

## Chapter 17

# DISPUTES OVER CONTRACT CLAUSES

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Drafting and negotiation of construction contracts are often governed by either the “golden rule” or a “game of chicken.” The golden rule applies when one party has the economic muscle to dictate contract terms. The weaker party can only take it and hope for the best. The contracting game of chicken is played when one party submits its contract form and the other party either does not read it or is simply afraid to question onerous contract provisions out of fear of losing the job.

On the other hand, knowledgeable parties to construction-related contracts know what should or should not be included in their contracts, or they have them reviewed by knowledgeable counsel.

The purpose of this chapter is to highlight a number of common construction industry contract provisions that, depending upon the party involved, may be of benefit to or a burden upon that particular party.

**§ 17.2 • CONTRACT CONTENTS (GENERALLY)**

The typical construction contract is a multi-part assemblage. There is usually an agreement, some general conditions, possibly supplemental general conditions, technical specifications and drawings, shop drawings, submittals, and samples — and possibly more. That assemblage produces the typical “general” or “prime” contract.

Subcontracts are likely to include all of the above, plus additional provisions along with limitations applicable to the scope of the subcontract work covered. Rather than repeating all of the terms of general contracts, subcontract forms typically incorporate the terms of the applicable general contracts by a reference.

For years, the construction industry has used construction contract forms sold by the American Institute of Architects (AIA). In October 2007, a combination of 20 associations representing designers, owners, contractors, subcontractors, and sureties created ConsensusDOCS, which has now issued 70 construction contract and construction-related forms. Both the AIA and Consensus tout their forms as “fair and balanced.” The AIA forms are available through [www.aia.org/docs](http://www.aia.org/docs), and the Consensus forms may be obtained from [www.consensusdocs.org/support](http://www.consensusdocs.org/support).

### § 17.3 • INCORPORATION BY REFERENCE (“FLOW-DOWN” CLAUSES)

“Flow-down,” “flow-through,” or “conduit” clauses are frequently found in construction subcontracts. Their principal purpose is to pass on to subcontractors some or all of the obligations that the general contractors have to the owners. Ideally, the incorporated provisions should apply only to the subcontractor’s physical work. However, more comprehensive or loosely worded clauses may add more.

*Example 1.* The Subcontractor hereby agrees to be bound to the Contractor by the same terms as the Contractor’s contract with the Owner and assume toward the Contractor all obligations and responsibilities that the Contractor, by contract, assumes toward the Owner.

*Example 2.* The Contract Documents are incorporated in this Subcontract by reference, and the Subcontractor and his or her subcontractors will be and are bound by the Contract Documents insofar as they relate in any way, directly or indirectly, to the work covered by this Subcontract. Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents, to the extent of the work provided for in this Subcontract, and that where reference is made to Contractor in the Contract Documents, and the work or specifications therein pertain to Subcontractor’s trade, craft, or type of work, then such work or specification shall be interpreted to apply to Subcontractor instead of Contractor.

#### § 17.3.1—Analysis

Flow-down clauses, like the examples quoted above, may substantially and materially expand the terms of what might otherwise appear to be a simple subcontract.

A clause may be limited to those provisions of the general or prime contract that deal only with the contemplated subcontractor’s physical *work*. Such a clause may be acceptable unless one

or both of the parties wish to incorporate all of the general/prime contract terms. However, if the flow-down clause reads or may be interpreted to incorporate other provisions of the general contract such as those dealing with contract administration, changes, indemnities, dispute procedures, claims, allowances, payments, damages, scheduling, and other provisions, the incorporation may be trouble for either the contractor or subcontractor, or both.

In a leading case, the United States Supreme Court observed:

The reference in the sub-contract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done and in what manner done by the sub-contractor. Notwithstanding occasional expressions of a different view [citations omitted], in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of sub-contracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.<sup>1</sup>

However, other courts have taken a less restrictive view and have held subcontractors to the terms of general contracts that were not directly related to the subcontractors' specific work.<sup>2</sup>

Loosely written flow-down provisions have bound subcontractors to arbitration or other dispute resolution provisions of the incorporated general contracts.<sup>3</sup>

Flow-down provisions have also spawned other litigation. For instance, in *Pierce Assoc., Inc. v. Nemours Foundation*,<sup>4</sup> the court ruled that the prime contractor could not recover liquidated damages against the subcontractor unless the prime contractor was liable to the owner for such damages. In *Gibbons v. Graves Construction Co.*,<sup>5</sup> the indemnity provisions of the general contract were held to be binding on the subcontractor under the flow-down clause in issue. *Fisher v. United States*<sup>6</sup> held otherwise.

There currently do not appear to be any Colorado appellate decisions on the effect of flow-down clauses in construction contracting.

### **§ 17.3.2—Solution**

Incorporation-by-reference provisions should ideally be worded to limit their application to the physical work to be done and the manner of its performance by the subcontractor, unless the parties wish otherwise. The clause should also provide that in the event of any inconsistency, the provisions of the subcontract agreement itself are to take precedence. A party-neutral flow-down provision might read:

The terms of the contract between Contractor and Owner that apply to the physical work to be performed by Subcontractor and the manner of its performance that are not inconsistent or in conflict with any term of this Subcontract are incorporated here by this reference. A copy of that contract is available for examination by Subcontractor at Contractor's office during normal business hours.

The 2007 AIA subcontract form does not appear to resolve the flow-down issues. It simply identifies, as a contract document, the prime contract and provides that, except when there is a conflict, the AIA general conditions (AIA Document A201-2007) are the general conditions that govern the subcontract.

The Consensus form, however, appears to clarify the issue. It provides: “[T]o the extent the terms of this Agreement between Owner and Contractor (prime agreement) apply to the work of Subcontractor . . . .” That suggests that only the prime contract provision relating to the Subcontractor’s work would apply.

## § 17.4 • PAYMENT ISSUES

### § 17.4.1—Introduction

Important money clauses in construction contracts deal with the time for and amount of payments, withholding payments, payments for extras, payments on account of differing or changed conditions, and security for payment.

### § 17.4.2—Pay-When-Paid or Pay-If-Paid Clauses

Who bears the risk of non-payment by a construction project owner: the contractor or project subcontractors? Naturally, neither party wants the risk, and it therefore often becomes a battle of who wins at the contracting stage.

