjective than the measured mile method
- Uses industry studies to identify estimated percentage impacts by a variety of potential causes – the effect on productivity caused by:
 - Ambient temperatures
 - Weekly work shift structure/overtime
 - Stacking of trades
 - Other issues affecting efficiency
- Criticisms:
 - Generic nature of the data does not account for specific circumstances on a project
 - There is still a need to corroborate the use of studies with the data from the project

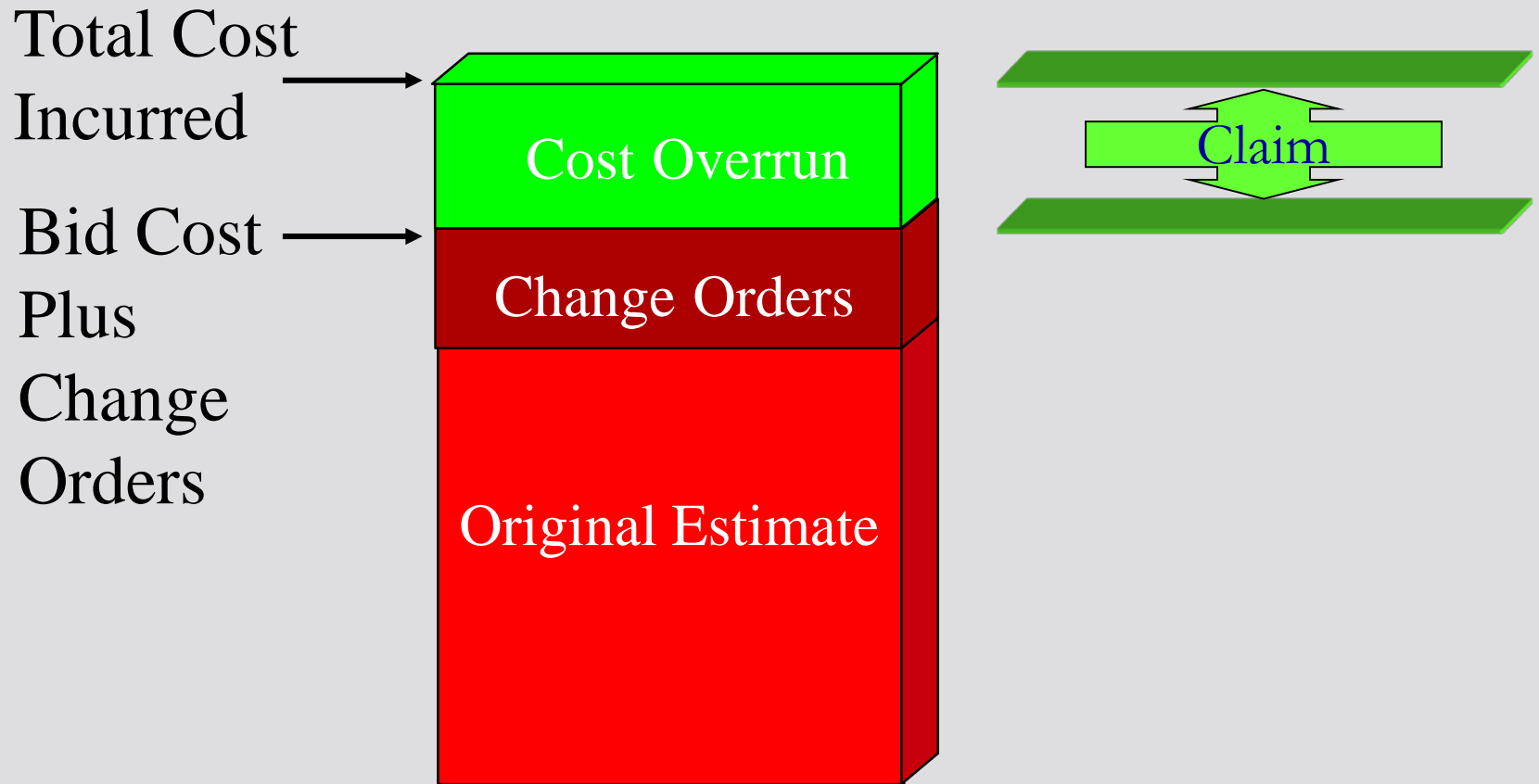
Planned v. Actual Analysis

- Compares the actual costs incurred to the planned costs *for a work activity*
- Alternative approaches:
 - Modify the estimated planned costs (to account for any “bid busts” on that item), and/or
 - Reduce the actual costs (to account for self-inflicted problems)
- Sometimes *erroneously* referred to as “total cost” or “modified total cost” methods
 - With corresponding reference to case law that courts heavily disfavor these approaches
- Criticisms and criteria:
 - Were the planned costs a reasonable reflection of the costs for performing the (un-impacted) work?
 - Were the actual costs incurred reasonable?
 - Was the contractor responsible for some (or all) of the additional costs?

Total Cost Method

- Highly disfavored by courts
- Requires:
 - Reasonable original bid
 - Reasonable actual costs
 - Additional costs not caused by contractor problems
 - No other method available to quantify claim

