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Contractual Limitations of Liability Clauses Are Enforced as Written

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Commercial parties are entitled to limit the damages recoverable in the event of a breach, and contract clauses limiting such damages will be afforded their plain meaning, and enforced by courts as written. These are two of the lessons for contractors imparted by *Potomac Constructors v. Efco*, a 2008 decision by the United States District Court of Maryland.

Potomac was the general contractor on a Maryland State Highway Administration contract to replace and construct the Maryland approach spans of the Woodrow Wilson Bridge. Potomac entered into a purchase order agreement with Efco to engineer and supply steel formwork for the bridge.

Potomac sued Efco for \$13 million, alleging that the entire project was delayed due to late deliveries by Efco, and due to the poor quality of Efco's formwork. At issue before the Court was the recoverability of these damages, which turned upon the interpretation and enforceability of two clauses in the "warranty and conditions" provision of the Potomac-Efco purchase order agreement.

The first clause stated that Efco's liability was limited to the charges, expenses costs and damages expressly provided for in the agreement; that Efco's liability was strictly limited to the repair or replacement of defective material; and that Efco was not liable for any other incidental, indirect or consequential damages. The Court ruled that under Maryland law, the parties to a contract are free to limit the damages recoverable in the event of a breach, and that such freedom may be used to exclude the recoverability of consequential and incidental damages, provided that the exclusion is not unconscionable.

Since the Potomac-Efco agreement specifically disallowed incidental or consequential damages, and given that Potomac did not argue that the disallowance was unconscionable, the provision was valid, and Potomac's recovery was limited to the cost to repair or replace the allegedly defective work.

The Court rejected Potomac's argument that the repair or replacement clause of the purchase agreement was unenforceable under the Maryland Commercial Code, which prohibits a remedy which "fails of its essential purpose." The Court noted that this rule arises only when a party is unable or

unwilling to make required repairs, and thus had no application to the case before it, in which the defective formwork was actually repaired. Document hosted at JDSupra
<http://www.jdsupra.com/post/documentViewer.aspx?fid=546e0940-603c-4452-a5f9-97f0>

The second clause of the purchase agreement stated that Efco would use all reasonable means to deliver materials within the time specified, but assumed no liability for loss or damage arising from delay, or from non-fulfillment of the contract due to fires, strikes or other causes beyond its control. Potomac urged the Court to read the clause to only exclude damages for delays stemming from the specifically enumerated causes of fires, strikes, etc. The Court held that the word "delay" was not modified by the phrase addressing fires and strikes, but rather was part of a separate and distinct phrase that, by its plain meaning, barred Potomac from seeking damages for delay.

Finally, the Court noted that while the purchase order agreement clearly obligated Efco to indemnify Potomac for claims by third parties caused by Efco's negligence, such language could not be used to "circumvent" the liability exclusions of the "warranty and conditions" provision, and thus did not permit Potomac to seek reimbursement for claims by third parties caused by delays in Efco's deliveries.

Bridges and contracts, observed the Court in *Potomac Constructors v. Efco*, have many things in common: "They both unite people, they both make commerce possible, and they both need to be put together very carefully." A further reality shared by bridges and contracts is that when they are not put together carefully, the consequences can be dire, if not catastrophic. In order to avoid the fate of the plaintiff in *Potomac Constructors v. Efco*, parties should carefully draft, read and understand contract provisions, and take all steps necessary to ensure that such provisions clearly and accurately set forth the parties' respective rights and obligations.

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