Contract Damages

Failure to perform

Indiana law generally provides damages for a breach of a construction contract amounting to the "benefit of the bargain". *Berkel & Company Contractors, Inc. v. Palm & Associates*, 814 N.E.2d 649, 660 (Ind. App. 2004); *INS Investigations Bureau, Inc. v. Lee*, 784 N.E.2d 566 (Ind. App. 2003). Such a benefit is determined by the reasonable cost of completion of the contract or those damages actually suffered and reasonable expenses incurred as a natural consequence of the breach, including, "damages for delays, for economic loss resulting from breach of contract, for loss of full use and enjoyment of property occasioned by breach, and for probable cost for future repairs". *Orto v. Jackson*, 413 N.E.2d 273, 278 (Ind. App. 1980); *See Fowler v. Campbell*, 612 N.E.2d 596, 603 (Ind. App. 1993); *J.E. Pierce v. Drees*, 607 N.E.2d 726, 729 (Ind. App. 1993); *Johnson-Johnson v. Farah*, 108 N.E.2d 87, 639 (Ind. App. 1952); *Merrillvill Conservancy Dist. v. Atlas Excavating*, 764 N.E.2d 718, 724 (Ind. App. 1940). These costs can include any fairly defined and reasonably measurable standards, such as, "cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances." *Fowler*, 612 N.E.2d at 603. In general, the court acts to return the injured party to the position it would be in had the breach not occurred, but may not act to place the party in a, "better position than it would have enjoyed had the breach not occurred." *Whitaker v. Brunner*, 814 N.E.2d 288, 296 (Ind. App. 2004) ("When injured by a breach of contract, a party's recovery is limited to the loss actually suffered. Such party may not be placed in a better position than he or she would have enjoyed if the breach had not occurred."); *Abbey Villas Development Corp. v.*

Site Contractors, Inc., 716 N.E.2d 91, 102 (Ind. App. 1999); *Sheppard v. Smith*, 749 N.E.2d 609 (Ind. App. 2001). These damages are measured according to an objective test of what a reasonable person would foresee as the potential liability stemming from the contractual relationship. *Fairfield Development, Inc. v. Georgetown Woods Sr. Apartments Ltd. Partnership*, 768 N.E.2d 463, 474 (Ind. App. 2002) ("Generally, the measure of damages for breach of contract is either such damages as may fairly and reasonably be considered as arising naturally from the breach itself, or as may be reasonably supposed to have been within the contemplation of the parties at the time they entered into the contract as a probable result of the breach."). However, an injured party must act to mitigate any damage incurred to the extent reasonable. *Berkel*, 814 N.E.2d at 660; *J.E. Pierce*, 607 N.E.2d at 729. Failure to mitigate must be proven by the breaching party by a preponderance of the evidence as an affirmative defense. *Id.*

An injured party may also seek damages for consequential damages such as lost profits caused by the breach, assuming, "evidence is sufficient to allow the trier of fact to estimate the amount with a reasonable degree of certainty of certainty and exactness". *Clark's Pork Farms v. Sand Livestock Systems, Inc.*, 563 N.E.2d 1292, 1298 (May receive damages for the lost profits as well as cost to bring structure into accordance with contract); *See Berkel*, 814 N.E.2d at 659; *Orto*, 413 N.E.2d at 278; *Uebelhack Equipment, Inc. v. Garrett Bros., Inc.*, 408 N.E.2d 136, 140 (Ind. App. 1980). "Lost profits need not be proven with mathematical certainty, the evidence must be, however, sufficient to allow a trier of fact to estimate the actual amount of profits lost with a reasonable degree of certainty and exactness." *Uebelhack Equipment*, 408 N.E.2d at 140.

When legal damages are insufficient to genuinely remedy the injury caused by the breach, specific performance is a possible, but extremely rare, remedy. *Kesler v. Marshall*, 792 N.E.2d 893, 896 (Ind. App. 2004). However, specific performance is considered an equitable remedy, which may not be granted when an adequate method of relief exists in law which serves to compensate the injured party. *Id.* at 897, *Porter v. Bankers Trust Co. of California, N.A.,* 773 N.E.2d, 901, 908 (Ind. App. 2002). Thus, only when legal damages fail to adequately or effectively remedy the harm caused by the breach may the court impose a remedy of specific performance. *Id.* ("Where substantial justice can be accomplished by following the law, and the parties actions are clearly governed by rules of law, equity follows the law.")

Additionally, there is a possible available remedy of "total economic loss" damages in very specific and rare circumstances, in which damages are determined by, "subtracting the contract amount from the total cost of performance." *Northrop Corp. v. General Motors Corp.*, 807 N.E.2d 70, 101 (Ind. App. 2004). It is unclear whether Indiana law would allow this measure of damages, as the only case decided in Indiana allowing such damages involved an application of California law. *Id.* However, assuming total cost damages are allowed in Indiana, a court may only apply total cost damages through the application of a four-part test. *Id.* "A jury may be permitted to award damages under the total cost methodology, but the plaintiff must 'establish (1) the impracticality of proving actual losses directly; (2) the plaintiff's bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs.'" *Id.*, citing *Amelco Electric v. City of Thousand Oaks*, 38 P.3d 1120, 1129 (Cal. 2002).

