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LIQUIDATED DAMAGES FOR DELAY IN COMPLETION OF COMMERCIAL CONSTRUCTION PROJECTS: ARE THEY RECOVERABLE BY THE OWNER WHEN THE OWNER CONTRIBUTES TO THE DELAY?

Rocky Unruh*
John Worden**

I. INTRODUCTION

As those who litigate construction cases can attest, it is frequently difficult and costly to determine the actual damages sustained by an owner when its commercial construction project is completed late. For this reason, commercial construction contracts often contain a provision for liquidated damages in the event of a delay in completion of construction. Typically, these provisions require the general contractor to pay a predetermined amount of damages to the owner—usually calculated on a "per diem" basis—if the contractor fails to complete the project by the agreed-upon date.1

If the general contractor or its subcontractors are the sole cause of the delay, then enforcement of the typical liquidated damages clause is simple: The number of days of delay

1. The type of liquidated damages clause whereby a specific amount of liquidated damages is awarded for each day of delay is commonly referred to as a "per diem" liquidated damages clause. For example, a typical per diem liquidated damages provision might provide that the general contractor pay the owner/developer $10,000 for each calendar day that construction is ultimately completed behind schedule. See JERVIS & LEVIN, CONSTRUCTION LAW: PRINCIPLES AND PRACTICE 10 (1988).

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is multiplied by the "per diem" amount to determine the total liquidated damages, which the owner then usually deducts from the retention owed to the contractor. If, however, as is more often the case, the owner or the owner's consultants contribute to the delay in the completion, then enforcement of the clause becomes problematic for several reasons. First, scheduling experts for the owner and contractor typically disagree over complex issues of causation and concurrency of delay. For example, the parties argue over who caused how much of the construction delay. Also, the state of the law itself is uncertain as to whether the owner can recover any liquidated damages from the contractor, even though the contractor admittedly caused some of the delay. This article examines the general state of California law on the issue of liquidated damages. Specifically, the article focuses on whether, and to what extent, liquidated damages provisions in commercial construction contracts can be enforced against the contractor when the owner has contributed to the delay in completion of construction. The article analyzes conflicting California appellate decisions in this area. Some courts have refused altogether to award the owner liquidated damages, while others have been willing to apportion the damages based roughly on the comparative fault of the owner and contractor. This article also examines selected decisions on these issues from other jurisdictions, and concludes by offering suggestions on how owners and general contractors might avoid the existing uncertainty in the law by carefully drafting liquidated damages provisions.

II. THE TYPICAL CONSTRUCTION PROJECT

Contracts for commercial construction can vary significantly, depending on the size and nature of the project. However, for the purpose of discussion within this article, imagine

2. Compare Gogo v. Los Angeles County Flood Control Dist., 114 P.2d 65, 70 (Cal. Ct. App. 1941) (refusing to award owner liquidated damages) with Jasper Constr., Inc. v. Foothill Junior College Dist., 153 Cal. Rptr. 767, 774 (Cal. Ct. App. 1979) (holding that owner should have been allowed to recover some liquidated damages even though owner caused some of the delay in completion). See also discussion infra text accompanying notes 22-37 and 148-160.

3. See Gogo, 114 P.2d at 70.


5. See generally Jervis & Levin, supra note 1.
the following hypothetical construction project, based on a commonly used form agreement that incorporates a provision for *per diem* liquidated damages.

Assume that a real estate developer (hereinafter "Owner") wishes to build a commercial office building on its own property. Owner retains an architect (hereinafter "Architect") and all appropriate consultants. Owner solicits bids from general contractors and awards the job to one such entity (hereinafter "Contractor"). Owner and Contractor sign a "Standard Form of Agreement Between Owner and Contractor," which, as the name implies, is a form agreement authored by the American Institute of Architects used commonly on large commercial construction projects.\(^6\) The contract provides for a guaranteed maximum construction cost of $60 million. The completed building will have approximately 500,000 square feet of rentable space.

Owner agrees that Architect, Owner's agent under the contract, will ensure that all project plans, drawings, and specifications conform to any and all applicable municipal requirements. Contractor agrees that the project will take two years to build, and that it will be "substantially complete" by January 1, 1995. The contract defines "substantial completion" as that date on which a temporary certificate of occupancy (hereinafter "TCO") for the building is obtained from the relevant municipal bodies. If the project is not complete by that date, the contract provides for *per diem* liquidated damages as follows: "Liquidated Damages: Contractor shall pay Owner $15,000 per day for each day that substantial completion is delayed beyond January 1, 1995." Finally, the Standard Form Agreement's "General Conditions" state that the Contractor is entitled to extensions of time where "the Contractor is delayed . . . by any act of neglect of the Owner . . . or by any other cause which the Architect determines may justify the delay . . . ."\(^7\)

A short time after the construction contract is signed, Owner negotiates a favorable lease agreement with Tenant. Anticipating that the building will be substantially complete on January 1, 1995, Tenant agrees to lease the entire building at a rental rate of $1,500,000 per month, and is to be

\(^6\) American Institute of Architects, General Conditions of the Contract for Construction § 8.3.1 (1976).

\(^7\) Id.
given possession and full access to the building beginning on February 1, 1995, when rental payments will commence.

On October 1, 1992, with demolition and excavation complete, Contractor begins construction according to the plans and specifications provided by Architect. Construction begins as scheduled on January 1, 1993, but does not run smoothly. Contractor experiences a number of delays in construction for which it is ultimately responsible, including defaults by certain of its subcontractors and delays caused by Contractor's own failure to competently schedule the work.

It is now January 1, 1995, the date the building is to be substantially completed. Construction is not complete due to the various delays caused by Contractor and its subcontractors.

On February 1, 1995, Tenant's lease with Owner is scheduled to begin. As the building has not yet obtained a TCO, Tenant cannot inhabit the building, and Tenant is not, therefore, obligated to pay its $1,500,000 monthly rent.

On April 1, 1995, during final building inspections, municipal inspectors discover that the building fails to conform with certain municipal requirements resulting from Architect's failure to properly design the project. The city inspectors order that certain substantial modifications be made before a TCO is granted.

On July 1, 1995, Contractor finishes the modifications necessitated by Architect's improper design. The city inspectors grant a TCO. The building is now "substantially complete," albeit six months late. Tenant moves in immediately and begins paying its $1,500,000 monthly rent. The Owner did not receive any rent for February through June, as Tenant was precluded from occupying the premises during that period of delay.

Owner files a lawsuit against Contractor for breach of contract in order to recover damages relating to the building's late completion. At trial, the parties and their respective experts agree on the following:

1. The building was completed 180 days after the agreed-upon date;
2. Architect failed to design the building in compliance with applicable municipal requirements;
3. The modifications necessitated by Architect's negligent design took three months to complete;
4. Contractor is responsible for all other delays;
5. Contractor would have substantially completed the building only three months late had it not been for Architect's negligent design;
6. Had Architect's design been proper, the building still could not have obtained a TCO by January 1, 1995 due to the Contractor's delays;
7. Had Contractor timely completed its work, the building still would not have obtained a TCO on January 1, 1995 once the design inadequacies were discovered;
8. Had there been adequate design or no Contractor-caused delays, the building would have been substantially complete by January 1, 1995, and Tenant could have begun its occupancy on February 1, 1995 as scheduled;
9. Owner's actual damages during the delay period are $7,500,000; and
10. The total per diem liquidated damages are $2,700,000 (180 days x $15,000 per day).