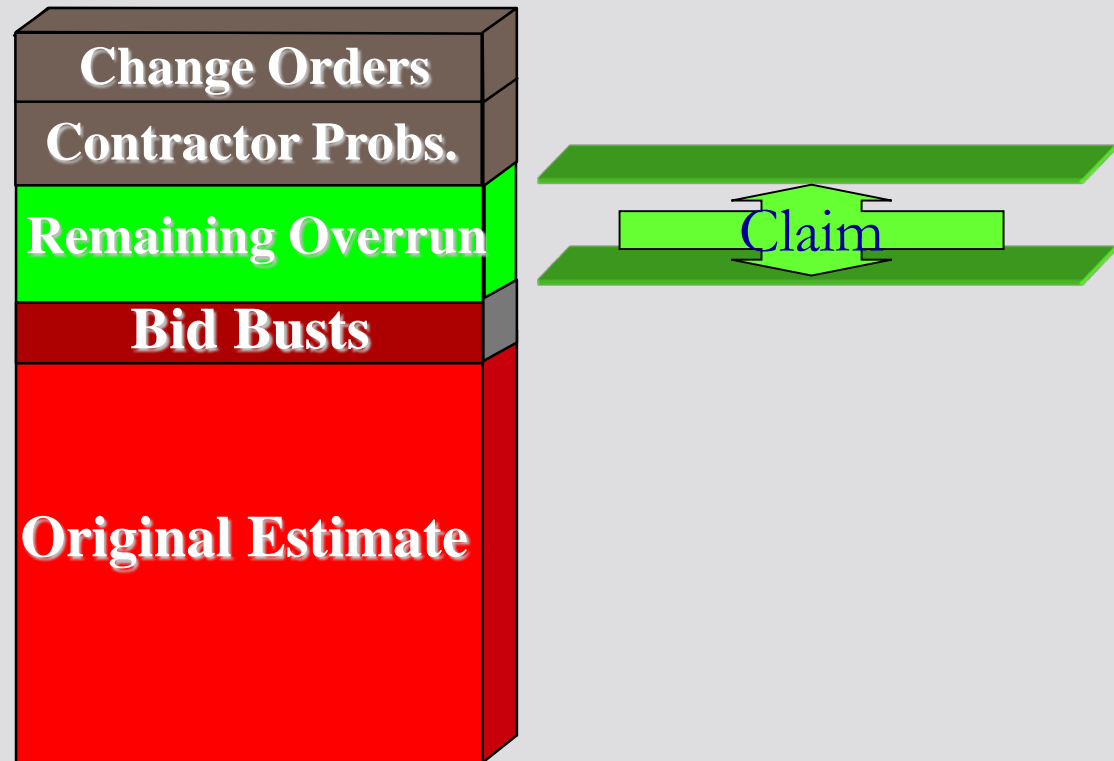
Total Cost Method



Modified Total Cost Method

- Modifies the total cost approach to compensate for:
 - Bid errors
 - Specific costs arising from the contractor's actions
 - Unclaimable costs
 - Specific costs arising from actions of other parties
- Claimant must prove that costs incurred in performing the original work and the extra work had become so co-mingled and inextricably intertwined that use of a segregated damage measure is impracticable.

Modified Total Cost Method



Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - **Displaced Activity Costs and Escalation**
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Displaced Activity Costs and Escalation

- Related to delay
- May involve the deferral of activities
- Heavily-influenced by the contract
- Can compare quoted prices (at bid time) to the actual prices incurred
- Some purchase orders include provisions (*e.g.*, set annual or periodic increases) making quantification of the increased costs straightforward
- Some contracts (*e.g.*, FDOT or other institutional owners) recognize market volatility of certain products
 - Include indices for price adjustments associated with the same

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - **Delays**
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Delays

- Time-Related Direct Costs
- Time-Related Overhead
 - Jobsite Overhead
 - Home Office Overhead

Time-Related Direct Costs

- May include labor, material (e.g., extended rental), equipment, subcontractor and subconsultant expenses
- May also be incurred when an activity's performance has been moved or displaced to a later period than originally planned
- May include expenses for project-wide support (not limited to performing isolated work activities)
 - Casting yard
 - Surveying
 - Maintenance & protection of traffic
 - Dewatering
 - Sedimentation / erosion control
 - Quality control, quality assurance, and inspection

Time-Related Direct Costs

- Can be compiled utilizing a combination of:
 - Project schedules (for identifying affected activities' planned and actual durations)
 - Cost-accounting system (for quantifying the actual costs incurred during the extended or displaced time periods).
- It may be appropriate to identify a typical fleet of equipment on the project, or a grouping of key personnel for field operations, required for an extended duration
 - Then pricing the time-related cost of the same