Contractors typically propose (or require) either *pay-when-paid* or *pay-if-paid* clauses in their subcontracts. Subcontractors either (1) fail to read their subcontracts; (2) fail to recognize potential problems in contractor-drafted subcontract pay provisions; or (3) are willing to accept the risks knowing that there are not likely to be owner payment problems.

*Example 1.* Progress payments shall be made by Contractor seven (7) days after a corresponding payment has been received by Contractor from Owner or his or her agent. In no event shall Subcontractor be entitled to receive any payment from Contractor prior to Contractor’s actual receipt of that payment from Owner. Contractor’s receipt of payment from Owner shall be a condition precedent to any obligation to pay Subcontractor for any portion of the Subcontract Work and Subcontractor waives all right to commence litigation for payment until said monies are received by Contractor, unless non-payment is caused solely by the negligent acts or omissions of Contractor.

*Example 2.* No payment under this Contract shall be considered due until five (5) days after receipt by Contractor of such payment by the Owner.

Example 1 above appears to be a *pay-if-paid* clause that conditions payment to the subcontractor on the contractor’s receipt of payment from the owner. Courts in several jurisdictions

have ruled that when payment is clearly and unambiguously conditioned upon owner payment to the contractor, the risk of non-payment falls on the subcontractor.<sup>7</sup>

In *OBS Co., Inc. v. Pace Construction Corp.*,<sup>8</sup> the same court that enforced what appeared to be a pay-if-paid clause in its ruling in *DEC Electric* found other language in the subcontract to avoid the strict application of that provision.

Example 2 above appears to be a pay-when-paid clause. Courts have struggled over these provisions. The Colorado Supreme Court and the majority of courts of other jurisdictions have concluded that a “pay-when” provision only prescribes the *time* for payment, but does not condition payment to the subcontractor upon owner payment. Instead, the subcontractor gets paid by the contractor — eventually.<sup>9</sup> The majority of courts reason that the effect of the pay-when-paid clause is to allow the contractor a reasonable time within which to obtain payment from the owner before being required to pay the subcontractor from the contractor’s own funds.<sup>10</sup>

A few courts have held that the strict “condition precedent” pay-if-paid clauses are void and unenforceable because they violate public policy.<sup>11</sup> The legislatures of five states, North Carolina, Wisconsin, Illinois, Maryland, and Missouri, have enacted statutes dealing with payment clauses in construction contracts. In North Carolina, both pay-when and pay-if clauses are unenforceable. The Wisconsin statute voids pay-if clauses. The Illinois, Maryland, and Missouri statutes provide that pay-when or pay-if clauses do not afford defenses to mechanic’s lien claims.

From the language and result in *Main Electric*, it may be assumed that a well-drafted pay-if clause would be enforceable in Colorado and not offend public policy.<sup>12</sup> However, that issue does not appear to have been expressly presented to the Supreme Court and may still be an open question.

Although not entirely clear, remedies against surety bonds and under mechanic’s lien statutes may be rendered unavailable by pay-when-paid or pay-if-paid subcontract provisions. The decided surety cases go both ways.<sup>13</sup>

In *United States ex rel. DDC Interiors, Inc. v. Dawson Construction Co., Inc.*,<sup>14</sup> the trial court ruled that the “pay upon payment” clause was not a waiver of a subcontractor’s rights to proceed under the Miller Act. The court (Babcock, J.), observed that waiver of Miller Act rights must be definite, clear, explicit, and unmistakable, noting “[a]t a minimum, an effective waiver of Miller Act rights must include mention of the Miller Act and unambiguously express intention to waive the rights provided by it.”<sup>15</sup>

Whether conditional payment clauses have any effect upon subcontractor or supplier rights under Colorado mechanic’s lien laws has not been judicially determined. However, Colorado mechanic’s lien laws are intended for the protection of those who supply labor, services, materials, and other lienable items and affords them lien rights against owners’ properties. C.R.S. § 38-22-119 mandates that agreements to waive, abandon, or refrain from enforcing mechanics’ liens are only effective between contracting parties. Mechanic’s lien waivers are not favored in

Colorado.<sup>16</sup> Also, the mechanic's lien provisions are to be liberally construed in favor of "mechanics" if they meet the statutory requirements for perfection of their liens.<sup>17</sup>

The Colorado statutory scheme does not appear to require that the subcontractor or supplier have a recoverable claim against the contractor to be entitled to a mechanic's lien. Since it is likely that the owner's failure to pay would be the cause of the non-payment, the owner's property should logically and reasonably be answerable for the debt due the subcontractor or supplier — unless, perhaps, the non-payment is caused by the contractor's breach of contract, for which the subcontractor shares some responsibility.

Both the Consensus and AIA 2007 subcontract forms avoid pay-if and pay-when issues. The Consensus form provides that if nonpayment from the owner is not attributable to any fault of the subcontractor, the contractor is to pay the subcontractor within a reasonable time for subcontract work satisfactorily performed. The AIA form provides that if nonpayment by the owner is not attributable to the fault of the subcontractor, the contractor is to pay progress payments owed to the subcontractor "on demand."

#### § 17.4.3—Security For Payment Provisos

There are typically two forms of security for payment of sums due for construction-related work: (1) mechanics' liens and (2) bonds. On Colorado state and federal public projects, payment bonds are usually required and mechanics' liens are unavailable. In Colorado, mechanics' liens are available for private construction work unless waived. Owners occasionally and successfully insist that their contractors waive mechanic's lien rights — and contractors knowingly or unwittingly agree to such provisions. Such waiver language should be as simple as: "The [c]ontractor shall not file a mechanic's or materialman's lien or maintain any claim against the [o]wner's real estate . . . for or on account of any work done, labor performed or materials furnished under this [c]ontract. . . ." <sup>18</sup>

Whether such a waiver in a general contract would result in a waiver of mechanic's lien rights by a subcontractor under the flow-down clauses discussed in a preceding section of this Chapter is uncertain — at least in Colorado. Cases from other jurisdictions have held that flow-down clauses do not apply to mechanic's lien waivers.<sup>19</sup> The Colorado mechanic's lien statute at C.R.S. § 38-22-119, provides that waivers of mechanic's liens are effective only as ". . . between the parties to such contract."

