

CLASSIFICATION OF A DEFECT AS BREACH OF CONTRACT OR TORT: A COMPARATIVE STUDY OF THE U.S. AND THE REPUBLIC OF LITHUANIA

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Abstract. *Purpose* – this paper compares the approach of United States' law and Lithuanian law in classifying a construction defect as a breach of contract or tort.

Research methodology – the paper uses case studies to analyze. United States' law approach divides damages into damages for breach of contract and tort damages. According to Lithuanian law, civil liability is assigned to contractual and non-contractual (tort) liability depending on the nature of the unlawful actions.

Findings – the cases demonstrate that a defect usually is considered a breach of contract. Different types of damages are recoverable: compensatory damages according to United States' law and direct and indirect damages are recoverable according to Lithuanian law.

Research limitations – both contractual and non-contractual liability are analyzed. In addition, defects to construction by an act of fraud are covered. More research is needed on how the law affects the extension of the warranty period or the statute of limitations.

Originality/Value – the paper provides a new interpretation of classification a construction defect as a breach of contract or tort and offers new insights comparing the different approach of law.

Practical implications – the paper will be instructive to developers, contractors, management corporations.

Keywords: construction law, construction defects, contractual liability, non-contractual (tort) liability.

JEL Classification: K12, L15, L74.

Conference topic: Legal Business Environment.

Comparison of legal systems¹

In order to understand some of the comparative legal aspects presented in this paper, it is necessary to have a basic understanding of the legal systems under discussion. The primary legal systems considered here are Lithuania and the United States of America (US).

The European Union (EU) has its own law and legal order. European law has a direct or indirect effect on the laws of its 28 member states: once in force, its laws become part of the legal system of each member state. The main legal foundations of the EU are the Treaty on European Union with other treaties and international agreements, general principles of Union law, and secondary legislation (regulations, directives, decisions, recommendations, and opinions) also part of the body of law. Directly or indirectly, the construction industry in the EU is regulated by six secondary regulations (Regulation (EC) No 765/2008, Directive 2010/31/EU, Regulation (EU) No 305/2011, Directive 2011/92/EU, Directive 2014/24/EU, Council Directive 92/57/EEC (European Parliament and the Council of the European Union, 2008, 2010, 2011a, 2011b, 2014; Council of the European Union, 1992)).

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Most EU countries utilize a civil law legal system based on a comprehensive compendium of statutes. The alternative to a civil law system is a common law system, which may contain a comprehensive statutory framework but also includes the decisions of judges on the interpretation of the law as binding precedent. Civil law systems, such as Lithuania, do not, as a rule, recognize the decisions of judges as binding on later cases, which is the case in the US (Common Law and Civil Law Traditions, 2017).

Before March 11, 1990, Lithuania was a part of the Union of Soviet Socialist Republics (USSR) but after that date, it became an independent nation and began the creation of its own legal system. The foundation of this legal system is the Constitution of the Republic of Lithuania, adopted in 1992 by referendum. The main source of the country's private law is the Civil Code of the Republic of Lithuania, which went into effect on May 1, 2001. The Code is the main source for private construction law in that it regulates the legal relationship between the parties involved in construction contracts

The main sources of public construction law in Lithuania are the Law on Construction and the Law on State Supervision of Territory Planning and Construction. In addition, public construction law is subject to numerous regulations. Even though construction law, along with the entire legal system of the Lithuanian Republic, is quite young, it was created with reference to the legal systems of developed European civil law countries with Germany, the Netherlands, and France has a great deal of influence. It therefore primarily reflects the main legal traditions of European civil law countries, despite the presence of some remnants of Soviet law (Bakšienė, 2016).