Owner argues, however, that while it may have been responsible for some delay, the delay is irrelevant. Owner argues that Contractor contracted to finish work by January 1, 1995, and that due to Contractor's own delays the project would have under no circumstances been substantially complete by that date, notwithstanding any acts or omissions on Owner's part.

Contractor's argument mirrors that of Owner. Contractor contends that even if its own work had run smoothly, the Owner-caused delay would have made it impossible for a TCO to have been granted by January 1, 1995, per the contract, or even by February 1, 1995, the date on which Tenant was to begin its tenancy. Accordingly, Contractor contends that Owner should be precluded from recovering any damages whatsoever.

To what, therefore, is Owner entitled?
1. $2,700,000 in liquidated damages, covering the entire 180 days of delay?
2. $1,350,000 in liquidated damages, based on a finding that Owner caused fifty percent, or three months, of the total delay in completion?
3. No liquidated damages, but all (or some portion) of its $7,500,000 in actual damages?
4. No liquidated or actual damages, based on a finding that because the building could not have been substantially complete by January 1, 1995, due in part to acts of the Owner, Owner is precluded from recovering any damages?

As will be discussed below, before 1978, Owner probably would have been precluded from recovering any liquidated damages due to its comparative fault, but at the same time would have been allowed to recover all (or some portion) of its actual damages. After 1978, the resolution of the issue in this manner is no longer so assured.

III. DISCUSSION

A. California Law Governing Liquidated Damages Clauses—California Civil Code Section 1671

In California, contractual provisions for liquidated damages have been governed by statute for more than a century. Before 1978, those statutes — Civil Code sections 1670 and 1671 — "expressed a strong public policy against liquidated damages provisions," declaring such provisions "void" unless used in cases where it was "impracticable or extremely difficult" to determine the amount of actual damages sustained as a result of the contract breach. As a result of this legislative sentiment, courts were generally reluctant to enforce liquidated damages clauses, and litigation over these clauses usually centered on whether it was, in fact, "impracti-

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9. See CAL. CIV. CODE §§ 1670, 1671 (both of these statutes were first enacted in 1872).


11. Former CAL. CIV. CODE § 1670 read as follows: "Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Rice v. Schmid, 115 P.2d 498, 499 (Cal. 1941) (quoting CAL. CIV. CODE § 1670 (West 1985)). Former California Civil Code Section 1671 read as follows: "The parties to the contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Id. (quoting CAL. CIV. CODE § 1671 (West 1985)).
LIQUIDATED DAMAGES

As evidence of their reluctance to enforce these provisions, the courts imposed upon proponents of liquidated damages the additional burden of proving that the parties, when negotiating the contract, made a "reasonable endeavor" to state an amount of liquidated damages that bore a "reasonable relationship" to actual damages. As evidence of their reluctance to enforce these provisions, the courts imposed upon proponents of liquidated damages the additional burden of proving that the parties, when negotiating the contract, made a "reasonable endeavor" to state an amount of liquidated damages that bore a "reasonable relationship" to actual damages.

Effective July 1, 1978, however, section 1670 was repealed and section 1671 was amended to provide, in relevant part: "[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." With the enactment of this section, "a new general rule favoring the enforcement of liquidated damages provisions" came into being.

While a number of California decisions, both before and after 1978, have interpreted the validity of liquidated damages provisions in the context of a construction contract, only a handful have ever attempted to delineate a standard for awarding liquidated damages where the party seeking recovery under the provision (usually the owner) is partially or wholly responsible for the delay giving rise to the liquidated damages.

Further, decisions that addressed this matter have been anything but consistent. In Vrgora v. Los Angeles Unified School District, one of the most recent cases to address this issue, the court found "[t]here appears, at present, to be a split of authority regarding enforcement of liquidated damages when fault for delay can be apportioned between the parties . . . ."

Both the line of cases allowing apportionment of liquidated damages and the line of cases refusing apportionment

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14. CAL. CIV. CODE § 1671(b) (West 1985).
15. Id. (as quoted in Law Revision Commission Comment to 1977 amendment). The new general rule did not apply only where enforcement was sought "against a consumer in a consumer case." Id.
18. Id. at 135.
continue to hold precedential, albeit suspect, value for several reasons. First, Vrgora failed to reconcile the conflict. Second, there are numerous inconsistencies in the relevant cases. Third, the effect of section 1671's amendment remains undefined.

B. California Appellate Decisions Refusing to Apportion Liquidated Damages Where Both Parties Are Responsible for Delay

1. Gogo v. Los Angeles County Flood Control District and London Guarantee v. Los Lomitas School District: All or Nothing

The seminal case refusing apportionment of liquidated damages is Gogo v. Los Angeles County Flood Control District. In Gogo, a plaintiff contractor entered into a contract with the defendant flood control district for excavation and construction work on a dam. Following the completion of construction, the district withheld liquidated damages from its final payment to the contractor based on the contractor's failure to complete the work in a timely manner. Although the contract provided the work was to be completed within 120 days, the contractor took 369 days to finish the job. The contract provided for per diem liquidated damages of fifty dollars for every day of delay. The district withheld $12,450 for 249 days of delay. The evidence demonstrated, however, that the first forty days of delay were caused by the district's failure to clear the worksite to allow the contractor to begin work, and another forty days of delay were caused by inaccuracies in the district's plans and specifications.

The district contended it was entitled to keep the liquidated damages, because, even discounting the delay caused by the district's acts, the contractor would not have completed

19. See id.
20. See generally infra text accompanying notes 96-111.
23. Id. at 66.
24. Id. at 70.
25. Id.
26. Id.
28. Id.
the job within 120 days. The district asked the trial court to apportion the amount of delay attributable to each and fix damages accordingly. The trial court refused the district’s request and ordered the district to return to the contractor the entirety of the liquidated damages withheld by the district.

The court of appeal affirmed, stating:

The correct rule is that where such delays are occasioned by the mutual fault of the parties the court will not attempt to apportion them but will refuse to enforce the provision for liquidated damages. There is no way for summing up the defaults of each and apportioning the damages to them, but the whole must be allowed or none; and, as all cannot be, none must be.

The court of appeal stated that “[b]y its own act [the district] rendered performance within the time limited by the contract impossible and has therefore lost its right to claim the liquidated damages provided in the contract.”

Gogo closely resembles the facts in our hypothetical. In our hypothetical, Contractor completed construction after the agreed-upon date for substantial completion, as the contractor had done in Gogo. Both our Contractor and the contractor in Gogo were responsible for a substantial portion of the delay. In each case, the contractor would not have timely completed construction even discounting the delay caused by the other party. Nonetheless, the court in Gogo pronounced that where an owner is responsible for any delay, that owner cannot recover liquidated damages. According to Gogo, Owner in our hypothetical cannot recover any of the $2,700,000 of liquidated damages at issue.