#### § 17.4.4—Payment For Extra (Changed) Work

In the last decade, there has been a noticeable change in the way extra work has been treated in construction contracting. Before the 1987 edition of the American Institute of Architects General Conditions document that is widely used on privately owned construction projects (AIA Doc. A-201 (1987)), contracts typically provided that the owner could require additional work, but there had to be an agreement between the owner and contractor for that additional work, *i.e.*, an executed change order. Under those provisions, if the contractor proceeded to perform extra work without a signed change order or written notice to the owner, the contractor would not be entitled to additional compensation, although some courts have ruled otherwise under particular circumstances.

It was assumed that by doing additional work without a change order, the contractor was either agreeing that the work involved no additional cost or that the work was not, in fact, extra work, but was that already included in the contract documents.<sup>20</sup> Colorado cases, however, have held that a party's conduct may constitute a waiver of a requirement for a written change order.<sup>21</sup>

However, the 1987 AIA General Conditions document established a new mechanism that allowed owners to issue contract change directives requiring contractors to do extra work if such changes are within the scope of the contracts. Provision is made for a method for determination of the amount to be paid the contractor for such changes. *See* Appendix A, AIA Doc. A-201 (1987).

Because the 1987 AIA changes clause frequently resulted in contractors having to wait for some time until there was agreement or resolution of disputes over the amounts that were to be paid for extra work, the 1997 and the updated 2007 editions of the AIA General Conditions document provides for payment to the contractor for at least the undisputed amount of compensation due for extra work. *See* Appendix A, AIA Doc. A-201, ¶ 7.3.7 (1997).

It is not unusual for subcontracts to mandate that subcontractors will not be paid for additional work unless the contractor receives payment for that work from the owner. One such provision reads:

In any event, Subcontractor's compensation for changes in the work shall be limited to that which Contractor receives from Owner on Subcontractor's behalf.

However, there are times when extra work imposed upon a particular subcontractor is within the scope of the general contractor's work, but not included in that subcontractor's scope. The general contractor will not be paid for that work by the owner because it is not extra work under the general contract. Therefore, the above-quoted provision may not be acceptable to subcontractors.

## § 17.5 • COMPLETION TIME

### § 17.5.1—Introduction

There are probably more disputes among construction industry participants involving completion time than any other issue. Delays are often costly to everyone involved. Owners are deprived of the use of their projects. Contractors and subcontractors incur additional overhead for prolonged completion time, coupled with their inability to take on other work that might be profitable. It is, therefore, not unusual for all of the participants to blame others for delays and seek to be compensated for delay damages. Some delay-related risk may be avoided at the contracting stage.

### § 17.5.2—No-Damages-For-Delay Clauses

During the contracting process, everybody wants to get a leg-up by assuring the recovery of damages resulting from delays, limiting those damages, or avoiding delay damage recoverability entirely.

Some smart aleck attorney or wise counsel (depending upon whose interest was involved) came up with the idea of promoting a contract provision simply eliminating the right to recover damages for delay in construction contracts and subcontracts. Many of those “no-damages-for-delay” provisions (generously) agree that subcontractors would be entitled to time extensions, but no damages.

*Example 1.* Subcontractor agrees that delay/impact costs for its subcontract work are waived, except for those items which [contractor] can recover from the Owner or other subcontractors/suppliers, for which Subcontractor provided timely written notice allowing [contractor] a minimum of two (2) weeks to address the issue with the responsible party.

*Example 2.* Should the Subcontractor be delayed by the act or omission of the Contractor or by any other Subcontractor on the project, or by any cause beyond this Subcontractor’s control and not due to any fault, act, or omission on its part, then the time for completion of the work shall be extended for a period equivalent to the time lost by reason of the aforesaid causes, as determined by the Contractor. Such extension of time shall be the Subcontractor’s sole and exclusive remedy for any delay and the Subcontractor shall have no claim for damages against the Contractor for any delay.

### § 17.5.3—Analysis

Contractors and subcontractors on the receiving end of a no-damages-for-delay clause should probably “just say no.”

It does not appear that Colorado has any appellate court decisions ruling on the enforceability of such clauses. Colorado does, however, have a statute, C.R.S. § 24-91-103.5, that renders no-damages-for-delay clauses in *public works contracts* unenforceable. C.R.S. § 24-91-103.5(1)(a) reads:

Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.

In jurisdictions that do enforce no-damages clauses, the result might be disastrous. For example, in *Marriott Corp. v. Dastra Construction Co.*,<sup>22</sup> the appeals court reversed a \$4.6 million delay damages verdict in favor of a contractor against an owner because of the “no-damages” clause in the parties’ contract.

Courts in some jurisdictions have held that no-damages clauses may not be enforced when the contractor is delayed by the other party's bad faith, fraud, concealment, active interference with the performance, or willful, malicious, or grossly negligent conduct.<sup>23</sup>

#### § 17.5.4—Solution

Contractors and subcontractors should simply refuse to agree to no-damages provisions unless they (1) are willing to accept the risk, (2) can pass the risk on to someone else, or (3) have an attorney in their immediate family who works for peanuts.

Neither the AIA nor Consensus subcontract forms have “no-damages” provisions. The Consensus form specifically provides that “[N]othing in this agreement shall preclude Subcontractor's recovery of delay damages caused by Contractor.”

#### § 17.5.5—Force-Majeure Clauses

No reasonably drafted general contract or subcontract should be without a provision excusing delays on account of circumstances beyond the control of the parties involved. The newly revised AIA force-majeure clause is included in AIA Doc. A-201, ¶ 8.3.1 (1997). *See* Appendix A, AIA Doc. A-201 ¶ 8.3.1 (1997).

## § 17.6 • DAMAGES

#### § 17.6.1—Waiver Of Consequential Damages

For the fourteenth time, the American Institute of Architects had amended its frequently used general conditions, AIA Document A-201, now A-201 (1997). (The 2007 AIA general conditions were not available to be included in this publication at press time.) The general conditions evidenced a good deal of persuasive acumen on the part of the Associated General Contractors' lawyers who served on the AIA/AGC drafting committee that produced some changes in favor of contractors and perhaps not so favorable to owners. The 1997 change drawing the most attention was the waiver-of-consequential-damages provision. *See* Appendix A, AIA Doc. A-201, ¶ 4.3.10 (1997). The 2007 AIA general conditions also include waivers of consequential damages. So does the new Consensus form, but it also provides space for exclusions.