In comparison to Lithuania, the US consists of over 300 entities (jurisdictions) united in a federation called the "United States". A federation (Merriam-Webster Dictionary, 2017) is a societal entity formed by uniting smaller or more localized entities (called "jurisdictions" in the US). Each entity in the federation (states, tribes, territories) and the federation itself, is referred to as a jurisdiction (Merriam-Webster Dictionary, 2017) in U.S. law and has its own laws applicable for that jurisdiction. For example, the law of the federation is called "U.S." or "federal law" and some aspects of that law are applicable to all members of the federation. The law of the state of California is called "California law" and applicable only in the geographic area known as "California". The topic of this paper (defect as a breach of contract or tort) is covered by the law of each of the jurisdictions but is very similar in each jurisdiction because it is common for member entities of the federation to refer to their sister members when developing the law for their jurisdiction. Another defining characteristic of the law in the US is that all of the jurisdictions in the U.S. federation, except for Louisiana, are common law jurisdictions. In this paper, the term "US law" will refer *not* to the law of the federal government of the US, but to the body of law consisting of the law of all of the members of the federation.

1. Breach of Contract v. Tort (US Law)

In the US damages have traditionally been divided into two broad categories: damages for breach of contract, available only to parties who have a contract with each other (are said to be "in privity of contract") and tort damages, covering all other situations. The available types of damage are different for tort versus contract actions. It may appear odd to start here when discussing the topic of this paper, however, it is this distinction in the types of damages available keeping tort and contract law virtually separate in the US. To keep these two categories separate a basic maxim of US law is that one cannot turn a breach of contract claim into a tort claim. "[T]he distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate "social policy" (Erlach v. Menezes, 1999).

The distinction exists because the goal of tort law is the safety of the individual person while the goal of contract law is the protection of the commercial relationship (*E. River S.S. Corp. v. Transamerica Delaval*, 1986). "The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the [injured] person is not prepared to meet" (*Escola v. Coca Cola Bottling Co.*, 1944).

Damages for breach of contract are the sum necessary to place the non-breaching party in the same position, *but not better*, it would have been in had the contract been performed and are called "compensatory damages". For example, in the case of *Short v. Greenfield Meadows Associates* (2008), the homeowner entered into a contract with a contractor to remove existing asphalt and replace it with new concrete. In addition, certain grassy areas were to be restored. The homeowner claimed the contractor's work was defective ("failed to perform in a workmanlike manner") and sued for the replacement cost of the concrete and grassy areas, \$40,997. The trial court determined that the contractor had, indeed, failed to perform in a workmanlike manner but the damages were only cosmetic and the measure of damages was the current value of the premises, as opposed to the value, had the job been done properly. Because the owner failed to present any evidence on the diminution in value of the property, the homeowner was awarded \$0 in damages. In other words, the homeowner was in the same position both before and after the contractor's breach and therefore was not entitled to any damages.

In another case requiring the breaching party to put the injured party in as good a position as if the contract had been performed, meant the non-breaching party did not have to use an inferior (but cheaper) paint to cure the defects caused by the breaching party's use of an inferior grade of steel on the project (*Rhode Island Turnpike & Bridge Auth.*

v. Bethlehem Steel Corp., 1977). Literally, thousands of cases exist in support of this statement. However, for a contrary view see Scott and Triantis (2004).

Other remedies for breach of contract exist. Lost profits is a form of contract damage (*Sargon Enterprises, Inc. v. University of Southern California*, 2012). Specific performance, that is a court order to perform a contract, is another form of relief but is used in situations where the object of the contract is unique, such as the real estate. “The applicability of the doctrine of specific performance is well established in this Commonwealth in the context of agreements for the purchase and sale of real property” (*BBNT Solutions, LLC v. 625 Concord, Inc.*, 2006). Mental suffering is a form of damage that, for the most part, is prevented in breach of contract claims.

In the construction industry, compensatory damages are often calculated as the cost of repair however, additional damages may also be necessary to put a damaged party in the same position it would have been in had the contract been performed. In the case of *Duffy v. Woodcrest Builders, Inc.* (1963) the plaintiff was entitled to the cost incurred to discover the construction defect in addition to the costs needed to remedy the construction defect.

A common, but confusing, the name for preventing the turning of contract claims into tort claims, is called the “economic loss rule” which fundamentally prevents the turning of a breach of contract claim into a tort claim. The reason for this rule is the assumption that the economic risks for breach of the contract were determined during the bargaining process and seeking tort damages, which are usually higher than a breach of contract damages, would be trying to seek a better deal than what was originally agreed on.