29. Id. at 70.
30. Id.
31. Id.
33. Id. at 71 (citing King Iron Bridge & Mfg. Co. v. City of St. Louis, 43 F. 768 (C.C.D.Mo. 1890)).
34. Id. at 70.
35. Id.
36. Id.
The first case to comment on *Gogo* was *London Guarantee & Accident Co. v. Las Lomitas School Dist. of San Mateo County*. The plaintiff, London Guarantee, was the bonding company of a defaulted contractor. London Guarantee sued the defendant school district to recover an amount retained by the district pursuant to a *per diem* liquidated damages clause in a contract for construction of an elementary school. The trial court determined that all delay was the responsibility of the contractor and dismissed the complaint. The court of appeal agreed that the contractor caused all delay. The court held that the district was justified in retaining liquidated damages for the number of days the contractor delayed substantial completion. The court of appeal cautioned, however, that had the district caused some delay, the decision in *Gogo* would have prevented the district from recovering liquidated damages: "If the trial court had found that there was fault on the part of the school district it would not have allowed the school district to retain any liquidated damages." The *Gogo* rule was well on its way to entrenchment in California commercial contract law.

One must note, however, that throughout *Gogo* and the cases that follow there is an overriding, implicit adherence to the equitable maxim of "unclean hands." It has long been true that in *equity* actions, "one who seeks equity must do equity." As stated above, before the 1978 amendment to Civil Code section 1671, California case law and legislation exhibited a strong bias against liquidated damages provisions. Liquidated damages were seen as an extraordinary remedy, and appropriate only where the benefiting party deserved extraordinary equitable relief. *Gogo* and its progeny manifest

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39. Id.
40. Id.
41. Id.
42. Id. at 600.
44. Id. at 599.
45. See, e.g., Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 478-79 (9th Cir. 1969), and cases cited therein.
46. See supra text accompanying notes 9-15.
47. See supra text accompanying notes 9-15.
LIQUIDATED DAMAGES

this bias against liquidated damages. As will be discussed below, whether this bias will survive the amendment to section 1671 remains uncertain.

2. Peter Kiewit Sons' Co. v. Pasadena City Junior College District: The California Supreme Court's Only Guidance

The next case to address the issue, and the only California Supreme Court decision to analyze the matter, was Peter Kiewit Sons' Co. v. Pasadena City Junior College District. In Kiewit, the plaintiff contractor entered into a contract with the defendant, a junior college district, for the construction of school facilities. Following late completion of the project, the district withheld final payment based on a per diem liquidated damages clause. The trial court refused to allow the district to retain any of the liquidated damages, after finding that late completion was caused by matters beyond the contractor's control, including the district's own conduct.

Curiously, the California Supreme Court affirmed without referencing Gogo. Rather, the court relied heavily on California Civil Code section 1511(1), which provides that "any delay in the performance of an obligation 'is excused' when performance is delayed by 'the act of the creditor ... even though there may have been a stipulation that this shall not be an excuse.'" The court determined that:

[A]n owner who is a party to a construction contract is a creditor within the meaning of section 1511 ... [and] in the absence of a contractual provision for extensions of time, the rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay

48. See supra text accompanying notes 22-47 and infra text accompanying notes 62-111.
50. Id. at 19.
51. Id.
52. Id. at 20.
53. CAL. CIV. CODE § 1511 (West 1982) (although this section was amended in 1965, the amendment did not affect that part of the statute relied upon in Kiewit).
to which he has contributed, even though the contractor 
has caused some or most of the delay.55

Much of what was added to the analysis in Kiewit has 
been rendered obsolete by provisions that are now typically 
included in construction contracts.66 The Kiewit contract did 
not allow the owner to grant the contractor extensions of time 
for completion.57 Construction contracts used today, however, 
routinely provide that an owner shall grant extensions to the 
agreed-upon substantial completion date where the owner (or 
some other cause beyond the contractor's control) has delayed 
the contractor's ability to perform pursuant to the stipulated 
timetable.58 Although section 1511 does not appear to explicit-
ly limit itself to situations where the contract at issue lacks 
such a provision, the California Supreme Court, in Kiewit, 
clearly focused on this fact.59 While the court did not explicit-
ly limit the application of section 1511 to cases in which the 
contract had no provision for extensions of time, it is notable 
that Kiewit is cited in substance in only one other case — a 
case involving a construction contract lacking such a 
provision.60

As stated above, the American Institute of Architects' 
"General Conditions of the Contract for Construction," used 
in our hypothetical, provide that the owner may grant the 
contractor an extension where the contractor is delayed by 
the owner's neglect.61 Thus, the issue today is not whether 
the owner may grant such an extension, but whether the con-
tractor is entitled to an extension. As is the case in our hypo-
thetical, much of the litigation in this area involves situations 
where an owner disputes that it caused any delay, disputes 
that it should have granted such an extension, or contends 
that any such delay either did not cause or was only a minor 
cause of the contractor's failure to complete work under the 
terms of the contract. Thus, in construction practice today, 
Kiewit is the only California Supreme Court guidance on the

55. Id. at 20 (citing 5 SAMUEL WILLISTON, ON CONTRACTS 764 (3d ed. 1961)).  
56. See supra text accompanying note 7.  
58. See generally, JERVIS & LEVIN supra note 1.  
61. See supra note 7 and accompanying text.
issue, and Kiewit appears to be of little assistance in resolving the issues presented when both the owner and the contractor contribute to the delay in completion of the project.

3. Aetna Casualty Co. v. Board of Trustees of Rincon Valley Union School District: The Specter of Actual Damages

The next case in the Gogo line is Aetna Casualty & Surety Co. v. Board of Trustees of Rincon Valley Union School District, 62 where the defendant school district contracted with the plaintiff contractor for the construction of an elementary school. The agreement contained a fifty-dollar per diem liquidated damages provision. 63 The district withheld liquidated damages for 125 days of delay, and the contractor filed suit to recover that sum. 64 The trial court determined that although the contractor was somewhat "dilatory" in its work habits, the district, by its own delay in processing change orders and providing architectural drawings, rendered performance by the contractor impossible within the time agreed to by the parties. 65 The trial court found that the district's neglect caused ninety-five days of delay. 66 Therefore, the court apportioned the liquidated damages, allowing the district to retain liquidated damages for only thirty days of delay. 67

On appeal, the district contended, as does Owner in our hypothetical, that since the contractor by its own conduct would not have completed the project by the stipulated substantial completion date, the district should be allowed to retain all liquidated damages, even though the district's conduct caused further delay. 68

The court of appeal disagreed with the district, stating that the test is whether the contractor could have completed work on time given the delays caused by the district. 69 After determining that the contractor could not have completed the

63. Id. at 766.
64. Id.
65. Id. at 767.
66. Id.
68. Id.
69. Id.
work on time, the court of appeal reasoned as follows: "Liqui-
dated damages are a penalty not favored in equity and should
be enforced only after he who seeks to enforce them has
shown that he has strictly complied with the contractual req-
uisite to such enforcement." Based on this reasoning, the
court of appeal reversed the trial court's award of apportioned
liquidated damages, and ruled that the district was not ent-
titled to retain any liquidated damages whatsoever.

The holding in Aetna appears to be very favorable for
Contractor. Applying the court of appeal's test — whether
Contractor could have completed the work on time given the
delays caused by Owner — the conclusion would clearly be
negative. Due to the problems with the design, Contractor
could not have completed the work by January 1, 1995, even
if Contractor had performed in an exemplary manner. Under
Aetna, the fact that Contractor would still have finished late,
even in the absence of the inadequate drawings, appears ir-
relevant. According to the Aetna court, Owner would there-
fore be precluded from recovering any of the $2,700,000 in
liquidated damages. Unfortunately for Contractor, how-
ever, the Aetna decision may not be as favorable as it initially
appears. After refusing to apportion or award any liquidated
damages to the school district, the court proceeded to provide
that "[t]he District, of course, retains its right to show actual
damages sustained by the contractor's subsequent delays." In
support of this proposition, the court of appeal quoted New
York Continental Jewell Filtration Co. v. United States:

It is well settled that in cases where delays have been
caused by both parties to a contract, and the completion of
the contract has thereby been extended beyond the time
fixed, the obligation for liquidated damages is annulled,
and it can not [sic] be revived, and any recovery for subse-
quent delays must be for actual loss proved to have been
sustained.