#### § 17.6.2—Analysis

The primary motivation for the AIA waiver-of-consequential-damages clause appears to have been the New Jersey Supreme Court decision in *Perini Corp. v. Grete Bay Hotel & Casino, Inc.*<sup>24</sup> In that case, the construction manager working for a \$600,000 fee was stuck with a \$14.5 million arbitration award for lost profits in favor of the owner. That result was not unlike the damages awarded in *Riva Ridge Apartments v. Robert G. Fisher Company, Inc.*,<sup>25</sup> in which a judgment in excess of \$2 million for delay damages was rendered against the construction manager.

Undoubtedly, the AIA consequential damages waiver provisions will generate litigation. There is no uniformity in the definition of “consequential damages.” The wording appearing to

waive “all consequential damages” may legally be limited by the specific itemization of damages waived is questionable under the doctrine of *expressio unius est exclusio alterius*. The itemization itself presents a question of whether the listed damages are consequential or direct. Under typical definitions, consequential damages are those that result from, but are not the usual, natural, and foreseeable result of the injury.

Under Colorado pattern jury instructions, at CJI-Civ. 30:35(2), general damages appear to be those that:

. . . were a natural and probable consequence of the claimed breach of the contract . . . but also that, at the time the parties entered into the contract, the [party accused of the breach] reasonably could have anticipated from facts or circumstances that the [accused] knew or should have known that these damages would probably be incurred by the [other party] if [the accused], breached the contract.

The word “direct” in the AIA provision eliminating the waiver’s applicability to an award of liquidated *direct* damages provides a fruitful area for litigation. (The word “direct” is not included in the 2007 AIA general conditions.) In attempting to liquidate delay damages during the contract drafting stage, why wouldn’t the owner of an office building, for example, want to include projected loss-of-use damages? Loss-of-use is included in the listing of consequential damages that are waived. If the word “direct” means other than consequential, would that element of liquidated damages be excluded in calculating the liquidated damages that an owner would be entitled to?

According to two members of the negotiating team of the Associated General Contractors of America, the waiver-of-consequential damages provision was included for “proper risk allocation” to provide that the “. . . risk assumed by a contractor bear some reasonable relationship to the contractor’s ability to profit on the project.”<sup>26</sup> The solution was for owners to give up their rights to recover consequential damages, specifically including “. . . rental expenses, losses of use, income, profit, financing, business and reputation and loss of management or employee productivity or of the services of such persons.”<sup>27</sup> In exchange, the contractor waives damages incurred for home office expenses, loss of financing, business and reputation, and loss of profits other than those anticipated directly from the work under the subject contract.

While Colorado does not appear to have an appellate decision interpreting the no-consequential-damages provisions, the court of appeals has upheld an exculpatory provision in a boiler installation contract in *1745 Wazee LLC v. Castle Builders, Inc.*<sup>28</sup>

The 1997 and 2007 AIA subcontract forms also have mutual waivers of consequential damages. See Appendix A, AIA Doc. A-401, ¶ 15.4 (1997).

### § 17.6.3—Solution

Careful consideration and careful drafting!

**§ 17.7 • NATURE OF REMEDIES****§ 17.7.1—Introduction**

It goes without saying that the nature of the remedy — whether contract or tort, legal or equitable — is terribly important in construction litigation. Many of the recent significant decisions from the Colorado appellate courts in this area focus on a careful determination of which remedies are available to the litigants. Given this trend, practitioners in Colorado will need to take even more care in reviewing the relevant construction contract provisions, matching them to the applicable law and tailoring the requested remedies appropriately.

**§ 17.7.2—Economic Loss**

In 2004, the Colorado Supreme Court held in *BRW, Inc. v. Dufficy & Sons, Inc.* that a subcontractor may not sue the project's design engineer in tort for the subcontractor's alleged economic losses on the project.<sup>29</sup> That decision turned on the economic loss doctrine, which comes into play when a party to a contract, claiming financial or other economic loss, asserts negligence or other tort claims to cover its alleged losses. Negligence is often pled in construction cases because of the generalized standard of care and because of an expansive measure of damages. However, the economic loss doctrine also provides that a party who sustains only economic loss from the breach of a contractual duty cannot sue in tort for that breach unless the breaching party owes the injured party an independent duty of care.<sup>30</sup>

The *BRW* case arose from a contract between the City and County of Denver and BRW. Those two parties had entered into a design contract for a bridge over Speer Boulevard pursuant to a contract that stated that BRW would perform its services in accordance with the standards of "care, skill, and diligence provided by competent professionals . . . ."<sup>31</sup> A lower-tier subcontractor, Dufficy, and the general contractor and other subcontractors, all agreed to build the bridge in accordance with BRW's plans and specifications. The trial court found that this matrix of contracts, under which all the parties operated, assigned the respective duties and proscribed the remedies for any disputes. Nevertheless, Dufficy sued BRW directly, alleging that BRW was negligent in preparing, interpreting, and administering the paint system specifications. Dufficy also claimed that BRW made negligent misrepresentations regarding compliance with plans and specifications. Dufficy cited only economic damages for these claims, including lost profits, consequential losses, attorneys' fees, prejudgment interest, and the like.<sup>32</sup> The Colorado Supreme Court dismissed Dufficy's claims and held that the Court of Appeals erred when it failed to consider whether a proposed new duty differed from any of the duties found in and arising from the contracts. Further, the Court held that the duties argued for by Dufficy were not independent of duties named in the contract and therefore could not survive application of the economic loss rule.<sup>33</sup>

The key aspects of the *BRW* decision are that the economic loss rule:

- turns on the source of the duty as allegedly breached, not on the professional status of the defendant;

- applies not only where commercial parties are in direct contractual privity, but also where they are bound by the series of interrelated contracts that frequently characterize commercial and public construction contracts; and
- insures that the commercial parties' contractual allocations, duties, rights, and remedies will be enforced, not altered, by the courts.

In previous decisions, the Colorado Supreme Court applied the economic loss rule where the parties were bound by a direct, two-party contract.<sup>34</sup> The rationale for the expansion of the application of the economic loss rule was to maintain a distinction between contract and tort law; to enforce expectancy interests and to allow the parties to reliably allocate risks and costs; and to encourage the parties to build cost considerations into the contract. In fact, the Court reasoned that all of these policies are at stake when multiple, commercially sophisticated parties enter into a series of interrelated contracts for the design and completion of commercial projects.<sup>35</sup>

By rejecting tort claims designed to alter the parties' contractual allocations of risks and rewards, the *BRW* decision underscores the impact of contract allocations of risk and responsibilities in the commercial setting on litigation involving that contract. Parties engaged in this industry should consider carefully the duties they are willing to assume, as well as those they want to avoid.