A factor keeping tort and contract separate is the concept that it is not illegal to breach a contract, it is only illegal to fail to pay compensatory damages for the breach. This concept has been called the “efficient breach” doctrine or concept in at least one case (*United States v. Blankenship*, 2004).

Compared to damages for breach of contract, the fundamental maxim of American tort law is to make the injured party whole, whether or not the tortfeasor knows or should know in advance what that would take. Not only does this maxim allow for compensatory damages, such as reimbursement for medical expenses and lost wages, but mental suffering and compensation for pain are also recoverable. Compare this to the case of *Erllich v. Menezes* (1999). In that case, the homeowner sued for mental suffering caused by the contractor’s serious breaches of the construction contract. However, the California Supreme Court held that damages for breach of contract were limited to the cost of repair. In the case of *Evans Landscaping, Inc. v. Stenger* (2011) the contractor installed a fish pond that leaked and allegedly precluded the homeowners from using their yard. The court held that loss of enjoyment of a residence and annoyance and discomfort were not properly recoverable as emotional distress damages absent bodily harm or where the contract is of the type where serious emotional distress is a likely result.

In addition, when the tortfeasor’s actions are intentional, punitive damages may result. Compare this to a contract breach where even if the breach is intentional, it is not illegal as long as compensatory damages are paid. As stated above some few exceptions have arisen, but these are rare. Punitive damages can be awarded for a breach of fiduciary duty but this is considered a tort (*Gauld v. O’Shaughnessy Realty Co.*, 2008).

Some exceptions have arisen in the construction industry and punitive damages have been awarded. For example, where the contractor failed to follow plans and specifications, concealed defects from the owner and fraudulently misrepresented facts concerning the adequacy of the structure (*Borkholder Co. v. Sandock*, 1980), where fraud had occurred (*Rosener v. Sears, Roebuck & Co.*, 1980; *Walker v. Signal Co.*, 1978); where the contractor has made a willful misrepresentation that the building was built in accordance with plans and specifications in order to secure payment (*Borkholder Co. v. Sandock*, 1980; *C.A. Jeffers v. Allen Nysse, (Wis. 1980)*, 1978); upon refusal to release a mechanic’s lien in spite of payment (*Harper v. Goodin*, 1980); and, upon failure by an owner or contractor to make payments requests which impeded the contractor’s (or subcontractor’s) performance of the contract (*Whitfield Constr. Co. v. Commercial Dev. Corp.*, 1975; *Cuddy Mountain Concrete, Inc. v. Citadel Constr., Inc.*, 1992).

Louisiana, the only U.S. state with a civil law system, has a specific statute awarding damages for nonpecuniary loss in contract cases. This statute reads, “Damages for nonpecuniary loss. Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.” (Louisiana Civil Code. Art. 1998, 2017). Alabama and Mississippi have begun to allow damages for mental suffering in this circumstance (Simpson, Ware, & Willard, 2004; *Harrison v. McMillan*, 2002).

However, just because the parties have a contract does not mean they are precluded from suing in tort. If the tort is independent of the contract, it can stand on its own. Some courts have used the term “independent duty doctrine” making it clear that a tort claim must rest on a duty independent of the contract to be actionable. “An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.” (*Eastwood v. Horse Harbor Found., Inc.*, 2010) The concept of “contort” has also been used to try to clarify this area of the law (*Clark v. Aenchbacher*, 1974; Eisenberg, 2000). Courts must carefully evaluate the claims to determine if they are contract or tort (Patel, 2015). If the action is related to the contract, then only contract damages can arise.

Goh and Yip, argue that if the same act results in both a breach of contract and tort, then concurrent liability should exist and a plaintiff should be able to choose the most advantageous cause of action, thus preventing the defendant from restricting the plaintiff’s choice. The authors of this paper suggest tortious and contractual liabilities

should be assessed side-by-side, and tort liability should be used when the losses incurred in the case are beyond losses which the parties in the contract could have considered during negotiations. However, in cases where the losses are foreseeable, both tort and contract would reach the same conclusion, rather than one ruling out the other. In order to determine whether tort or contract should be used, the facts need to be carefully considered. In professional negligence cases, for example, tort duties can arise from the existence of a contract, and therefore tort and contract will match. However, in the case of a contract arising after the realization of tort duties, tort claims will be used over contract claims for the pre-contract issues. Contracts can simply say that tort cannot be used. Contract and tort, overall, should not be one trumping the other, but instead, should be the application of both rule sets (Goh & Yip, 2017).