Increased Equipment Costs

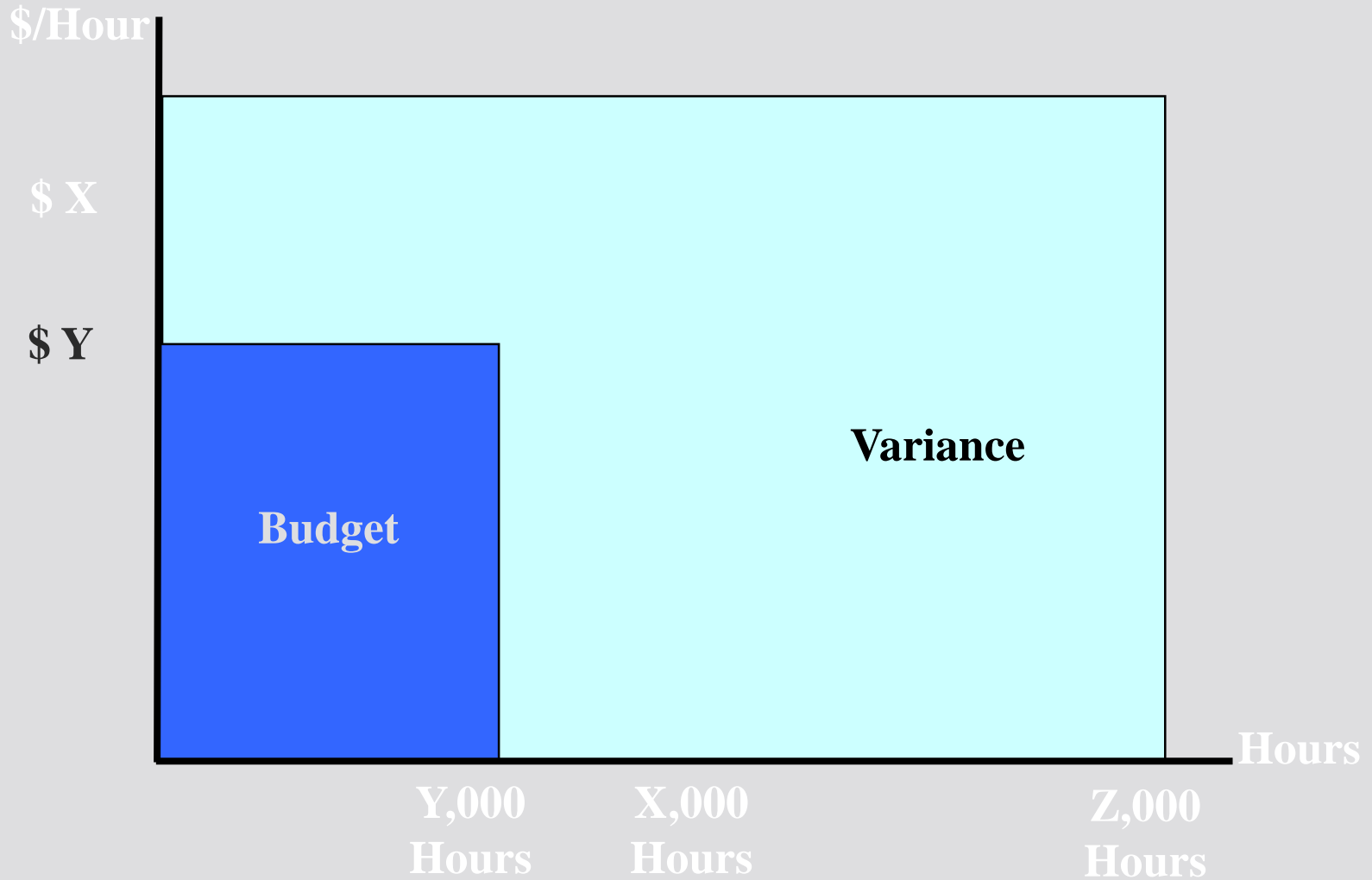
- Need detailed equipment plan
- Perform overrun analysis
 - More equipment
 - Increased use
 - Increased rates
- Determine liability for overrun
- Contract terms

Increased Labor Costs

- Perform detailed overrun analysis
 - Costs
 - Hours
 - Wage rate
 - Productivity rates
 - Quantities
 - Extra work
 - Others
- Decide on an approach