70. Id. at 767.
71. Id. at 768.
72. Aetna Casualty & Surety Co. v. Board of Trustees of Rincon Valley
Union Sch. Dist., 35 Cal. Rptr. 765, 768 (Cal. Ct. App. 1963)
73. See infra text accompanying notes 75-77.
74. See infra text accompanying notes 75-77.
75. Aetna, 35 Cal. Rptr. at 768 (emphasis added).
76. Id. (quoting New York Continental Jewell Filtration Co. v. United
States, 55 Ct. Cl. 288 (1920)) (emphasis added by Aetna court).
Thus, *Aetna* appears to hold that while an owner may not recover liquidated damages if it causes or contributes to delay in completion, it can still recover actual damages caused by the contractor’s delay.\(^{77}\) In our hypothetical case, this could be disastrous for Contractor, because Owner may well be able to prove actual damages in excess of what the parties had agreed to as liquidated damages. It could also lead to the anomalous situation of an owner seeking to invalidate a liquidated damages clause because of its own “unclean hands,” so as to permit it to recover more in actual damages than it could have recovered in liquidated damages. Neither *Aetna* nor any other appellate decision since *Aetna* has discussed further how actual damages should be calculated or awarded.

4. General Insurance Co. v. Commerce Hyatt House

The next case ostensibly following *Gogo* and *Aetna* and refusing to apportion liquidated damages was *General Insurance Co. v. Commerce Hyatt House.*\(^{78}\) *Hyatt* is the only case to address an issue involving a purely private construction contract.\(^{79}\) In *Hyatt*, the contractor’s performance surety sued Hyatt, the owner, to recover *per diem* liquidated damages retained by Hyatt following the construction of a hotel.\(^{80}\) The contractor completed the hotel seventy-one days after the agreed-upon target date.\(^{81}\)

During construction, the parties encountered a variety of delays, including delays caused by various departments of Los Angeles County and miscellaneous “acts of God.”\(^{82}\) The trial court found also that certain delays were caused by acts attributable solely to Hyatt.\(^{83}\) The trial court held, accordingly, that Hyatt was not entitled to retain any of the liquidated damages.\(^{84}\)

Thereafter, the court of appeal addressed the central issue: “Is there substantial evidence in the instant record to

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77. Id.
79. Id.
80. Id. at 319-20.
81. Id. at 320.
82. Id. ("Acts of God" include "general war or casualty beyond the control of the contractor").
84. Id. at 320.
support the trial court's findings to the effect that the delay of seventy-one days in the completion of construction resulted from causes chargeable to the owners and that respondent fully performed the contract except as lawfully excused from performance?" 85

The court of appeal answered the question in the affirmative. 86 "[E]vidence tending to prove that construction would have been fully completed prior to the completion date specified in the contract . . . had it not been for delays directly chargeable to [Hyatt]" 87 persuaded the court that Hyatt was responsible for the delay in completion. 88 Under these circumstances, the court stated that "[t]he rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay to which he has contributed, even though the contractor has caused some or most of the delay." 89 The court then observed, in equitable terms reminiscent of Gogo, that:

An owner whose acts have contributed substantially to the delayed performance of a construction contract may not recover liquidated damages on the basis of such delay. "Liquidated damages are a penalty not favored in equity and should be enforced only after he who seeks to enforce them has shown that he has strictly complied with the contractual requisite to such enforcement." 90

Although the Hyatt court cites to Gogo and Aetna throughout its opinion, 91 the facts in Hyatt are markedly dissimilar from those present in the cases upon which the court relies. 92 While the court appears to base its decision on Gogo's pronouncement that "where such delays are occasioned by

85. Id. at 322-23.
86. Id. at 323.
87. Id.
89. Id. at 323-24 (quoting Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist., 379 P.2d 18, 20-21) (Cal. 1963). The court added that this general rule applies "in the absence of a contractual provision for the extensions of time . . . ." Id. at 324 (quoting Kiewit, 379 P.2d at 21).
90. Id. at 325 (quoting Aetna Casualty & Surety Co. v. Board of Trustees of Rincon Valley Union Sch. Dist., 35 Cal. Rptr. 765, 767 (Cal. Ct. App. 1963) (citations omitted).
91. See id. at 325 and infra text accompanying note 93.
92. See generally supra text accompanying notes 22-77.
the mutual fault of the parties the court will not attempt to apportion them but will refuse to enforce the provision for liquidated damages,'" there was no "mutual fault" in Hyatt.\(^9\)

This is not a case such as our hypothetical where Contractor, already behind schedule, finished work even further behind schedule because of additional delays caused by Owner. Rather, the Hyatt court determined that the contractor would have finished the project on time had it not been for Hyatt's actions.\(^9\) Thus, contrary to the court's declarations, Hyatt was not an apportionment case at all — there was nothing to apportion.\(^9\)

5. Vrgora v. Los Angeles Unified School District: Resolving the Conflict?

The last case purporting to address whether to apportion liquidated damages was Vrgora v. Los Angeles Unified School District.\(^9\) Vrgora was an action arising from a construction contractor's delay in completion of a school district's automotive service facility.\(^9\) The trial court determined that the contractor was liable for damages pursuant to a per diem liquidated damages clause.\(^9\) The agreement providing for liquidated damages was entered into in January of 1977, before the effective date of the amendment of Civil Code section 1671.\(^9\) The contractor contended that the district was not entitled to liquidated damages because the delay was attributable to the district's failure to warn the contractor of anticipated difficulties in obtaining approval of the vehicle performance testing machine by the City of Los Angeles.\(^10\) The contractor further asserted that the district actually used and occupied a portion of the facility prior to substantial completion, therefore entitling the contractor to a set-off against the liquidated damages.\(^10\) The trial court disagreed,

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94. Id. at 325.
95. See generally id.
97. Id. at 131.
98. Id. at 132.
99. Id. See also supra text accompanying notes 9-15.
100. Id.
awarding the district the full amount of liquidated damages after finding that "the subject delays were totally due to [the contractor's] carelessness."\textsuperscript{102}

The court of appeal for the first time acknowledged that the cases following \textit{Gogo} may be in conflict with other decisions regarding the propriety of apportioning liquidated damages.\textsuperscript{103} Although the court of appeal determined that the \textit{Gogo} and \textit{Aetna} line of cases was more "persuasive authority against [an] apportionment argument in the context of a liquidated damages dispute, such as ours,"\textsuperscript{104} the court reasoned that:

\begin{quote}
[It must be presumed that certain direct or indirect benefits which might be enjoyed by the [District], even though delay and breach were due to no fault of that party, were considered by the contracting parties. Accordingly, it follows that in agreeing to the liquidated damages provision in the subject contract, [the contractor] "bargained away" any offsetting claim he may have had for [the District's] unjust enrichment at his expense.\textsuperscript{105}
\end{quote}

The court concluded that the contractor was the "sole source of any delays and thus was obligated under the terms of the contract for the agreed liquidated damages."\textsuperscript{106} Although the \textit{Vgora} court addressed the "apportionment argument," this case, like \textit{Hyatt}, was not an apportionment case. Because the contractor was responsible for \textit{all} delay, the contractor was responsible for all liquidated damages and, as in \textit{Hyatt}, there was nothing to apportion.\textsuperscript{107} The \textit{Vgora} appellate court purported to reconcile the conflict existing in the case law.\textsuperscript{108} However, its determination that \textit{Gogo} and its progeny are more persuasive was irrelevant to the facts at issue in the

\textsuperscript{102} Id.