Some situations do offer a difficult choice. For example, commercial bribery cases involve a situation where the issue of tort or contract, and usually both, arise. In a commercial bribery case, there are two potential defendants: the briber (the person who proposes the bribe) and bribee (employee of the company and accepting the bribe), and the plaintiff (the company or entity with whom the relationship/contract with the briber ensued because of the bribe) (Rendleman, 2017).

Commercial bribery is a crime in thirty-nine states although rarely prosecuted but what if the company were to sue the employee(s) involved and the entity that paid the bribe? Would this be a tort or contract claim? The plaintiff would have a contract with both the briber and the bribee. If considered a tort, the injured company could receive punitive damages as this form of damage is only possible in tort actions and not contract. However, because the statute of limitations is often shorter for tort than contract the plaintiff may be forced to sue under contract law if the statute has run. If sued under contract law, the number of damages would be compensatory only, probably restitution that is payment of the bribe to the plaintiff. However, this does not discourage bribery since the briber is merely paying the bribe to a different entity. If the matter is a tort, then the briber might be forced to pay punitive damages which is a form of damage used to discourage the behavior (Rendleman, 2017).

Kaye (2017) writes a taxonomy (categorization) of remedies based on rights will help to assure the proper remedy is applied in a case. The basis of the taxonomy must be of rights, not goals or wrongs because this would allow for overlap of remedies. Kaye believes the remedies must be mutually exclusive in order for a taxonomy to work. Three types of rights exist: primary, secondary, and tertiary. A primary right does not require wrongdoing to come into being, for example, rights created by contract or the law. A secondary right is one that arises because of another's misconduct. A tertiary right is created by the law which allows enforcement of a court order. Using the three categories of rights, three mutually exclusive categories of remedies can be developed: replicative (protect primary rights), substitutionary (protect secondary rights), and transformative (protect tertiary rights).

The state of the law in the US at the present time is that a defect is considered a breach of contract. This allows for only compensatory damages. Damages such as pain and suffering or mental anguish are not recoverable.

2. Breach of Contract v Tort (Lithuanian law)

In Lithuanian law, civil liability is assigned to contractual and non-contractual (tort) liability depending on the nature of the unlawful actions whether dealing with contract or not. Taking into account that the general duty of care is in contract law, as well as in tort law (Civil Code of the Republic of Lithuania, 2000, Article 6.263(1)), its violation may satisfy the contract breach as well as the tort, which may lead to the overlap between the tort and the breach of the contract.

Civil Code of the Republic of Lithuania stipulates that contractual liability is a pecuniary obligation arising from the non-performance or improper performance of a contract where one party has the right to claim compensation for damages or demand payment of a penalty (fine, interest) and the other party is required to compensate for the breach (Civil Code of the Republic of Lithuania, 2000, Article 6.245). Contractual liability arises from the non-fulfillment or improper performance of a contractual obligation, or by a violation of the general duty of care and diligence (Civil Code of the Republic of Lithuania, 2000, Article 6.246, Article 6.256).

A characteristic feature of contractual liability, as compared to tort liability, is that the parties have a civil legal relationship before the civil law violation occurs. In such a case, the violation of civil law usually occurs as a breach of contract (Civil Code of the Republic of Lithuania, 2000, Article 6.256).

The contract is considered to have been breached if the contract is only partially completed, the deadline has not been met, the duty of co-operation has been violated, or mandatory legal norms have not been met. In principle, legitimate expectations are protected by contractual law. This means that the party expects to find itself in a position where it would be if the contract were executed properly, so applying the contractual responsibility is to ensure that the injured party is in that position.

Non-contractual (tort) liability is a pecuniary obligation arising from non-contractual damage, except in cases where it is established by laws that non-contractual (tort) liability also results from damage related to contractual relations (Civil Code of the Republic of Lithuania, 2000, Article 6.245(4)).