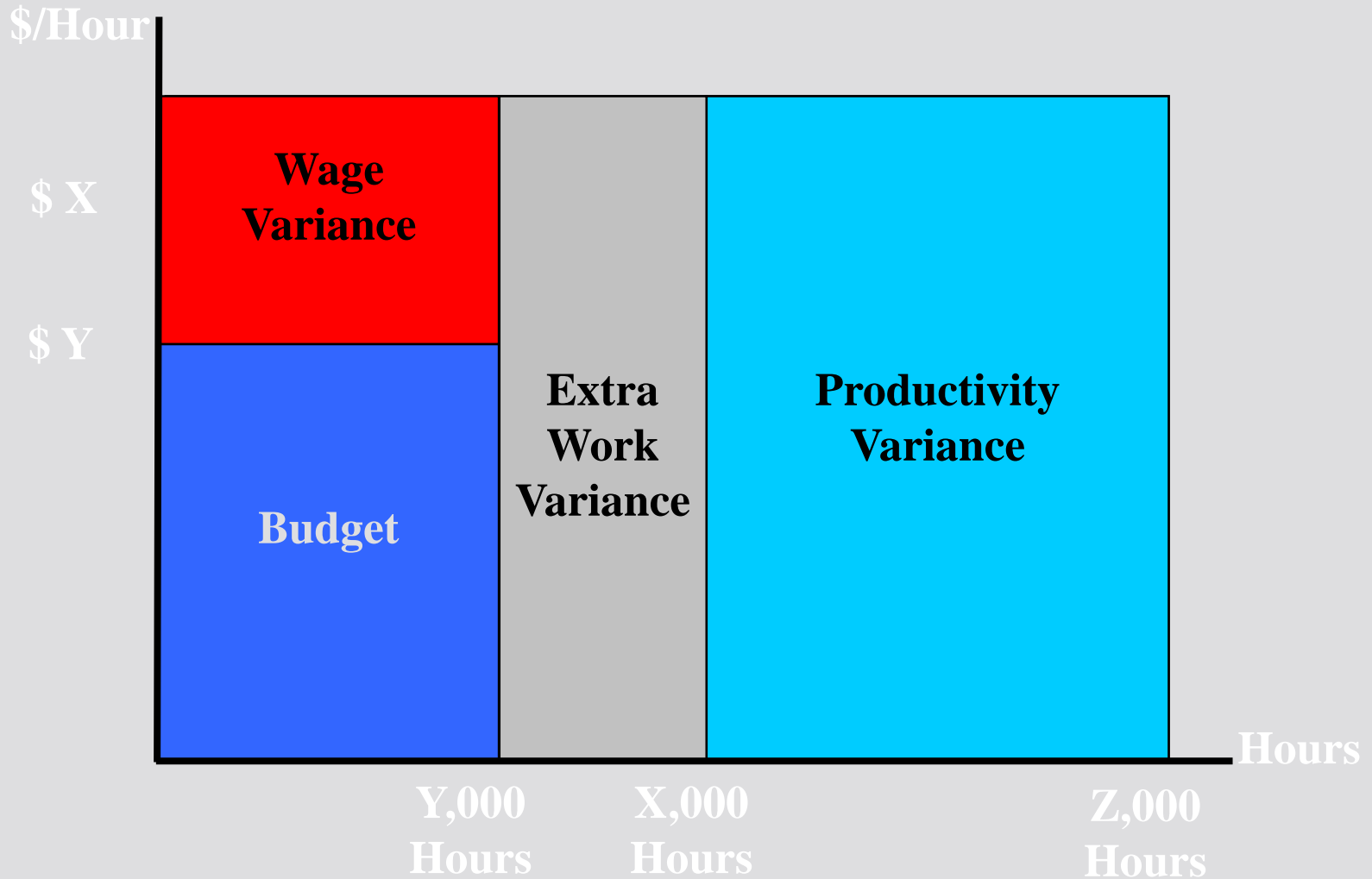
Increased Labor Costs

Labor Overrun Components



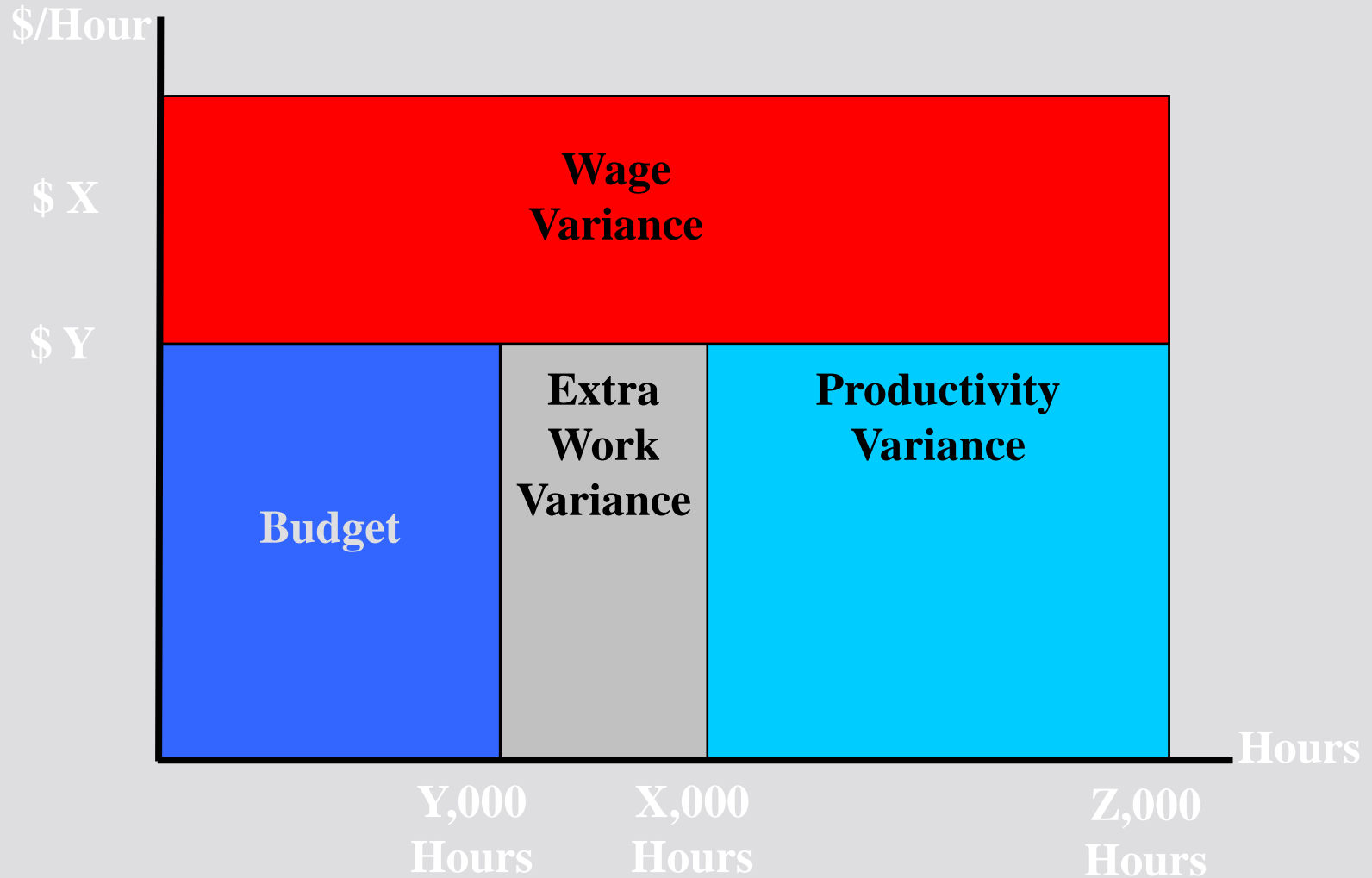
Increased Labor Costs

Labor Overrun Components



Increased Labor Costs

Labor Overrun Components



Jobsite Overhead

- Often called extended general conditions, jobsite overhead includes:
 - Facilities (office, trailer, utilities, furniture, computers, software, etc.)
 - Management and administrative staff
 - Cars / trucks for management / administrative staff
 - Insurance and bond costs (unless separately addressed by contract).
- Isolate the jobsite overhead (time-related) costs
 - Eliminate one-time expenses
- Select aggregate period of costs used to determine the daily rate
- Different approaches:
 - Averaging the costs over the entire project length
 - Selecting a reasonable time covering the period(s) in which the impact(s) occurred
 - Evaluating the costs incurred after the original contract completion date
- No one-size-fits-all approach

Jobsite Overhead

- Contracts may include provisions that stipulate (or liquidate) an amount the contractor will be paid
- For some projects, the Bid Form includes a line-item for the contractor to specify the daily overhead rate it will receive for a compensable delay
 - May be a consideration for determining the entity to whom the project will be awarded
 - Calculation, form and breadth of coverage may vary substantially as they are creatures of contract

Increased Field Overhead Costs

Time Related Costs Calculation

- Identify Cost Components Which Are Time Related
- Review Indirect / Field Office Overhead Costs Over Time To Aid In Determining Which Are Time Related
- Screen the Pool for One-Time Costs
- Calculate A Daily Or Monthly Rate For Time Related Costs

Jobsite Overhead Costs

Sample of Cost Classifications

| <i>Time-related</i> | <i>Not Time-related</i> |
|---------------------|-----------------------------------|
| Rent | Insurance based on Contract Price |
| Utilities | Consultant Fees |
| Office Supplies | Temporary Structures |
| Janitorial Services | Job Office Set Up |
| Project Management | Mobilization |
| Safety Department | |

Jobsite Overhead Costs

- Small tools?
- Expanded general conditions?
- Equipment costs?