### § 17.7.3—Acceptance Of Work

Another important instance of a Colorado appellate court attempting to preserve and enforce the parties' allocation of risk is *Regents of University of Colorado v. Harbert Construction Co.*<sup>36</sup> In that case, the University of Colorado ("CU") sought to recover damages from its contractor arising out of the explosion of a cogeneration power facility the construction company had installed. The owner sued for negligence, breach of contract, breach of express and implied warranties, strict liability, and indemnification.

The Colorado Court of Appeals held that Section 9.4 of the parties' contract, which stated that "[a]cceptance of the work . . . shall constitute a release of **all claims** against CONTRACTOR . . .," was unambiguous, clearly expressed the intent of the parties, and therefore released the negligence, breach of contract, and strict liability claims.<sup>37</sup>

The Colorado Court of Appeals also held that the contract created a 12-month warranty period triggered by CU's acceptance of the work. Section 18 of the contract "states that the contractor's 'WORK will be performed in accordance with the Contract Documents and in accordance with generally accepted engineering and construction principles and practices.' Section 18.2 warrants that the contractor's 'WORK will be free from defects in design, workmanship, equipment and materials,' and that 'the CONTRACTOR shall promptly correct any defects, including nonconformance with the Contract Documents,' that occur within the warranty period." Section 18.3 provides: "The warranty period provided in Section 18.2 shall begin on Acceptance or the date that care, custody and control of a portion of the WORK is transferred to the OWNER . . . and shall end twelve (12) months later . . ." Because the warranty period had expired prior to the accident, CU's warranty claims were time-barred.<sup>38</sup>

Once again, the importance of the allocation of the parties' respective rights, duties, and obligations, as well as available remedies is underscored. The *Regents* and *BRW* cases signal industry participants that their contractual allocation of risks and remedies will be given careful consideration and enforced. In fact, the *Regents* decision can be read as judicial approval of a contractual version of the old common law "accepted work" doctrine that is now out of favor in many jurisdictions. This signal, in turn, should encourage industry participants to carefully consider what contract provisions will best serve their interests and to fully consider those provisions in the course of contract negotiations, because, at least in Colorado, they may well have to live with those provisions.

#### § 17.7.4—Engineer's Duty Of Care, Designer's Duty Of Care

An older case that demonstrates duty of care is *Wheeler & Lewis v. Slifer*.<sup>39</sup> Slifer, an employee of a project subcontractor, was injured when the roof to the high school upon which he was working collapsed. The collapse was allegedly due to insufficient bracing and shoring of the roof. Slifer sued the architect, Wheeler & Lewis, alleging that it was liable for his injuries. The contract between the school district and Wheeler provided that:

The Architects shall supervise the construction of the work in such manner as to assure the [owner] performance of all contracts in accordance with the terms thereof; and the Architects shall exercise due diligence so that the construction shall be strictly in accordance with the final approved plans . . . .

And further provided that:

The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all [safety codes] to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of workmen . . . .

[The Architect] shall have authority to stop the work whenever such stoppage may be necessary in his reasonable opinion to insure the proper execution of the Contract.

The lower court held that the authority given to the architect in the general contractor's contract with the owner to stop the work placed a duty on the architect to ensure that the contractor was proceeding in a relatively safe manner.

The Colorado Supreme Court overruled. The contracts, when read together, did not burden the architect with the duty to ensure the safety of the construction workers. Rather, the architect was only contractually required to ensure that the work complied with the plans and specifications. The architect's authority to "stop work" should only arise in the context of compliance with the plans and specifications, not for reasons relating to unsafe working conditions.<sup>40</sup> This ruling is consistent with AIA 201 § 2.3.1 (1997), where the owner has no duty to stop the work for

the benefit of the contractor or any other person. Once again, in determining the available rights, remedies, and responsibilities even in a tort context, Colorado courts will look to the provisions of a contract.

### § 17.7.5—Third Party Beneficiary

*Maryland Casualty Company v. Formwork Services, Inc.*<sup>41</sup> explains the importance of the contract terms in an indemnity and third party beneficiary contract. The widow of a worker killed during framing work at a hotel sued the project manager for wrongful death. The widow won at trial and the project manager's insurer, Maryland Casualty, paid the widow. Maryland Casualty, in turn, brought suit to recover from the project manager. The project manager joined the framing subcontractor, Formwork Services, under the indemnity clause in the subcontract, which read:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, . . . .

Formwork moved for summary judgment, claiming that its project manager was not the owner, architect, or contractor as defined in the subcontract, and thus the indemnification clause was not applicable as a matter of law. The issue was whether the project manager was a third-party beneficiary of the subcontract.

The project manager was not a third-party beneficiary. The subcontract's indemnification clause did not mention the project manager and did not indicate the parties' intention for the project manager to attain third-party beneficiary status. An indemnification clause must clearly express the intention to benefit a third party to grant such a benefit. Therefore, Formwork's motion for summary judgment was granted.<sup>42</sup>

## § 17.8 • NEGLIGENCE PER SE

A 2002 Colorado Court of Appeals case, *Smit v. Anderson*<sup>43</sup> explains how violation of a building code operates in the context of a claim for negligence *per se*.<sup>44</sup>

In *Smit*, a homeowner asked a friend to pull permits and name himself as the contractor so that the homeowner could secure financing to build a house. The friend did so, but expressed to the homeowner that he was too busy to do any work on the house. The friend's involvement with the construction ended after obtaining the permit. During construction, a person was injured in an accident that occurred while he and other inexperienced people attempted to raise a 20-foot wall. The injured person sued the contractor, alleging negligence *per se* because the contractor failed to conform to the local building code.

The Court of Appeals held that a negligence *per se* claim requires that:

- 1) the victim be a member of the class the statute or ordinance was enacted to protect;
- 2) the injuries suffered must be of the kind the statute or ordinance was enacted to prevent; and
- 3) the defendant must have violated the statute or ordinance.