\textsuperscript{103} The court cited \textit{Gogo} v. Los Angeles County Flood Control Dist., 114 P.2d 65 (Cal. Ct. App. 1941) and \textit{London Guarantee & Accident Co. v. Las Lomitas Sch. Dist. of San Mateo County}, 12 Cal. Rptr. 598 (Cal. Ct. App. 1961) for the proposition that liquidated damages will not be apportioned; and \textit{Jasper Constr., Inc. v. Foothill Junior College Dist.}, 153 Cal. Rptr. 767, 775 (Cal. Ct. App. 1979) for the proposition that liquidated damages may be apportioned based upon comparative fault for delay. \textit{Id.} at 135 n.6. \textit{See also infra} text accompanying notes 148-160 for discussion of \textit{Jasper}.

\textsuperscript{104} \textit{Vgora}, 200 Cal. Rptr. at 135.

\textsuperscript{105} \textit{Id.} at 136.


\textsuperscript{107} \textit{Id.} at 136.

\textsuperscript{108} \textit{Id.} at 135-36.
case before it.\textsuperscript{109} This implicit finding of irrelevance is further exemplified by the fact that the court, while ostensibly following \textit{Gogo} and \textit{Aetna}, in refusing to apportion liquidated damages, allowed the owner to retain \textit{all} liquidated damages.\textsuperscript{110} In \textit{Gogo} and \textit{Aetna}, the courts similarly refused to apportion liquidated damages, but ordered that the owner could \textit{not} recover \textit{any} liquidated damages.\textsuperscript{111}

C. \textbf{Are the Cases Refusing to Apportion Liquidated Damages Still Valid Precedent?}

No California appellate decision refusing to apportion liquidated damages has ever been overruled. Nonetheless, the precedential value of these cases is questionable for a variety of reasons.

Initially, one must note that there is no reported decision of a California court that was asked to apportion liquidated damages under a construction contract signed \textit{after} the 1978 amendment to Civil Code section 1671. All of the decisions adjudicating this issue have involved contractual provisions governed either by pre-amendment Civil Code section 1671 or, as will be further discussed, by California Government Code section 14376.\textsuperscript{112} As discussed above, pre-amendment section 1671 declared that liquidated damages were void except in extraordinary circumstances.\textsuperscript{113} \textit{Gogo}, ordained by \textit{Vrgora} as the more "persuasive authority,"\textsuperscript{114} and \textit{Gogo}'s progeny, all started from the proposition that the law disfavors liquidated damages.\textsuperscript{115} These courts were thus reluctant to enforce a disfavored contractual provision on behalf of an owner whose own "unclean hands" had hindered the contractor's ability to timely complete construction.\textsuperscript{116}

The 1978 Amendment to section 1671 completely altered the attitude toward liquidated damages.\textsuperscript{117} As stated above, the amended provision now espouses a legislative \textit{preference}\textsuperscript{119}

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id. at 136.}
\textsuperscript{111} \textit{See supra} text accompanying notes 22-77.
\textsuperscript{112} \textit{See infra} note 160.
\textsuperscript{113} \textit{See supra} text accompanying notes 9-15.
\textsuperscript{115} \textit{See supra} text accompanying notes 9-15.
\textsuperscript{116} \textit{See supra} text accompanying notes 9-15.
\textsuperscript{117} \textit{See supra} text accompanying notes 9-15.
for liquidated damages.\textsuperscript{118} Thus, the "unclean hands" analysis of \textit{Gogo}, \textit{London Guarantee}, \textit{Aetna} and, in part, \textit{Hyatt}, appears no longer to be dispositive. The pronouncement, for example, by the \textit{Hyatt} court (citing \textit{Gogo} and \textit{Aetna} as authority) that "liquidated damages are a penalty not favored in equity,"\textsuperscript{119} is no longer true. Since 1978, judicial enforcement of liquidated damages \textit{is} favored.\textsuperscript{120} Unfortunately, whether this change in attitude will result in apportionment of such damages based on comparative fault has not been adjudicated.

The second reason courts refused to apportion liquidated damages was the absence of contractual provisions for extensions of time.\textsuperscript{121} It is now common in the industry, and is part of the American Institute of Architects' "General Conditions of the Contract for Construction," to provide explicitly that the owner may grant the contractor extensions for delay caused by the owner.\textsuperscript{122} Current construction delay litigation seldom involves the issue of whether an owner \textit{could} have granted a contractor an extension of time. Therefore, this justification for refusing apportionment seems no longer pertinent.

The final reason courts refused to apportion liquidated damages was based on the perception that "'[t]here is no way for summing up the defaults of each and apportioning the damages to them . . . .'"\textsuperscript{123} As will be discussed below, however, more recent decisions thoroughly rebuff the view that fault cannot be segregated, calling apportionment "an uncomplicated fact finding process," and stating "'[t]hat is what courts are for.'"\textsuperscript{124} In our hypothetical, as is common in current construction litigation, scheduling and delay experts are fully capable of apportioning quantum of delay, making it

\begin{footnotes}
\item[118] \textit{See supra} text accompanying note 15.
\item[120] \textit{See supra} text accompanying note 15.
\item[121] \textit{See cases cited supra} notes 49, 78 and accompanying text.
\item[122] \textit{See AMERICAN INST. ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, § 8.3.1, at 13} (1976).
\end{footnotes}
rather unlikely that the court will conclude that in such cases there is "no way for summing up the defaults of each and apportioning the damages to them." ¹²²⁵ For these reasons, the precedential value of the line of cases refusing to apportion liquidated damages is suspect. If the courts now choose to apportion liquidated damages, what becomes of the holding in *Aetna*, which authorizes the owner's recovery of actual damages in lieu of liquidated damages? ¹²²⁶

Although *Aetna* is frequently cited for its refusal to apportion liquidated damages, ¹²²⁷ it is the only California case to discuss the viability of a claim for actual damages where liquidated damages have been disallowed. One reason for the dearth of analysis in this area could be that in most cases the owner suffers only a small amount of actual damages, if any, relative to the liquidated damages at stake. A second reason could be that courts addressing liquidated damages provisions before the 1978 amendment simply voided the clause summarily, thus precluding any subsequent appellate analysis.

Whatever the reason, *Aetna* is the only California authority allowing an owner to recover actual damages when that owner is prohibited from recovering liquidated damages because it had contributed to the delay in completion. One could argue that *Aetna* makes sense in that an owner should not be without some remedy if a contractor had admittedly caused delay in completion of the project. In cases such as our hypothetical, however, the approach envisioned by *Aetna* would be inequitable to Contractor. It would expose Contractor to actual damages well in excess of what Contractor had bargained for when it agreed to a completion date and the specified amount of liquidated damages should it fail to meet that completion date. The way to avoid these problems, it seems, is to abandon the "all or nothing" rule of *Gogo* ¹²²⁸ and permit the apportionment of liquidated damages. Cases adopting this approach are discussed below.