Home Office Overhead

- Costs that are expended for the benefit of the whole business
- Cannot be attributed or charged to any particular contract
- Fixed costs that are allocated on a pro-rata basis among various contracts

Home Office Overhead

- The *Eichleay* formula is most common method used for the calculation of home office overhead costs:

- $$\frac{\text{Delayed Contract Billings}}{\text{Contractor's Total Billings}} \times \text{Total Home Office Expenditures} = \text{Overhead Allocable to Contract}$$
- $$\frac{\text{Overhead Allocable to the Contract}}{\text{Days of Contract Performance}} = \text{Overhead Allocable Per Day}$$
- $$\text{Daily Overhead Rate} \times \text{Days of Delay} = \text{Extended / Unabsorbed Overhead}$$

Home Office Overhead

- Three requirements for utilizing the *Eichleay* formula:
 - Owner-imposed delay occurred;
 - The owner required the contractor to ‘standby’ during the delay
 - While ‘standing by,’ the contractor was unable to take on additional work
- See *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536, 540 (Fla. 4th DCA 2005)
- See *Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126, 131 (Fla. 4th DCA 2010)

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Expanded Jobsite Overhead

- Distinct from extended jobsite overhead
- Increase in the resources assigned to a project (facilities, equipment, management staff, administrative staff, supervisory staff, or otherwise)
- Typically intended to handle substantial amounts of extra work or to mitigate / overcome delays or impacts encountered on the project.
- Usually readily-identifiable for purposes of pricing
- Ensure that the costs have not been duplicated

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Acceleration

- Any action taken to increase the rate work is accomplished (compared with the planned rate)
- Normally implemented in an effort to mitigate / overcome delays or impacts
- Typical acceleration measures:
 - Re-sequencing the work
 - Extending work hours / paying premium time
 - Offering incentives / bonuses for increased productivity
 - Other creative solutions.

Acceleration

- Discretely added resources or changes to how the work is performed are, for the most part, readily-identifiable for purposes of pricing
 - However, disputes may arise as to whether the originally-provided resources were sufficient
- Debates sometimes arise when the acceleration measures were implemented, but were unsuccessful
- Working longer hours, crowding crews and other accelerative measures can have diminishing returns on the productivity achieved per worker or per crew
 - Segregating the inefficiency costs from the acceleration costs can be challenging
- Another challenging situation arises when acceleration measures are implemented (to overcome / mitigate delays), but new or further impacts occur, which delay the accelerated work
- Care must be taken to ensure that costs are not duplicated through pricing the discrete components of a claim.

Acceleration

- Contractor reasons:
 - Make up for contractor delays
 - Achieve bonus incentives
 - Avoid unfavorable weather
 - Coordinate with another project
- Owner reasons:
 - Need facility – political forces
 - Regulatory requirements
 - Mitigate impacts
- Debates often arise due to mixed responsibility for project impacts

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - **Consequential Damages**
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Consequential Damages

- Are separate from increased activity-related costs and time-related costs
- Generally, consequential damages are those that do not “naturally flow” from breach of a contract
- Specific to a contractor, examples may include:
 - Financing costs
 - Reputational damage
 - Loss of goodwill
 - Lost profits on other projects
 - Losses of or impaired bonding capacity
 - Lost bidding opportunities
 - Insolvency and bankruptcy

Consequential Damages

- Due to the inherent nature of consequential damages (not flowing directly from a breach), recovery is difficult
 - Typically only be available in limited circumstances.
- Claimant must prove that:
 - Any loss was (or should have been) within the reasonable contemplation of the parties
 - Loss was not remote, contingent or conjectural
 - Damages are reasonably certain
- Waivers of consequential damages are common in construction contracts
 - Valid and enforceable under FL law
 - Must be clearly and unambiguously drafted

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Types of Damages Suffered by an Owner

- Defective and/or incomplete work
 - Reasonable Costs of Construction
 - Economic Waste
- Delays/Liquidated Damages

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Defective and/or Incomplete Work

- The Florida Supreme Court case:
 - *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982)
 - Establishes the measure of an owner's damages where the contractor's breach involves defective or unfinished construction. Contractor infamously built a mirror image of the house purchased by the Hourihans
 - Hourihans sued for specific performance (i.e., tearing down and rebuilding the home facing the proper direction)
 - Trial court found that the contractor breached the contract, but refused to require specific performance.
 - It would be economically wasteful

Defective and/or Incomplete Work

- On review, the Florida Supreme Court adopted Subsection 346(1)(a) of the Restatement (First) of Contracts:

(1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:

(a) For defective or unfinished construction he can get judgment for *either*

(i) the *reasonable cost of construction and completion* in accordance with the contract, if this is possible and *does not involve unreasonable economic waste; or*

(ii) the *difference between the value* that the product contracted for would have had and the value of the performance that has been received by the plaintiff, *if construction and completion* in accordance with the contract *would involve unreasonable economic waste*

Reasonable Costs of Construction

- “Reasonable cost[s] of construction” has been the subject of dispute in numerous Florida cases
- General rule:
 - Non-defaulting party must show actual expenditures incurred due to the breach
 - Defaulting party may present their evidence to prove waste, extravagance and lack of good faith
- Actual costs may include items reasonably necessary to accomplish the work, such as engineering and architectural fees, among other things.