Here, the contractor had violated the building code provision that penalized the contractor when it “obtain[s] permits required under this Code for work that will not be performed by or supervised by the contractor.” However, according to the Court of Appeals, the code was designed to ensure safe buildings, not safety during construction. *Smit* was not a member of the class the code was enacted to protect.<sup>45</sup> Thus, reliance on building code violations to establish a negligence *per se* claim may be justified, but that reliance will depend on the announced purpose of the particular building code in question and the class to which the potential plaintiff belongs.

## § 17.9 • CHANGE ORDERS

*Randall & Blake, Inc. v. Metro Wastewater Reclamation District*<sup>46</sup> provides an interesting discussion of the nature and purpose of contractual provisions regarding change orders. *Randall & Blake Inc.* (“RBI”) brought suit against defendant owner Metro Wastewater to recover \$101,384 that Metro withheld under the contract’s change order provision. The large project included construction of a reeration structure called “RS3,” that required Class II bedding with various additional layers of rock, rip-rap, and boulders. Though the entire project was bid as a combination unit price and lump sum, the RS3 portion was bid as lump sum. The lump sum bid included all labor and materials required to construct RS3.

Metro’s engineer, Camp Dresser & McKee, found that the native material satisfied the Class II bedding specification, thereby relieving RBI from the obligation to procure Class II bedding. As a result, Metro withheld \$101,384, which was the anticipated cost of the Class II material (Metro did not withhold labor costs for re-working the native material). The contract required that “[s]uitable excavated material . . . shall be used for fill embankments or backfill on the different parts of the work as required and as acceptable to the Engineer.” RBI sought to recover the \$101,384 under grounds that the RS3 contract was lump sum and that any cost savings belonged to RBI, not Metro.

The Court of Appeals held that Metro received exactly what it bargained for and ordered it to pay RBI for the cost of the Class II bedding. The contract did not contain a provision requiring RBI to import Class II material; therefore, there was no deletion of work. Further, the contract required that all change orders must be made in writing during construction:

Any claim for an adjustment in the Contract Price shall be based on written notice delivered by the party making the claim to the other party and to ENGINEER promptly (but in no event later than thirty days) after the start of the occurrence or event giving rise to the claim and stating the general nature of the claim. Notice of the amount of the claim with supporting data shall be delivered . . . and shall be accompanied by claimant's written statement that the adjustment claimed covers all known amounts to which the claimant is entitled as a result of said occurrence or event. All claims for adjustment in the Contract Price shall be determined by ENGINEER . . . if OWNER and CONTRACTOR cannot otherwise agree on the amount involved. No claim for an adjustment in the Contract Price will be valid if not submitted in accordance with this paragraph.

Thus, the Court of Appeals concluded that Metro never notified RBI of a change order during the construction of RS3. The change order clause required "written amendment . . . promptly . . . after the start of the occurrence or event giving rise to the [change order] . . . ." Because Metro notified RBI in writing approximately eight months after completion of the Class II bedding installation, Metro did not comply with the change order requirement and its claim was time-barred. Nevertheless, the case was remanded for further proceedings to determine if the parties had modified the contract by their conduct. The court also held that because this portion of the work was a lump sum contract, a change order would not have been appropriate under the circumstances, anyway.

The *Randall & Blake* case demonstrates the difficulties courts face when the project records are not clear as to the parties' intent when negotiating change orders and where the parties have not complied with the strict requirements of the contract in that regard. It is clear that the *Randall & Blake* court was sympathetic to the plaintiff and suggested that the defendant had attempted to use an after-the-fact change order as a substitute for a unit price adjustment to which it was not entitled. Because of the lack of clarity in the project records, the court was unable to rule in the plaintiff's favor, the judgment of the trial court was reversed, and the case was remanded for further proceedings.

## § 17.10 • ADMINISTRATIVE CLAIMS

The operation of administrative procedure clauses is demonstrated in *City and County of Denver v. District Court*.<sup>47</sup> The City and County of Denver ("Denver") hired General Contractor PCL, who in turn hired Corradini under a subcontract to do work at Denver International Airport. The contract between Denver and PCL required that "disputes regarding the contract shall be resolved by administrative hearing under procedures described in Revised Municipal Code Section 56-106." Disputes arose between Corradini and PCL, between PCL and Denver, and between Corradini and Denver. Both PCL and Corradini filed suit against Denver. At issue was whether the contract required Corradini to pursue its claim via administrative hearing or allowed it to maintain its claim in court.

Because Corradini was not a party to the contract between Denver and PCL, its claim existed independently and Corradini was not compelled to submit to an administrative hearing.<sup>48</sup> The court stayed Corradini's claim until completion of Denver and PCL's administrative hearing, though, because the pursuit of the Corradini claim prior to conclusion of the hearing could result in inconsistent determinations.<sup>49</sup>

The obvious lesson from this case is that Colorado courts are not at all reluctant to require parties to use contractually mandated administrative procedures set out in the contract. The clear implication is that the right of parties to contract encompasses the power to agree to a non-arbitration ADR method. Moreover, in order to by-pass such a clause, a party must satisfy stringent guidelines and overcome a presumption in favor of ADR. Even non-parties to a contract requiring administrative review may be affected because of the need to ensure consistent determinations.

### § 17.11 • INSURANCE ISSUES — SUBROGATION

*Town of Silverton v. Phoenix Heat Source Systems, Inc.*<sup>50</sup> is instructive as to some of the complex issues regarding subrogation. The Town of Silverton hired Phoenix Heat Source System to install a new roof with a snow-melting system on the town hall. The dispute arose out of a fire at the town hall 18 months after completion of the roof. Silverton blamed Phoenix for all damages relating to the fire. Silverton's insurer, the Colorado Intergovernmental Risk Sharing Agency, compensated Silverton and reserved from Silverton its right of subrogation for benefits paid due to the fire. The issue was whether Silverton contractually waived its right to subrogate the claim.

AIA 201 1987, § 11.3.5 states,

[I]f after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance . . . .

§ 11.3.7 states,

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants . . . for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work . . . . A waiver of subrogation shall be effective . . . whether or not the person or entity had an insurable interest in the property damaged.

It was determined in *Town of Silverton* that the subrogation clause applied not only to negligence and breach of contract claims, but also to products liability and breach of warranty claims.<sup>51</sup> Further, “[T]he phrase, ‘other property insurance applicable to the Work,’ referred to any property insurance applicable to the work other than that procured under paragraph 11.3.1” and not just builders risk insurance.<sup>52</sup> Under those provisions, the waiver of subrogation in § 11.3.7 has been limited to the value of “the work” (a new roof) only because the contract did not contemplate that mutual exculpation extends to parts of the building not included in “the work” (everything besides the roof). Therefore, Phoenix was only responsible for the cost of replacing the roof.