¹²²⁶ See supra text accompanying notes 62-77.
D. California Decisions Apportioning Liquidated Damages Based on Comparative Fault

1. Nomellini Construction Co. v. California Department of Water Resources: The New Model?

The first California case allowing apportionment of liquidated damages was Nomellini Construction Co. v. California Department of Water Resources. In Nomellini, the contractor sued the Department of Water Resources to recover liquidated damages withheld by the department following delayed completion. The contractor argued that the department had delayed construction by failing to approve shop drawings within the time required by the contract. The trial court agreed and held that the department was not entitled, therefore, to retain any liquidated damages.

The court of appeal framed the issues in the following manner: "(1) Was [the contractor] or the Department or both responsible for delays attendant to the approval of certain shop drawings? (2) If some of the delay was the responsibility of each party, was the Department properly deprived of all liquidated damages?"

With regard to the first issue, the appellate court disagreed with the trial court's conclusion that the department was responsible for some delay. It held that either all delays were caused by the contractor or, for any delays arguably not the contractor's responsibility, the department properly granted extensions of time pursuant to an extension provision in the contract. However, the court went on to address the second issue: "Assuming arguendo contrary to our holding that there were delays which the Department should have allowed, they were delays which the trial court would have been obligated to apportion."

130. Id. at 683.
131. Id.
132. Id. at 684.
133. Id. at 683.
135. Id. at 685.
136. Id.
The court of appeal found the United States Supreme Court's decision in *Robinson v. United States*¹³⁷ persuasive. *Robinson* involved a contract that provided for both liquidated damages and extensions of time.¹³⁸ The work was not completed on time.¹³⁹ The government acknowledged that it had caused a portion of the delay in completion.¹⁴⁰ The United States Supreme Court held that simply because the government caused some delay, the delay presented no legal ground for denying compensation for other loss suffered wholly through the fault of the contractor.¹⁴¹

Since the contractor agreed to pay at a specified rate for each day's delay not caused by the Government, it was clearly the intention that it should pay for some days' delay at that rate, even if it were relieved from paying for other days, because of the Government's action.¹⁴²

The *Nomellini* court of appeal also found persuasive the pronouncement of Professor Williston:

In building contracts, there is often inserted a provision giving the architect power to certify an extension of time in certain cases, by virtue of which the effect of a delay caused by the owner operates merely as an extension of time of performance, and a new time is substituted for the old. In that event though the owner causes delay the builder is liable in liquidated damages, but the period of delay caused by the owner is deducted from the total delay. Unless the contract contains such a provision the delay due to each party will not generally be apportioned.¹⁴³

The *Nomellini* court found most significant, though, Government Code section 14376's requirement that every public works contract contain a liquidated damages provision specifying the following: "[A] provision in regard to the time when the . . . portion of the work contemplated shall be completed, [providing] that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay the

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¹³⁷. 261 U.S. 486 (1923).
¹³⁸. *Id.* at 487-88.
¹³⁹. *Id.* at 487.
¹⁴⁰. *Id.*
¹⁴¹. *Id.* at 488.
State a specified sum of money . . . .” The court observed that “Gogo . . . cases which have followed it have either involved contracts devoid of extension provisions or contracts between private parties . . . and when it was said: ‘Liquidated damages are a penalty not favored in equity . . . .’ However, in public contracts, the court noted, provisions for liquidated damages “are not only favored, they are expressly commanded by Government Code section 14376.” The court further reasoned that:

[C]ategorical statements [such as those made in Gogo] that where delays are caused on both sides there is no way to “apportion damages” are an absurdity. Damages are not being apportioned. Damages are liquidated. Quantum of delay in terms of time is all that is being apportioned. That is an uncomplicated fact finding process. That is what courts are for.


Nomellini was followed closely by Jasper Construction, Inc. v. Foothill Junior College District, in which the plaintiff contractor sued a junior college district for damages for breach of contract resulting from alleged defects in plans and specifications for the construction of an auditorium. The essence of the contractor’s claim was that as a result of inadequate and defective plans and specifications for the construction of the project and negligence in construction administration, the contractor suffered delays and extra expenses. The district cross-claimed for per diem liquidated damages for 363 days of delay, as provided for in the contract. The parties had signed the contract in 1968, before the amendment of Civil Code section 1671. The trial court held in

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144. Id. at 684.
146. Id.
147. Id.
149. Id. at 769.
150. Id. at 770.
151. Id.
152. Id. at 769.
favor of plaintiff on all its claims and denied the district's cross-claim for liquidated damages.\textsuperscript{153}

The court of appeal observed, however, a "major error" in the following jury instruction given by the trial court: "If you find that any delay on the project was caused by Defendant Foothill or its agents, then Defendant Foothill may not withhold any liquidated delay damages from Plaintiff Jasper, and you may not apportion the liquidated delay damages between these parties."\textsuperscript{154} This instruction was coupled with a jury instruction that if the contractor proved "by a preponderance of the evidence" that the district was responsible for "'some of the delay' that prevented completion of the project within the official time, [then the district] was not entitled to any liquidated damages."\textsuperscript{155}

The court of appeal stated that the trial court's instructions "were based on the rules set forth in Gogo . . . and Aetna . . . , both of which held that where both parties are responsible for delay of the project, the court will not attempt to apportion the delay, but the entire liquidated damages clause will be unenforceable."\textsuperscript{156} The court of appeal stated, however, that in each of those cases, "the contract did not evince an intent that liquidated damages could be assessed even where delay was caused by both parties," because the contracts at issue were lacking provisions for extensions of time.\textsuperscript{157} The court observed that the contract between Jasper and Foothill not only contained a provision for extensions of time by the owner, but also specifically provided that liquidated damages would not be assessed "when the delay in completion of the work is due . . . [t]o unforeseeable cause beyond the control and without the fault or negligence of the Contractor, including . . . acts of the Owner . . . ."\textsuperscript{158}

The court of appeal found Robinson and Nomellini controlling, and cited Professor Williston for the general rule that "where a building contract contains provisions for extensions of time from the owner, the effect of owner-caused delay

\textsuperscript{154} Id. at 774.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Jasper Constr., Inc. v. Foothill Junior College Dist., 153 Cal. Rptr. 767, 774 (Cal. Ct. App. 1979) (emphasis added) (text omitted by the court of appeal).
will operate merely as an extension of time and the builder will still be liable in liquidated damages for delay caused on his own part."159

The court of appeal held that the apportionment rule set forth in Nomellini and Robinson applied, "... both because the contract contained an explicit provision allowing apportionment and because the 'all or none' rule of Gogo and Aetna is based upon the principle that liquidated damages are disfavored by the law."160

E. The Precedential Value of Cases Apportioning Liquidated Damages Based on Comparative Delay

Only two California courts have held that liquidated damages may be apportioned: Nomellini161 and Jasper.162 The precedential value of these two cases at first appears somewhat tenuous. Both cases involve pre-1978 liquidated damages provisions.163 Further, Nomellini's discussion of the issue is pure dicta, and Jasper does little more than merely incorporate this dicta without adding any real analysis to the