Economic Waste

- Where the actual cost of correcting the work would result in economic waste (out of proportion to the good to be attained)...
 - Appropriate measure of damages is the difference between the value of the defective structure and that of the structure if properly completed
 - “Diminution in value” damages
- Florida Supreme Court expressly found that the doctrine of economic waste is not limited to commercial construction
 - Applies to residential construction as well
 - *See Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982)

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - **Delays/Liquidated Damages**
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Delays/Liquidated Damages

- Where a contractor fails to complete a project timely, the owner may be entitled to delay damages, including:
 - Out-of-pocket costs directly associated with the project (e.g., extended project office, administrative staff, architectural, engineering and/or inspection costs)
 - Owner may also suffer loss of use damages, which may take several forms:
 - Extended rental / lease costs for another facility until construction is complete;
 - Loss of income from the uncompleted project;
 - Loss of toll income;
 - Loss of income from a sports stadium / arena;
 - Loss of rental income for an office building or apartment complex; and
 - Increased financing costs
 - Extended construction loan period (at higher rate than permanent loan); or
 - Increased rate due to expiration of guaranteed rate period
 - Depending on the circumstances, the delay damages incurred may be consequential (rather than direct) damages

Delays/Liquidated Damages

- Due to the uncertainties with the types / amounts of delay damages, parties often agree to liquidated damages (LD) rate
- Florida law is well-settled – parties may agree in advance on an amount to be paid as LD's
- Two-part test for whether LD's clause will be upheld (or stricken as an unenforceable penalty):
 - The damages due to a breach must not be readily ascertainable.
 - The LD rate must not be so grossly disproportionate to any damages that might reasonably flow from a breach

Delays/Liquidated Damages

- LD's provisions are creatures of contract
 - May specify varying assessments of LD's for different types of failures
 - Distinct LD's can be set for failure to meet:
 - Specified interim milestones,
 - Substantial completion, and/or
 - Final completion
- A party cannot recover both LD's and actual damages for the same harm
 - However, an LD's provision may be designed to cover only certain categories of delay damages
 - And leave other categories to be assessed based on actual costs incurred
 - Example, a toll road owner could specify that contractor-caused delays would result in:
 - Assessment of actual damages for extended administrative, engineering and inspection costs, AND
 - LD's for the anticipated loss of toll income resulting from delayed completion
 - KEY: counsel drafting such provisions must ensure they are unambiguous

Damages Concepts Regarding Specific Causes of Action

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - Other Damages Concepts

Breach of Contract

- Establish liability for a breach
- Injured party is entitled to compensatory damages
 - Sufficient to return to as good a position as he or she would have enjoyed had the breaching party fully performed
- Recoverable damages:
 - Flow naturally from the breach
 - Were foreseeable by the breaching party at the time the contract was entered
- Typically measure damages from the date of the breach

Breach of Contract

- Substantial Performance:
 - Not full performance, but nearly equivalent to what was agreed
 - Subject to recovery of damages caused by promisee's failure to render full performance
 - Ex: An Owner may deduct the reasonable costs of correction or completion, where contractor substantially (but not fully) performs
 - Normally a question of fact
 - Under appropriate circumstances, the issue of substantial performance can be withdrawn from the jury and determined as a matter of law

Breach of Contract

- Partial Performance:
 - A contract that has not been fully or substantially performed
 - Percentage of completion is not competent evidence to prove damages for partial performance
 - Measure of recovery is either in quantum meruit or the reasonable cost of partial performance plus lost profits
 - *Quantum Meruit*:
 - The reasonable value of the labor performed and materials supplied
 - Designed to restore the contractor to the same position he would have been in, prior to making the agreement
 - Lost Profits:
 - Lost profits plus the reasonable cost of labor and material expended in partial performance
 - Lost profit can be established by subtracting the total costs for services and materials necessary to complete the contract from the contract price
 - » Must also deduct the actual supervisory salary it paid and any other non-reimbursable operating expenses and costs (*e.g.*, home office expenses and overhead)
 - Must establish lost profit to a reasonable degree of certainty
 - Cannot be based on mere speculation or conjecture.

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - **Negligence**
 - Other Damages Concepts

Negligence

- Plaintiff must prove the extent of injuries, and that they were proximately caused by the Defendant's negligence
- Must generally allege a bodily injury or property damage
- Negligence claims for purely economic losses are recognized only in limited circumstances

Negligence

- **Economic Loss Rule:**
 - Judicially created
 - Stated with ease but applied with great difficulty
 - Prior to *Tiara*, there were three distinct forms of the economic loss rule:
 - *Products liability economic loss* rule: If a product physically damages **only itself**, causing additional economic loss, no recovery is permitted in tort.
 - *Contract economic loss* rule: If parties have entered into a contract, the contract's obligations cannot be used to establish a tort claim for the recovery of purely economic damages...
 - There must be a separate, 'independent tort.'
 - *Negligence economic loss* rule: Common law negligence will not be expanded to protect economic interests in the absence of personal injury or property damage...
 - Unless a strong public policy requires expansion of the common law to protect specific economic interests

Negligence

- In 2013, the Florida Supreme Court expressly limited the economic loss rule to products liability cases
- *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013).
- The Court reasoned that “[o]ur experience with the economic loss rule over time, which led to the creation of exceptions to the rule, now demonstrates that expansion of the rule beyond its origins [as only applying to product liability cases] was unwise and unworkable in practice.”

Negligence

- Concurring opinion (Justice Pariente)
 - Contrary to assertions otherwise, the *Tiara* decision was “neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles.”
 - Trial courts can still dismiss tort claims interconnected with contract claims based on “basic contract principles”
 - Also, a party seeking to assert a valid tort claim “must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.”