A waiver of subrogation is intended generally to place parties to the contract essentially in the position of co-insureds. In other words, the parties will not look to each other, but only to the insurance carrier for recovery. However, the extent of such a waiver needs to be spelled out carefully. The *Town of Silverton* case holds that the AIA provision applied only to the scope of work in the contract and not to any other property damage.

## § 17.12 • LIQUIDATED DAMAGES

A good discussion of liquidated damage issues and, even more importantly, the need to allocate and assign responsibilities for delay comes from *City of Westminster v. Centric-Jones Construction*.<sup>53</sup> Project owner, City of Westminster (“Westminster”), sought to recover from Centric-Jones Construction (“Jones”), over problems that arose during the construction of a water treatment plant under various types of remedies and theories of recovery. After Jones completed the Project, the underground five-million-gallon clearwell leaked and caused destabilization of the underlying fill. To fix the clearwell, Westminster hired new engineers who made significant design changes that increased the ultimate cost of construction and time required for completion. The contract clause pertinent to this discussion provided that Jones would pay Westminster \$1,000 per day past the scheduled completion date that the project was not operational. Westminster claimed Jones owed it \$1,994,500 under the liquidated damages clause.

Westminster’s liquidated damages claim failed for two reasons. First, the redesign went past correcting Jones’ errors, and therefore contributed to the delay. A liquidated damage clause is not enforceable when the delay is due in whole or part to the party seeking to collect under the clause. Second, Westminster did not divide the delay between optional redesign and necessary redesign. Therefore, the jury would have had to determine what portion of the delay resulted from Jones’ errors and what part resulted from Westminster’s additions to the project.<sup>54</sup>

Because of courts’ general hostility to a total cost approach to damages, it is fairly obvious that in seeking actual damages for overruns on a construction project, some attempt to apportion damages by the claimant is necessary. This necessity is less obvious in cases where liquidated damages are sought, but under *City of Westminster*, just as necessary.

**§ 17.13 • VOID INDEMNIFICATION PROVISIONS**

Construction contracts and subcontracts usually have indemnification provisions that should be carefully considered.

It has not been uncommon for indemnity clauses to provide that indemnitors indemnify the indemnitees even if the indemnitees are partly at fault. An example:

To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Contractor, the Owner, the Project decision professionals and their respective directors, officers, managers, employees, agents and assigns from and against claims, damages, losses and expenses of every kind and nature whatsoever, arising out of or resulting, in whole or in part, from actual or alleged acts, omissions, or breaches of this Subcontract or the violation of any laws by Subcontractor or any entity or person for whom Subcontractor is legally responsible and regardless of whether or not such claim, damage, loss or expense is caused in part by the fault of a party indemnified under these provisions.

In contracts for construction in Colorado entered into before July 1, 2007, such provisions are probably enforceable, particularly if the language is clear and the contracts were between sophisticated parties.<sup>55</sup>

However, provisions in construction contracts involving improvements to Colorado property entered into after July 1, 2007, that purport to indemnify against an indemnitee's own negligence in personal injury or property damage cases are statutorily rendered void. The intent of the 2007 Colorado statute is to allow indemnification only to the extent of the indemnitor's "... degree or percentage of negligence or fault (or that of its agents, representatives, subcontractors or suppliers)."<sup>56</sup>

A fair and presumably enforceable indemnity provision under the new Colorado statute might read:

To the fullest extent permitted by law, subcontractors shall defend, indemnify and hold harmless Contractor, the Owner, the Project design professionals and their respective directors, officers, managers, employees, agents and assigns from and against claims, damages, losses and expenses of every kind and nature whatsoever arising out of or resulting, in whole or in part, from the actual or alleged acts, omissions, or breaches of this Subcontract or the violation of any laws by Subcontractor or any entity or person for whom Subcontractor is legally responsible, but in instances involving death or injury to persons or damage to property, Subcontractor's indemnity obligations shall not be greater than that represented by the degree or percentage of negligence or fault attributable to Subcontractor or any entity or person for whom Subcontractor is legally responsible.