159. Id. (citing 5 SAMUEL WILLISTON, ON CONTRACTS 764-66 (3d ed. 1961)).
160. Id. The Jasper appellate court offered a third justification for the application of the apportionment rule, stating that the "all or none" principal of Gogo and Aetna "does not apply to public contracts, in which provisions for liquidated damages are expressly authorized by statute." Id. (citing Nomellini Constr. Co. v. California Dep't of Water Resources, 96 Cal. Rptr. 682, 686 (Cal. Ct. App. 1971); CAL. GOV'T CODE § 14276 (repealed by stat. 1981) (West 1992)). The court did not explain why the contract between Foothill and Jasper should be considered a "public contract," and therefore why Government Code § 14376 would be applicable. Id. While defendant Foothill was a school district, the defendants in London Guarantee, Kiewit, and Aetna were also school districts, and the defendant in Gogo was a flood control district. See supra notes 10-77. Further, Government Code § 14376 was enacted initially in 1945, four years after Gogo, but before all other decisions in this area. CAL. GOV'T CODE § 14376 (repealed by stat. 1981) (West 1992). Finally, "public works" was not defined until the enactment of Government Code § 2600 in 1981, now codified as Public Contract Code § 22000. CAL. PUB. CONT. CODE § 22000 (West Supp. 1992). Section 22000 provides that a "'public works contract' means . . . a contract awarded through competitive bids or otherwise by the state, any of its political subdivisions or public agencies for the erection, construction, alteration, repair, or improvement of any kind upon real property." Id. As this definition was not codified until two years after the adjudication in Jasper, it is unlikely that a change in the judicial understanding of a public contract could be responsible for the Jasper court's seemingly inconsistent finding. Thus, it is unclear why the Jasper court believed this third justification was relevant.
161. Nomellini, 96 Cal. Rptr. at 682.
162. Jasper, 153 Cal. Rptr. at 767.
163. Nomellini, 96 Cal. Rptr. at 683. See also supra text accompanying note 159.
LIQUIDATED DAMAGES

issue.\(^{164}\) However, the analysis set forth in *Nomellini*, followed by *Jasper*,\(^{165}\) may be more applicable to post-1978 contracts, such as the contract in our hypothetical, than any other decision. *Nomellini* was decided pursuant to the presumption that liquidated damages provisions are *valid*,\(^{166}\) rather than under the old presumption that disfavored liquidated damages.\(^{167}\)

The contract at issue in *Nomellini* was decided under Government Code section 14376, under which *per diem* liquidated damages “are not only favored, they are expressly commanded . . . .”\(^{168}\) Thus, the court was not confined by equitable “unclean hands” maxims, which have since been rendered questionable by the 1978 amendment to section 1671.\(^{169}\) While other courts were reluctant to enforce a presumably *invalid* contractual provision in favor of a party not completely deserving of such “extraordinary” equitable relief, this was not a concern in *Nomellini*, where the liquidated damages clause was drafted pursuant to a statute expressly favoring its existence.\(^{170}\) Such is the case in all post-1978 contracts. Thus, the post-1978 liquidated damages provision between Owner and Contractor is presumed valid, and, in the absence of precedent so stating, logic dictates that apportioning fault and, therefore, liquidated damages between the parties is the better view — one that courts and construction contractees alike should adopt wholeheartedly.

Today, it is clear that the “all or none” rule is antiquated and should give way to the more just and equitable approach of apportioning liquidated damages for delay based on relative comparative fault. Parties agree to liquidated damages when drafting a construction contract for one reason — to estimate and allocate risks, thereby minimizing economic uncertainty. They choose a liquidated damages amount that will be fair and that will reasonably compensate the injured party in the event that the contract is not performed in the manner


\(^{165}\) Id.


\(^{167}\) See *supra* text accompanying notes 9-13.

\(^{168}\) *Nomellini*, 96 Cal. Rptr. at 686.

\(^{169}\) See *supra* text accompanying notes 9-15, 45-48.

\(^{170}\) See *supra* text accompanying notes 9-15, 45-48.
envisioned at its making. Refusing to apportion liquidated damages, and archaic adherence to the "all or none" rule, utterly vitiates the intentions of the parties at the time of the making and performance of the contract. It is unfair and inappropriate to expose a contractor — who agreed to a liquidated damages provision so as to quantify its economic downside — to liability for actual damages. These actual damages could be far in excess of the liquidated damages estimated by the parties, simply because the owner was partially at fault and is thus unable, under the "all or none" rule, to recover liquidated damages. The "all or none" rule makes it possible for an owner with "unclean hands" to recover more in actual damages than could have been recovered in liquidated damages had the owner's hands remained clean.

Similarly, an owner, who has agreed to liquidated damages in an effort to protect itself in the event that the contractor cannot timely perform, can be exposed to unfair and inequitable outcomes due to the capricious application of the "all or none" rule. Is it equitable that an owner with minimal actual damages should be deprived of the entirety of the actual damages — for which it bargained at the time of the making of the contract — simply because, for example, the owner is responsible for only one out of one hundred days of delay? California courts adjudicating matters in tort law have long since eliminated the contributory negligence rule, which would bar an injured and deserving plaintiff from any recovery where that plaintiff was as little as one percent at fault. Logic and reason dictate that the "all or none" rule, set forth in 1941 by the Gogo court, should now similarly give way to the more progressive and equitable rule allowing apportionment of liquidated damages for delay based on comparative fault.

Though no case has ever overruled Gogo or any of its progeny, the logic upon which those cases was based has certainly withered substantially, and an owner or contractor favoring apportionment should argue accordingly. No longer are courts restricted in their ability to determine and apportion fault in a construction-delay context. Construction litiga-

171. See, e.g., Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (1975) (where contributory negligence is no longer a bar to recovery and damages are apportioned in relation to the percentage contribution).
172. See supra text accompanying notes 22-37.
tion experts and consultants who can apportion construction-delay responsibility are commonplace.\textsuperscript{173} It is no longer speculative to articulate the percentage of comparative fault of an owner/developer and contractor.\textsuperscript{174} No longer should the "all or nothing" approach of \textit{Gogo} and its progeny be the only available option.

F. \textit{Foreign Appellate Analysis and Commentary}

Despite the reluctance of California appellate courts to apportion liquidated damages, this remedy has not been a problem for a number of courts in foreign jurisdictions.\textsuperscript{175} For example, in \textit{E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas},\textsuperscript{176} the court sitting in diversity jurisdiction analyzed the issue under Alabama law.\textsuperscript{177} The case involved a series of disputes between, among others, Ernst, a subcontractor renovating a hospital, and Providence Hospital, the project owner.\textsuperscript{178} The contract between the two called for \textit{per diem} liquidated damages.\textsuperscript{179} Work was completed behind schedule, and evidence suggested that both Ernst and Providence were partially responsible for the delay.\textsuperscript{180} Although Alabama courts had previously adjudicated matters concerning apportionment of \textit{actual} damages,\textsuperscript{181} this was the first case under Alabama law to address the propriety of apportioning liquidated damages based on comparative fault.\textsuperscript{182}

Ernst argued that Providence should be precluded from recovering any liquidated damages based on "the so-called

\textsuperscript{173} See generally Jervis \& Levin, supra note 1.
\textsuperscript{174} See id.
\textsuperscript{175} For a further discussion of apportionment of liquidated damages based on mutual fault in other jurisdictions, see, e.g., 1 Construction Law Contracts and Disputes Program Handbook 116-18 (CEB 1989); Jervis \& Levin, supra note 1, \S 7.18.
\textsuperscript{176} 551 F.2d 1026 (5th Cir. 1977), \textit{reh'g denied in part, reh'g granted in part}, 559 F.2d 268 (5th Cir. 1977), \textit{and cert. denied, sub nom., Providence Hosp. v. Manhattan Constr. Co.}, 434 U.S. 1067 (1978).
\textsuperscript{177} \textit{Id.} at 1028, 1029 n.1.
\textsuperscript{178} \textit{Id.} at 1028.
\textsuperscript{179} \textit{Id.} at 1031.
\textsuperscript{180} \textit{Id.} at 1029-30.
\textsuperscript{181} See, e.g., Kershaw Mining Co. v. Lankford, 105 So. 896 (Ala. 1925).
rule against apportionment.” According to the court, the rule against apportionment provides that “under a liquidated damage provision against delay, where the owner has contributed to delays on the project he may not apportion the fault but forfeits all right to recover under the provision.”