Agenda

- Damages Concepts
 - Proof of Damages
 - Types of Damages Suffered by a Contractor
 - Extra or Additional Work
 - Disruption, Inefficiencies and Losses of Productivity
 - Displaced Activity Costs and Escalation
 - Delays
 - Expanded Jobsite Overhead
 - Acceleration
 - Consequential Damages
 - Types of Damages Suffered by an Owner
 - Defective and/or Incomplete Work
 - Delays/Liquidated Damages
- Damages Concepts Regarding Specific Causes of Action
 - Breach of Contract
 - Negligence
 - **Other Damages Concepts**

Professional Negligence

- Even before *Tiara*, claims for professional malpractice or professional negligence were not limited by the ELR, regardless of whether the parties were in privity
- An aggrieved party may file a tort action for professional malpractice *and* pursue a cause of action for breach of the contract pursuant to which the professional services were performed.
- The contract between an engineering firm and an aggrieved party does not eliminate the professional obligation of the employee-professional who actually renders the services
- The Florida Supreme Court declared that Florida law recognizes a cause of action against an individual for professional negligence whether or not the individual practices through a corporation
 - *See Moransais*, 744 So. 2d 973 at 977-982

Professional Negligence

- The Florida Supreme Court did not specifically address whether an individual professional may be insulated by a limitation of liability provision
 - A Third DCA opinion (*Witt v. La Gorce Country Club*) highlighted the extra-contractual nature of such a claim
 - Interpreted *Moransais* to mean that a cause of action in negligence exists irrespective, and “essentially independent,” of a professional services agreement.
 - Consequently, refused to enforce a limitation of liability provision in the professional services agreement in favor of an employee-professional.

Negligent Misrepresentation

- Restatement (Second) of Torts § 552B describes the damages recoverable for negligently supplying false information for the guidance of others
 - (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including
 - (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
 - (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.
 - (2) the damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.
- No Florida cases have specifically adopted section 552B
 - However, several Florida cases have cited section 552 with approval when discussing negligent misrepresentation generally

Quantum Meruit

- Quantum meruit claims are based on an implied contract
- The elements are:
 - the provision of goods or services of value by the plaintiff;
 - which are assented to and received by the defendant; and
 - where, in the ordinary course of events, a reasonable person would expect to pay for the benefit provided.
- Recoverable damages are to restore the contractor to the same position in which he would have been prior providing the benefit
 - Are based on the *reasonable value* of the labor, materials and services actually furnished
- An implied contract cannot be relied upon where an express contract governs the parties' rights and obligations

Unjust Enrichment

- Based on a legal fiction that implies a contract as a matter of law
 - Even though the parties never indicated by deed or words that an agreement existed between them
- The elements are:
 - a benefit conferred on the defendant by the plaintiff;
 - the defendant has knowledge of the benefit;
 - the defendant has accepted or retained the benefit; and
 - the circumstances are such that it would be inequitable to retain the benefit without paying fair value for it
- Damages are based on the value of the benefit conferred and accepted
 - Are not based on the costs incurred to provide

Implied Warranty

- A buyer is entitled to both incidental and consequential damages that are proximately caused by the breach of implied warranty

Open Account and Account Stated

- Open account is essentially an action to collect on a debt created by a series of credit transactions
 - Unlike an account stated, the debt remains unsettled as between the creditor and debtor
 - Plaintiff may recover the account balance resulting from the series of credit transactions
- In contrast, an account stated action involves an agreement between persons who have had previous transactions, fixing the amount and promising payment.
 - In the absence of an agreement, no recovery for an account stated theory is permitted
 - The balance, not the constituent items, constitutes the cause of action on the account.
 - The action is based upon the promise, express or implied, to pay the balance agreed upon
 - The agreed upon balance is the measure of damages.

Intentional Interference with Contract/Business Relationship

- Measure of damages is the loss of either property or personal benefit caused by the interference
- Objective is to put the plaintiff in the same economic position it would have been in had the contract not been interfered with
- Plaintiff is entitled to damages “reasonably flowing” from the interference

Fraud

- Damages are determined by the “benefit of the bargain” rule or the “out-of-pocket” rule
 - Benefit of bargain: awards the difference between the actual value of the property and its value had the alleged facts regarding it been true
 - Out-of-pocket rule: awards the difference between the purchase price and the real or actual value of the property
- Punitive damages may also be recoverable
- Fraud in the inducement claims provides two alternative remedies:
 - Rescind the contract (*if* the parties can be returned to the positions they previously occupied)
 - Ratify the contract and seek damages

Rescission

- Rescission is an equitable remedy devised by courts where monetary damages are inadequate or where one party, having a right, *elects* that remedy
- Concept is to restore the *status quo*
 - Placing the parties in the positions they occupied before contracting with each other
- Rescission extinguishes the contract for all purposes
 - Precludes the recovery of the contract price
 - Also prevents the recovery of damages for breach of the contract
- The party rescinding may, however, have a right to restitution for any performance on his part.
- A contracting party rescinding for a breach or other good cause can usually recover for his or her partial performance

Unfair and Deceptive Trade Practices

- FDUPTA establishes an action to *obtain a determination* that an act or practice violates the Act *and to enjoin* a person who has violated, is violating, or is otherwise likely to violate the Act.
- Plaintiff may recover actual damages, plus attorney's fees and court costs.
- The court may require the party instituting the action to post a bond
 - To indemnify the defendant for any damages incurred, including reasonable attorneys' fees
 - Motion requesting the posting of a bond must allege that the action:
 - is frivolous,
 - is without legal or factual merit, or
 - has been brought for purposes of harassment

Civil Theft

- Must prove by clear and convincing evidence injury caused by a defendant's theft
 - May recover treble actual damages and reasonable attorney's fees and court costs
 - Prejudgment interest is available only on the amount of actual damages (not on the treble damages)
- Punitive damages may not be awarded under the civil theft statute.
- Civil theft claims are not precluded merely because of the existence of a contract or the economic loss rule;
 - However, must prove elements of a civil theft *independent from* acts that breached the parties' contract, and damages that are *separate from* those suffered under the breach of contract