## NOTES

1. *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916).
2. *Westinghouse Elec. Supply Co. v. Fidelity & Deposit Co.*, 560 F.2d 1109 (3d Cir. 1977) (force account payment method for changes in general contract applied to subcontractor under flow-down clause); *Ehret Magnesia Mfg. Co. v. Gothwaite*, 149 F.2d 829 (D.C. Cir. 1945) (guaranty provisions in general contract were binding upon subcontractor).
3. *J.S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212 (5th Cir. 1973) (arbitration provisions of general contract applied to subcontract); *but see Fanderlik-Locke Co. v. United States ex rel. Morgan*, 285 F.2d 939 (10th Cir. 1960) (Miller Act decision holding that general incorporation of the prime contract in subcontract did not bind the subcontractor to the dispute resolution provisions of the prime contract).
4. *Pierce Assoc., Inc. v. Nemours Found.*, 865 F.2d 530 (3d Cir. 1988).
5. *Gibbons v. Graves Constr. Co.*, 727 F.2d 753 (8th Cir. 1984).
6. *Fisher v. United States*, 299 F. Supp. 1 (E.D. Pa. 1969), *rev'd* 441 F.2d 1288 (3d Cir. 1971).
7. *See Christman Co. v. Anthony S. Brown Dev. Co.*, 533 N.W.2d 838 (Mich. App. 1995); *Gilbane Bldg. Co. v. Brisk Waterproofing Co.*, 585 A.2d 248 (Md. Ct. Spec. App. 1991); *DEC Elec., Inc. v. Raphael Constr. Corp.*, 558 So.2d 427 (Fla. 1990); *Crown Plastering Corp. v. Elite Assoc. Inc.*, 560 N.Y.S.2d 694 (N.Y. App. Div. 1990); *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.*, 477 N.E.2d 30 (Ill. App. 1985).
8. *Compare OBS Co., Inc. v. Pace Constr. Corp.*, 558 So.2d 404 (Fla. 1990), *with DEC Elec.*, 558 So.2d at 427.
9. *Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522 (Colo. 1999).
10. *See Byler v. Great Am. Ins. Co.*, 395 F.2d 273 (10th Cir. 1968); *Midland Eng'g Co. v. John A. Hall Constr. Co.*, 398 F. Supp. 981 (N.D. Ind. 1975); and *Watson Constr. Co. v. Reppel Steel & Supply Co.*, 598 P.2d 116 (Ariz. App. 1979).
11. *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 938 P.2d 372 (Cal. 1997); *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 661 N.E.2d 967 (N.Y. 1995). *See also Shearman & Assoc., Inc. v. Continental Cas. Co.*, 901 F. Supp. 199 (D. Virgin Is. 1995) (*dicta*).
12. *Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522 (Colo. 1999).
13. *Compare U.S. ex rel. Harrington v. Trione*, 97 F. Supp. 522 (D. Colo. 1951) (Miller Act surety not liable under conditional — upon contractor making a profit — payment clause) *with OBS Co., Inc. v. Pace Constr. Corp.*, 558 So.2d 404 (Fla. 1990) (surety liable notwithstanding conditional payment clause) and *Shearman & Assoc.*, 901 F. Supp. at 199 (surety liable).
14. *U.S. ex rel. DDC Interiors, Inc. v. Dawson Constr. Co., Inc.*, 895 F. Supp. 270 (D. Colo. 1995), *aff'd* 82 F.3d 427 (10th Cir. 1996).
15. *Id.* at 274.
16. *See Bishop v. Moore*, 323 P.2d 897 (Colo. 1958).
17. *See A-1 Plumbing & Heating Co. v. 13th Street Corp.*, 616 P.2d 141 (Colo. App. 1980), *modified* 640 P.2d 1130 (Colo. 1982).
18. U.S. Dep't of Housing and Urban Dev., form HUD-92442-A (3/94), *Construction Contract Cost Plus*, Art. 7 (1994).
19. *See VNB Mortgage Corp. v. Lone Star Ind., Inc.*, 209 S.E.2d 909 (Va. 1974); 75 A.L.R. 3d 497 (1974).
20. *See, however, Specialized Grading Enterprises, Inc. v. Goodland*, 2007 Colo. App. LEXIS 2093 (Colo. App. Nov. 1, 2007) (subcontractor may be entitled to *quantum meruit* recovery in some situations).
21. *Hahl v. Langfur Constr. Co.*, 529 P.2d 1369 (Colo. App. 1974) (not selected for official publication); *Kirby Mfg. Co. v. Hinchman-Renton Fireproofing Co.*, 132 Fed. 957 (C.C.D. Colo. 1904).
22. *Marriott Corp. v. Dastru Constr. Co.*, 26 F.3d 1057 (11th Cir. 1994).

23. *Evergreen Pipeline Constr. Co. v. Meritt Meridian Constr. Corp.*, 95 F.3d 153 (2d Cir. 1996); see *Allied Fire & Safety Equip. Co. v. Dick Enters.*, 886 F. Supp. 491 (E.D. Pa. 1995); *Marriott Corp.*, 26 F.3d at 1072 (Paine, J., dissenting); *U.S. ex rel. Seminole Sheet Metal Co. v. SCI, Inc.*, 328 F.2d 671 (11th Cir. 1987); *Castagna & Son, Inc. v. Board of Educ.*, 570 N.Y.S.2d 286 (N.Y. App. Div. 1991).
24. *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364 (N.J. 1992).
25. *Riva Ridge Apartments v. Robert G. Fisher Co., Inc.*, 745 P.2d 1034 (Colo. App. 1987).
26. 1998 *Wiley Construction Law Update* § 1.7 (Aspen Publishers, Inc. 1998).
27. *Id.*
28. *1745 Wazee LLC v. Castle Builders, Inc.*, 89 P.3d 422 (Colo. App. 2003) (owner waived claims for loss of use, including consequential losses due to fire).
29. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004).
30. See, e.g., *Town of Alma v. AZCO Construction, Inc.*, 10 P.3d 1256 (Colo. 2000). The Colorado Supreme Court has held that homebuilders do have independent duties of care that would permit negligence claims by homeowners. *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 867 (Colo. 2005).
31. *BRW*, 99 P.3d at 68.
32. *Id.* at 70.
33. *Id.* at 74.
34. See, e.g., *Town of Alma v. AZCO Construction, Inc.*, 10 P.3d 1256 (Colo. 2000).
35. *BRW*, 99 P.3d at 72-73.
36. *Regents of University of Colorado v. Harbert Construction Co.*, 51 P.3d 1037 (Colo. Ct. App. 2001).
37. *Id.* at 1040.
38. *Id.* at 1041.
39. *Wheeler & Lewis v. Slifer*, 577 P.2d 1092 (Colo. 1978).
40. *Id.* at 1095.
41. *Maryland Casualty Company v. Formwork Services, Inc.*, 812 F. Supp. 1127 (D. Colo. 1993).
42. *Id.* at 1130.
43. *Smit v. Anderson*, 72 P.3d 369 (Colo. Ct. App. 2002).
44. See, e.g., AIA 201, § 3.7.4.
45. *Smit*, 72 P.3d at 375-76.
46. *Randall & Blake, Inc. v. Metro Wastewater Reclamation Distric*, 77 P.3d 804 (Colo. Ct. App. 2003).
47. *The City & County of Denver v. District Court*, 939 P.2d 1353 (Colo. 1997).
48. The court noted that any pass-through claims that Corradini asserted against Denver, through PCL, were subject to the ADR procedures in the contract.
49. *The City & County of Denver*, 939 P.2d at 1370.
50. *Town of Silverton v. Phoenix Heat Source Systems, Inc.*, 948 P.2d 9 (Colo. App. 1997).
51. *Id.* at 12-13.
52. *Id.* at 13.
53. *City of Westminster v. Centric-Jones Constr.*, 100 P.3d 472 (Colo. App. 2003), *cert. granted* Nov. 8, 2004.
54. *Id.* at 481. See also *Medema Homes, Inc. v. Lynn*, 647 P.2d 664 (Colo. 1982) (holding that a liquidated damages clause is an alternative remedy when an injured party seeks to enforce a contract and when that liquidated damage clause addresses delay, the injured party may not recover under it when the delay is due in whole or in part to the fault of the injured party).
55. See *Public Svc. Co. of Colorado v. United Cable Television of Jeffco*, 829 P.2d 1280 (Colo. 1992).
56. C.R.S. § 13-21-111.5(VII)(c).