The main function of non-contractual (tort) liability is compensatory. This means that civil liability is intended to return the victim to a previous state (restitution in integrum) (*Alytaus regiono Aplinkos apsaugos departamentas v. UAB "Graanul invest"*, 2008).

The basic rules of non-contractual civil liability are contained in Article 6.263 of the Civil Code of the Republic of Lithuania. It established the duty of every person to abide by the rules of conduct so as not to cause damage to another by his actions. Violation of the duty of diligence established in this law implies the occurrence of non-contractual (tort) liability.

One of the peculiarities of Lithuanian law is that Lithuanian law does not recognize competition for types of civil liability. In general, competition for types of civil liability, that is the choice of which law to use, is not allowed.

Paragraphs 3 to 4 of Article 6.245 of the Civil Code of the Republic of Lithuania clearly state when contractual civil liability arises and when non-contractual liability arises. It is stated that non-contractual (tort) liability is a pecuniary obligation which is not related to any contractual relation, except in cases where it is established by laws that tort liability shall also result from damage related with contractual relations. The linguistic analysis of these provisions leads to the conclusion that there is no tort if the damage relates to a contractual relationship.

In conclusion, the Lithuanian legislature has come out in favor of the prohibition of competition or choice of types of civil liability, because the law regulates the occurrence and application of these types.

Ivanauskienė (2015) concludes that structure and linguistic analysis of the Civil Code of the Republic of Lithuania allow for the independence of contractual and non-contractual claims or the priority of a contractual claim in respect to a tort claim.

The case law of the Supreme Court of Lithuania has also clarified that competition for contractual and non-contractual liability is not possible under the legal regulation of civil liability. It is stated that the noncumul principle established in Article 6.245 (4) of the Civil Code of the Republic of Lithuania prohibits the use of non-contractual liability of the parties' contractual relations but establishes the possibility to provide exceptions from this rule by law (*UAB "Gaumina" v. UAB "Raminora"*, 2015).

When deciding on the delimitation of contractual and non-contractual (tort) liability, it is important to note that under Article 6.189 of the Civil Code of the Republic of Lithuania, the contract obligates not only what is expressly provided but also that which is determined by the nature of the contractor determined by laws (implied provisions). Mandatory legal provisions bind the parties, irrespective of whether they are included in the contract (Civil Code of the Republic of Lithuania, 2000, Article 6.157(1)). The principle of enforceability of the contract states that every person have a duty to perform his contractual obligations in a proper way and without delay, otherwise there is a contractual liability for improper fulfillment of the obligation. This means that, irrespective of which provisions are violated – law or contract, the parties' responsibility to be regarded as a contractual (*UAB "Gaumina" v. UAB "Raminora"*, 2015).

The Supreme Court of Lithuania, in its statement on the contractor's liability for the damaged property of the customer, stated that the application of non-contractual (tort) liability to one of the parties of the contract can only take place when the legal basis is provided for by statutory law. (*AB "Lietuvos draudimas" v. AAS "Gjensidige Baltic"*, 2016).

Cases may exist where damage to third party property, health or life is caused by inadequate performance of the contract work. Non-contractual liability arises in this instance. For example the liability of a manufacturer or a supplier of services (Civil Code of the Republic of Lithuania, 2000, Article 6.292). A manufacturer or a supplier of services has to compensate for damage caused by defective products or defective services.

Both contractual and non-contractual liability may result in direct and indirect damages. Direct damages are the loss or damage of property, expenses incurred while indirect damages are the loss of income.

In the case of contractual liability, not only direct and indirect losses are compensated, but also a penalty (fine, interest). The purpose of the penalty established by agreement between the parties is to compensate the injured party for possible losses if the contractual or pre-contractual obligations are not fulfilled or improperly executed. In the case law of the Supreme Court of Lithuania stated that the amount of penalty shall be included in the number of damages and shall not exceed them (*Valstybinio socialinio draudimo Fondo valdybos Panevėžio skyrius v. UAB "Vaiba"*, 2009).