Defective Performance

The damages for a breach of a construction contract due to defects in the performance of the contract are measured as the cost to reasonably repair the defective work and bring the work up to the level required in the contract. *J.E. Pierce*, 607 N.E.2d at 729; *Gough Construction Company, Inc. v. Tri-State Supply Company*, 493 N.E.2d 1283, 1284-85 (Ind. App. 1986); *Sanborn Electric Company v. Bloomington Athletic Club*, 433 N.E.2d 81, 87 (Ind. App. 1982). Additional damages may also arise in defective performance claims, such as the additional costs to maintain or repair defective structures that would not exist had the work been completed adequately. *4-D Buildings, Inc. v. Palmore*, 688 N.E.2d 918, 921 (Ind. App. 1997) (Costs for concrete sealer and a heat source for repair crews forced to work in undesirable conditions held to be valid remedies for defective construction breach.) However, if repairs to the work are either not feasible or would constitute an "economic waste", the damages are the difference between the value of the contracted work had it been completed in accordance with the contract subtracted from the value of the work as currently done. *J.E. Pierce*, 607 N.E.2d at 729; *Willie's Construction Company, Inc. v. Baker*, 596 N.E.2d 958, 962 (Ind. App. 1992); *Gough Construction*, 493 N.E.2d at 1284-85 (Waste exists when, "compliance with original contract would require that a substantial portion of the work be 'undone'"); *James I. Barnes Construction Co. v. Washington Township of Starke County*, 184 N.E.2d 763, 766 (Ind. App. 1962). The measure for economic waste is whether the repairs would require the removal of a substantial portion of the structure to be rebuilt, in such a manner as that it would be more efficient to start the entire work over. *Willie's Construction*, 596 N.E.2d at 962 ("Economic waste exists only when the cost to repair

measure for damages would result in unreasonable duplication of effort. Further, economic waste is not present and the difference in value measure cannot be used unless the building would be substantially destroyed by completely remedying the defects." citing, *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.* 603 P.2d 513, 524-525 (Ariz. 1979)). The burden of showing economic waste is on the breaching party, who must show that it is impossible to remedy the defects without substantial duplication of the work, and thus damages should be limited to the difference in value of the work as contracted and the work as performed. *Willie's Construction*, 596 N.E.2d at 962.

Delay Damages

If the breach of the contract stems from a delay of the completion time, damages are measured as value of the use of the structure during the time the plaintiff was deprived of it, generally arising as the fair rental value of the structure for the time the injury existed. *Johnson-Johnson, Inc. v. Farah*, 108 N.E.2d 638, 639 (Ind. App. 1952) ("The general rule of law is well settled that the measure of damages for breach of a construction contract is the reasonable cost of completion, and that in event of long and unreasonable delay damages for loss of use may, under some circumstances, also be awarded."); *Cleveland, C., C. & St. L. Ry. Co. v. Joyce*, 103 N.E. 354, 357 (Ind. App. 1913); *Jay Clutter Custom Digging v. English*, 393 N.E.2d 230, 233 (Ind. App. 230); *Berkey & Gay Furniture Co. v. Hascall*, 24 N.E. 336, 338 (Ind. 1980) (Damages limited to "actual loss", which is the loss of use of a contracted object for the time of the breaching delay); *Singer v. Farnsworth*, 2 Ind. 597, *2 (1851) (Damages limited to use of product for the time delay occurred). Additionally, one may seek damages amounting to those costs arising directly from the delay, such as the rental of alternate premises or

equipment. *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 205 (C.A.7 1985) (Assuming they could show costs with adequate specificity, subcontractor would have been able recover for the rental value of tools and equipment left unused during delay caused by main contractor.); *Cleveland, C., C. & St. L. Ry. Co. v. Joyce*, 103 N.E. 354, 357 (Ind. App. 1913). These costs must be, "susceptible of ascertainment in some manner other than by mere conjecture, speculation or surmise. *Jay Clutter*, 393 N.E.2d at 233. Thus, awards for lost profits are looked upon warily by the court, as they are not reasonably certain enough to base an award of damages upon. *Id.* at 233-34 (loss of corn crop and resulting profits not reasonably certain to be caused by delay, and thus not viable as computation of damages.); *Berkey*, 24 N.E. at 338. If the specific contracted item is unusable at the time of the delay, damages for delay of completion are limited to the interest bearing ability of the funds already paid for the completion of the project, as rental or usage values are nil. *Wood v. Joliet Gaslight Co.*, 111 F. 463 (C.A.7 1901) (When item at issue is only usable during winter months, in the absence of evidence of special damages, defendant is entitled to recoup, as damages against the unpaid balance of the contract price, a sum at least equal to the legal interest on the monies and property invested in the project for those times when the object would have been unusable).