The court observed, however, that the rule against apportionment “is an old one whose underlying policies do not remain in full force.” The court noted that “[o]ne of the dominant reasons underlying it is early judicial hostility to the use of privately agreed upon contract damage remedies.” The court acknowledged that “[t]oday, given the increasing complexity of contractual relations, liquidated damage provisions have obtained fair judicial and legislative support.”

The court of appeals held accordingly that Alabama law permitted apportionment of fault. "As long as the owner's delay is not incurred in bad faith, it is not unjust to allow proportional fault to govern recovery. Generally, owners do not benefit from delays that they incur.”

The court acknowledged that allocating fault to the respective parties may be a complicated factual determination, “but recovery should not be barred in every case by a rule of law that precludes examination of the evidence.”

Similarly, in Aetna Casualty & Surety Co. v. Butte-Meade Sanitary Water District, a case decided under South Dakota law, the plaintiff, a bonding agent for the contractor, filed suit against the defendant water district to recover pay-
ments retained by the district under two construction contracts between the parties.\textsuperscript{192} The district counter-claimed against plaintiff for $56,900 in liquidated damages under one contract, and $65,050 in liquidated damages under the other.\textsuperscript{193}

In Butte-Meade, the parties had contracted to complete certain work on water mains and a pump house by an agreed-upon date.\textsuperscript{194} Each contract provided for \textit{per diem} liquidated damages of fifty dollars.\textsuperscript{195} The water main contract was completed 1,138 days late, and the pump house contract was completed 1,301 days late.\textsuperscript{196} The court found that the district and the contractor each were “at least in part responsible for delaying the completion of the project.”\textsuperscript{197} As such, plaintiff argued that the district was barred from recovering any liquidated damages:

By the weight of authority, where the contractee has caused a substantial delay in the beginning or progress of the work, without any agreement for an extension of time to offset the delay, the time limit fixed in the contract, and any provision for liquidated damages based thereon, are entirely abrogated, leaving the contractor responsible only for the completion of the work within a reasonable time.\textsuperscript{198}

The court disagreed: “[T]his Court feels that recent case law is clearly in favor of such apportionment of fault and that simply because [the district] contributed to the delay in the completion of the project, it should not be barred from recovering liquidated damages.”\textsuperscript{199} Referring to Robinson,\textsuperscript{200} the court stated that “where the causes for delay can be apportioned, the court is free to assess liquidated damages on this basis, unless the court finds that the contract would have been completed on time but for the delays caused by the party

\textsuperscript{192} Id. at 194.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{197} Id. at 197.
\textsuperscript{198} Id. at 194-95 (citing J.E. Macy, Annotation, \textit{Building Contract — Liquidated Damages}, 152 A.L.R. 1349, 1359 (1944)).
\textsuperscript{199} Id. at 197.
\textsuperscript{200} Robinson v. United States, 261 U.S. 486 (1923). \textit{See also supra} text accompanying notes 137-42.
claiming liquidated damages.201 Accordingly, the court awarded the district apportioned liquidated damages.202

Finally, state and federal courts in several other jurisdictions, including courts in Texas,203 New York,204 and Illinois,205 have found apportionment of liquidated damages based on mutual fault to be proper.206


203. See Dallas-Fort Worth Regional Airport Bd. v. Combustion Equip. Ass'n, Inc., 623 F.2d 1032, 1037-38 (5th Cir. 1980) (where court appears to agree that apportionment is proper, but remands due to inconsistent jury answers to interrogatories on issue of apportionment).


205. See United States ex rel. Thorleif Larsen & Sons, Inc. v. B.R. Abbott Constr. Co., 466 F.2d 712, 714 (7th Cir. 1972) (court found apportionment of damages by lower court appropriate).

206. Nonetheless, a number of jurisdictions do still cling to the rule against apportionment. See, e.g., Acme Process Equip. Co. v. United States, 347 F.2d 509, 535 (Ct. Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1965) (if "delays are caused by both parties to the contract, the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled."); United States v. Kanter, 137 F.2d 828, 830 (8th Cir. 1943) ("[I]t is also established that where one seeking to enforce a provision for liquidated damages is responsible for the failure of performance, or has contributed in part to it, the provision will not be enforced."); Jefferson Hotel Co. v. Brumbaugh, 168 F. 867, 875 (4th Cir. 1909) ("[T]he courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes there of have been mutual, but will refuse under such circumstances to enforce the penalty."); Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc., 371 F. Supp. 1154, 1161 (D.Md. 1974) ("Where one who is seeking to enforce a liquidated damages provision of a contract is responsible for the failure to perform or has contributed in part to it, the liquidated damages provision will not be enforced."); White Hall v. Southern Mechanical Contracting, Inc., 599 S.W.2d 430, 435 (Ark. Ct. App. 1980) (City unable to recover liquidated damages where it contributed to delay); State v. Jack B. Parson Constr., 456 F.2d 762, 764 (Idaho 1959); Haggerty v. Selsco, 534 P.2d 874 (Mont. 1974) (where "contractee caused a substantial part of the delay" liquidated damages where denied); L.A. Reynolds Co. v. State Highway Comm., 155 S.E.2d 473, 482 (N.C. 1967) (contractor not liable where "delays in the contract's completion was occasioned by mutual defaults . . . "); Lee Turzillo Contracting Co. v. Frank Messer & Sons, Inc., 261 N.E.2d 675, 679 (Ohio Ct. App. 1969) ("[W]here an owner and a contractor are each responsible for a certain amount of unreasonable delay in completing the work, the owner is barred from assessing the contractor with liquidated damages for whatever delay might have occurred in the completion of the work."). See also J.E. Macy, Annotation, Building Contract — Liquidated Damages, 152 A.L.R. 1349, 1359-78 (1944).
Owners and contractors agree to liquidated damages as a reasonable manner in which to provide some certainty regarding the amount of damages in the event of construction delays. California courts can no longer be excused from apportioning and awarding liquidated damages based on comparative fault simply by reference to the "unclean hands" of one of the parties, or by their own perceived inability to affix fault accordingly. Considering all judicial and legislative developments since Gogo and its progeny, logic and persuasion dictate only one conclusion: In the event that both the owner and contractor contribute to the delay in completion, liquidated damages should be apportioned according to the parties' comparative fault. Gogo and its progeny should now be overruled. Until they are, however, owners and contractors may wish to avoid the uncertainty in the law by specifically agreeing in their construction contract that per diem liquidated damages shall be apportioned where both parties contribute to late completion of the project, and thus insulate themselves from the archaic and arbitrary bite of the "all or none" judicial approach.