The non-performing party (enterprise or businessperson) is liable only for the foreseeable damages or damages which could have been reasonably foreseen at the time of the conclusion of the contract – that is as being likely to result from the non-performance of the obligation (Civil Code of the Republic of Lithuania, 2000, Article 6.258(4)). Thus, the obligation of the non-performing party to compensate for the damages depends on whether it could and should have foreseen such losses. However, the case-law of the Supreme Court of Lithuania states that, where the debtor fails to fulfill his contractual obligation by intentional fault or gross negligence, he has a duty to compensate the injured party for unforeseeable damages as a consequence of the non-performance of the contract (*UAB "Melesta" v. Lex System GmbH*, 2013).

3. Strict Liability (Lithuanian Law)

The law of strict liability is used in Lithuania, that is the existence of the defect is the only necessary element needed to make the contractor liable. This is not really so different than the law of US, that is, if strict liability is defined as "liability without fault" then a breach of contract is a form of strict liability although it has never been approached this way in US law. That is, a defect is, by definition, a breach of contract.

Both contractual and non-contractual liability may be strict, i.e. liability is engaged without the fault of the person who caused the damage. The doctrine of strict liability is an exception to the traditional guilt-based liability, and the essential elements of it are the emergence of liability for persons, regardless of their fault.

Strict contractual liability is set out in Article 6.256 (4) of the Civil Code of the Republic of Lithuania. Where an enterprise (businessman) fails to perform his contractual obligation or performs it defectively, he is liable in all cases unless he proves that non-performance or defective performance has resulted from a superior force unless it is otherwise provided for by laws or the contract.

The Supreme Court of Lithuania has held that strict contractual liability applies in cases where the law governing a particular type of contract or the contract itself provides that liability is strict and the party who has breached the contract is an entrepreneur (*UAB "Vera" v. R.S.*, 2017).

Article 6.697 (3) of the Civil Code of the Republic of Lithuania stipulates that the contractor, designer, and supervisor of construction are liable for defects discovered during the warranty period unless they can prove the cause of the defects is one of the following: normal wear and tear, improper use, or improperly carried out repairs or other culpable actions by the owner or other entities with a relationship to the owner. The Supreme Court of Lithuania has repeatedly stated that in the case of litigation due to defects of construction works, the owner only need prove the existence of the defect and does not have to prove that the contractor was negligent, that is acted unreasonably. If circumstances allow the contractor to avoid liability, it is up to the contractor to prove those circumstances. (*L. K. v. L. S.*, 2016; *DNSB Taurakalnio namai, Vilnius v. UAB Santechnikos verslas*, 2014; *AB Panevėžio statybos trestas v. UAB AK Aviabaltika*, 2004; *AB If P&C Insurance AS v. UAB Įrengimas*, 2009; *E. M. v. UAB Mindija*, 2005; *UAB Laugina v. UAB Agaras*, 2008).

Strict non-contractual (tort) liability is preferred when the losses incurred by a particular activity cannot be eliminated or reduced with due care. This means that strict non-contractual liability arises only when the activity is unusually dangerous.

One of these strict forms of non-contractual (tort) liability is the liability of the owner (possessor) of buildings (Civil Code of the Republic of Lithuania, 2000, Article 6.266). Pursuant to Article 6.266(1) of the Civil Code of the Republic of Lithuania, damage caused by reason of the collapse of buildings, constructions, installations or other structures, including roads or other defects thereof, shall be compensated by the owners of such objects.

This Article establishes a non-exhaustive list of objects where liability without the fault applies to damage caused by defects of such objects.

Aljassmi and Han (2014) have defined a defect as “a failing or shortcoming in the function, performance, statutory or user requirements of a building [that] might manifest itself within the structure, fabric, services or other facilities of the affected building”. The most frequent construction defects include the absence of specific component parts or undue functionality, damaged surfaces and undue installation (Trinkūnienė et al., 2017; Aïssani, Chateaufeuf, Fontaine, & Audebert, 2016). Structural defect and inappropriate installation of roofs and facades during construction are resolved at during the construction stage due to existing quality standards, while other aesthetic and functional defects remain and arise at handover (Forcada, Macarulla, Gangoellis, & Casals, 2016).