Civil Theft

- Additional civil remedies for theft are provided in the criminal statutes (§812.035)
- May seek injunctive relief from threatened loss or damage without having to show irreparable harm
- Court may enjoin a defendant's violation of criminal theft statutes by
 - Ordering the defendant to divest himself or herself of any interest in any enterprise;
 - Imposing restrictions on the defendant's future activities or investments;
 - Ordering the dissolution or reorganization of any enterprise;
 - Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any department or agency of the state; and
 - Ordering the forfeiture of the charter of a Florida corporation and its dissolution,
 - Or the revocation of the certificate of authorization of a foreign corporation

Common Law Civil Conspiracy

- Common law civil conspiracy is predicated on an agreement to either perform an unlawful act or to perform a lawful act by unlawful means
- Each act done pursuing a conspiracy by one of several conspirators is an act for which each conspirator is jointly and severally liable
- It is not presumed that a mere conspiracy *per se* results in damages
- Punitive damages may be recoverable

Florida's Civil Remedies for Criminal Practices Act, the Florida RICO Act, and the Federal RICO Act

- **Civil Remedies for Criminal Practices Act**
 - Cause of action for treble actual damages, upon a showing by clear and convincing evidence that he or she was injured
 - by another person's using proceeds (directly or indirectly) derived from a pattern of criminal activity to acquire an interest in or to establish or operate an enterprise;
 - from acquiring an interest in or control of an enterprise through a pattern of criminal activity;
 - from being employed by or associated with an enterprise for the purpose of participating in a pattern of criminal activity; or
 - from conspiring to do any of these preceding acts.
 - Plaintiff is entitled to a minimum of \$200 in damages.
 - Punitive damages may not be
 - Reasonable attorneys' fees and court costs may be recovered

Florida's Civil Remedies for Criminal Practices Act, the Florida RICO Act, and the Federal RICO Act

- **Florida RICO Act**

- Additional civil remedies are provided in the “Florida RICO
- Any person aggrieved by a violation of section 895.03 may seek injunctive relief
- Courts may enjoin violations of Florida’s RICO statute by:
 - Ordering the defendant to divest himself or herself in any interest in any enterprise;
 - Imposing restrictions on the defendant’s future activities or investments;
 - Ordering the dissolution or reorganization of any enterprise;
 - Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; and
 - Ordering the forfeiture of the charter of a Florida corporation and its dissolution (or revocation of the certificate of authorization of a foreign corporation)

Florida's Civil Remedies for Criminal Practices Act, the Florida RICO Act, and the Federal RICO Act

- **Federal RICO Act**

- Plaintiff may recover treble (actual) damages, reasonable attorney's fees and court costs
- Prejudgment interest is awardable at the discretion of the court on the amount of actual (not the treble) damages
- Federal courts may also provide the same injunctive relief as the state courts can provide under the Florida RICO Act
- Though Florida's RICO Act is patterned after the federal RICO Act, there are differences, including:
 - Statute of limitation, and
 - Burden of proof

Florida Uniform Trade Secrets Act

- Actual or threatened misappropriation of trade secrets may be enjoined
 - Except to the extent that a material prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable
- Damages can include *both*:
 - Actual loss caused by misappropriation
 - The unjust enrichment caused by misappropriation that is not taken into account in computing actual loss
- Alternatively, the damages may be measured by imposition of liability for a reasonable royalty
- If willful and malicious, the court may award statutorily-limited exemplary damages

Copyright Law

- Particularly relevant to design professionals
- A copyright owner may recover:
 - Actual damages, and
 - Any additional profits of a copyright infringer not taken into account in computing the actual damages; or
 - Statutory damages
- Copyright owner is required to present proof only of the infringer's gross revenue
 - Infringer must prove deductible expenses and the elements of profit attributable to factors other than the copyrighted work
- Instead of actual damages, the copyright owner may elect to recover an award of statutory damages for all infringements involved in the action with respect to any one work
 - Not less than \$750 to not more than \$30,000
 - Election may be made any time before final judgment is rendered

Copyright Law

- Factors to be considered in determining statutory damages:
 - Expenses saved and profits reaped by the defendant in connection with infringements
 - Revenues lost by the plaintiff as a result of the defendant's conduct
 - Infringer's state of mind, that is, whether willful, knowing, or merely innocent
- If the infringement was willful, the court, in its discretion, may increase the statutory damages to not more than \$150,000
- Where the infringer was not aware and had no reason to believe that his or her acts constituted an infringement, the court, in its discretion, may reduce the statutory damages to not less than \$200
- Other than against the United States or an officer thereof... , full costs (including reasonable attorneys' fees) may be recovered
- Punitive damages are not available

Interest

- Prejudgment interest is an element of compensatory damages
- The loss theory of prejudgment interest is the law in Florida
 - A plaintiff's loss of the use of funds is itself a wrongful deprivation
- As interest is merely another element of pecuniary damages, once determined that a defendant is liable for calculated damages, interest should follow as a matter of law
 - From the date of loss
- The State's CFO sets (quarterly) the rate of interest payable on judgments and decrees
 - On December 1, March 1, June 1 and September 1 for the following quarter
 - Does not affect the interest rates established by written contract
- Post-judgment interest: judgment shall bear, on its face, the rate of interest that is payable on the judgment
 - When a judgment is obtained, the interest rate is established
 - The interest rate is adjusted annually on January 1 to the interest rate in effect on that date as set by the State's CFO until the judgment is paid

Attorneys' Fees and Costs

- Attorneys' fees incurred prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing recovery
- “[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney’s fees.”
 - Note, however, that the Florida Supreme Court has held, in the context of a lien-foreclosure action, that a court may determine that neither party prevailed (*Trytek*)
- The “prevailing party” standard is not the standard for cost awards.
 - Section 57.041(1), Florida Statutes, provides that the *party recovering judgment* must be awarded costs