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Although Unlikely to be Immediately Adopted Elsewhere, A Recent Tennessee Decision Regarding an Owner's Liquidated Damage Claim Should Serve as a Wakeup Call

A Tennessee Court of Appeals recently held that liquidated damages under an AIA Contract (A201 -1997 Gen. Conditions) are neither automatic nor self-executing. *RCR Building Corp. v Pinnacle Hospitality Partners*, 2012 WL 5830587 ("*RCR*"). The Court went on to hold that a liquidated damage claim is a "claim" as defined by the Contact that must be asserted in a timely manner or waived. Although this decision highlights the perils of waiting until project completion to assert a liquidated damage claim and, conversely, the better practice of preserving and/or exercising such claims upon the passage of the agreed completion date, a closer look at the facts and authority upon which the Tennessee Court rests its decision would indicate that similar decisions in other jurisdictions are unlikely.

The *RCR* case involved a contract for the construction of a hotel after which the Owner refused to make final payment claiming, among other things, that it was entitled to withhold $237,000 in liquidated damages because the project was not completed on time. The General Contractor claimed that the Owner waived liquidated damages because it failed to make a timely claim as required by the Contract.

The Owner admitted to causing a substantial portion of the delays and to making scope changes after the passage of the original completion date, thus causing additional delay. The Owner further admitted that it did not provide notice of its intent to assert liquidated damages until after the parties had negotiated and agreed upon a final payment amount. The Owner went on to argue, however, that it was irrelevant whether it caused the delays as it was entitled to liquidate damages as a matter of law because the Contractor never sought nor was it granted an extension pursuant to the claim procedures of the Contract. In an exercise of "what's good for the goose …", the Court held that liquidated damages are a form of "claim" under the Contract and because the Owner did not make its claim within 21 days of the facts giving rise to the claim, its claim for liquidated damages was waived (just as the General Contractor waived its claim for additional time).

In light of the Owner's somewhat opportunistic approach to wrapping up the project, it would appear that the Tennessee Court went out of its way to justify its arrival at what could be argued to be a purely equitable resolution. In doing so, it notes that it is aware of only one other court that had arrived at the same conclusion. *A. Hedenberg and Co. v. St Luke's Hospital of Duluth*, No. C7-95-1683, 1996 WL 146732 (Minn. Ct. App. Apr. 2, 1996).

Just as there was no wholesale adoption of the Minnesota decision, it would appear, based on the facts upon which the Tennessee decision rests, that the Tennessee decision is not likely to be the subject of wholesale adoption elsewhere. Nonetheless, project owners should view this recent decision as a wakeup call regarding the effects of failing to preserve claims and as to the effects of proceeding with lacking transparency.