A more detailed list of defects has been developed by the Supreme court of Lithuania. For example the inadequate quality of roofing (due to leakage and exposure to atmospheric influences) are recognized as a construction defect, for which liability without the fault applies, but the piece of ice (snow) that has fallen from the roof of the apartment house on the car is not a defect in the construction (roof). Other defects of the construction include the uncovered well of a fire water tank, the cracked connection of a plastic water pipe, the inadequate installation of a shower enclosure or leaking bath equipment in an apartment house, and the cracked water supply pipe (*If P&C Insurance AS v. Vilniaus miesto savivaldybė*, 2015; *AB "Lietuvos draudimas" v. UAB "Naujamesčio būstas"*, 2017; *J. B., A. B. v. Lietuvos valstybė*, 2010; *AB "Lietuvos draudimas" v. Vilniaus miesto savivaldybė*, 2005; *M. K., E. K. v. G. N., A. N.*, 2008; *AB "Lietuvos draudimas" v. V. B.*, 2014, *ERGO Insurance SE v. A. F.*, 2016).

The owner (possessor) of the buildings must bear the risk and compensate for damage caused by the demolition or other defects of the structures, even if he has taken all measures that could reasonably be required, was prudent and diligent to avoid the damage, but it nevertheless appeared (*If P&C Insurance AS v. VĮ "Automagistralė"*, 2014; *UADB "Industrijos garantas" v. Vilniaus miesto savivaldybė*, 2015).

It should be noted that the owner is liable for damage caused by the defects of the structure in all cases, except when the management of the structure is transferred to another person – the possessor.

Most jurisdictions in the US have been reluctant to extend the concepts of strict liability, which is considered a tort, to the construction industry; however, a trend to do so can be seen in the law. It is usually only applied when the defect has caused a physical injury to a person (Recovery, Under Strict Liability in Tort, 2005; *Brooks v. Eugene Burger Management Corp.*, 1989).

4. Fraud or other intentional wrong

Defects to construction may be hidden by an act of fraud. Under Lithuanian law, in such cases, an extended warranty period applies. Article 6.698 (1) of the Civil Code of the Republic of Lithuania reads that in such cases an extra extended period of warranty (20 years) is applied. In all fraud cases, the fraud must be proved, it cannot be assumed.

Lithuanian law extends the warranty period however, in the US the warranty period is not extended, what may be extended is what is called the statute of limitations. A statute of limitations is a time period after the occurrence of some event during which the injured party can sue. Different statutes of limitations exist for different types of actions. For example, breach of contract may be four years and tort two years, depending on the jurisdiction.

In US law, as stated above, in U.S. law, it is a fundamental principle that one cannot turn a breach of contract into a tort and a defect is a breach of the contract. The normal damages would be the cost to repair that is compensatory damages. However, some exceptions have arisen in the construction industry and punitive damages have been awarded to deter willful misconduct. This is discussed in Section 2 above.

Conclusions

The state of the law in the US is that a defect is considered a breach of the contract never a tort. This allows for only compensatory damages. Damages such as pain and suffering or mental anguish are not recoverable. If a defect causes damages to third parties however, it is considered a tort as there is no contractual relationship between the injured party and the party causing the defect.

According to Lithuanian law competition for contractual and non-contractual liability is not possible under the legal regulation of civil liability. Irrespective of which provisions are violated – law or construction contract, the parties' responsibility to be regarded as a contractual. There may be cases where damage to third party property, health or life is caused by inadequate performance of the construction contract and non-contractual liability arises from the contract. Such cases can only take place when the legal basis for non-contractual liability is provided for by statutory law. Direct and indirect damages are recoverable. In contractual liability, the amount of penalty is included in the number of damages and shall not exceed them.

Lithuania applies the law of strict liability to a defect in the construction works and the US applies the law of breach of contract. The result is, however, the same: the contractor is liable for defects caused by the contractor. According to Lithuanian law, the strict contractual liability applies to the contractor, designer, and supervisor of construction. They are liable in all cases unless they can prove that the cause of the defects is a superior force or circumstances provided for by laws or the contract. The strict forms of non-contractual (tort) liability apply to the owner or possessor of buildings. Liability without the fault applies to damage caused by defects of such objects.

Under Lithuanian law, if defects to construction are hidden by an act of fraud, an extended warranty period applies. In the US the warranty period is not extended, but a different statute of limitations may apply or the statute of limitations may only begin to run once the fraud is discovered.

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