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CONTRACT DRAFTING TO REDUCE OR ELIMINATE DAMAGES – WHAT ARE THE LIMITS?

TIME IS NOT MONEY
THE WORLD OF "NO DAMAGES FOR DELAY" CLAUSES

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Contract Drafting to Reduce or Eliminate Damages - - What are the Limits?

TIME IS NOT MONEY
The World of "No Damages for Delay" Clauses

Buck Beltzer

Time is of the essence. Time is money. Time, in a construction project, is vitally important to all parties and the success of virtually any kind of construction project. So the ability of one party to force on another a contract clause that removes the ability to recover for lost time sets the stage for a grand fight; a fight in which the imposed-upon party may suffer a financial beat-down.

Delay can result from a number of sources, and the circumstances that lead to delay are as varied as the number of different types of construction projects. Owner-caused delay can result from a failure to provide site access or right-of-way, [1] interference by other prime contractors,[2] and deficient plans and specifications,[3] to name just a few. Of course, a contractor's self-inflicted delay is generally not compensable regardless of whether the contract includes a no damages for delay clause. Delay, and its varied and numerous causes and tracking methods are outside of the scope of this paper. Instead, this paper will focus on the so-called "no damages for delay" clause.

A "no damages for delay" clause waives the contractor's ability to recover damages from the owner due to project delay. And with flow-down clauses standard in a project with any level of sophistication, such a clause in an Owner/Contractor agreement will impact every project trade. No damages for delay clauses are a sharp knife in the Owner's sheaf, and in most projects will

[1] *Dep't of Trans. v. Arapaho Const., Inc*., 357 S.E.2d 593, 594 (Ga. 1987).
[2] *Phoenix Contractors, Inc. v. Gen. Motors Corp.*, 355 N.W.2d 673, 675 (1984).
[3] *United States v. Spearin*, 248 U.S. 132 (1918).

not only frame the contractor's available damage recovery after the project ends, but can also act as an accelerant on any breakdown in the Owner/Contractor relationship during the project.

Practitioners should be able to identify contract clauses limiting and extinguishing their ability to recover for delay damages, standard forms in which they may see such a clause, the jurisdictions and rationale courts use to uphold or void the clause, ways to form arguments to defeat or enforce the clause, and strategies in negotiating alternate clauses.

I. Background and History of No Damages for Delay Clauses

No damages for delay clauses provide an owner a contractual defense against claims by contractors and subcontractors for delay damages.[4] Project owners generally benefit most from the clauses, but contractors who negotiate flow-down provisions or independent no damages for delay clauses with project subcontractors and other lower-tier parties can also use the clause to their benefit.[5]

As the clauses gained popularity, contractor and subcontractor trade groups began to lobby state legislatures to enact laws prohibiting their use. Contractors and subcontractors argue the clauses are inherently unfair, but in today's construction environment where the project owner is in the power position, contractors and subcontractors will nonetheless sign away their rights to get the work. Now, more than a dozen states have enacted statutes prohibiting the clauses in public project contracts (and some states in private contracts, as well).[6]

Because they are heavily legislated and state-specific, choice of law and conflict of law contract clauses and state statutes take center stage in determining whether a no damages for delay clause is enforceable. For example, parties often include choice of law provisions by which a certain state's law would apply to the contract. But some states, like Colorado, require that Colorado law "shall apply to every construction agreement affecting improvements to real

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[4] Robert F. Cushman, John D. Carter, Paul J. Gorman, Douglas F. Coppi, Proving and Pricing Construction Claims 299-300 (3d ed. 2001) [hereinafter *Proving and Pricing Construction Claims*].

[5] *McDaniel v. Ashton-Mardian Company*, 357 F.2d 511, 517 (9th Cir. 1966). *See also Crawford Painting and Drywall Co. v. I.W. Bateson Co*., 857 F.2d 981 (5th Cir. 1988). *See also Atlantic States Construction, Inc. v. Hand, Arendall, Bedsole, Greaves and Johnson*, 892 F.2d 1530 (11th Cir. 1990)("exculpatory clause serves the purpose of insulating the general contractor itself from the possibility of being (1) liable to the subcontractor for delay caused by the government, yet (2) unable to recover from the government").

[6] *See* 50 State Survey Pay-if-Paid / Pay-When-Paid, and No Damage for Delay, Woods and Aiken, available at: http://www.woodsaitken.com/wp-content/uploads/2011/12/PayIfPaid_PayWhenPaid_NDFD-Provisions.pdf (last visited Oct. 31, 2012).

property within the state of Colorado."[7] And Colorado is one many states that refuses to enforce no damages for delay clauses on public works projects.[8] So a clever contractor who uses a standard form subcontract purporting to apply the law of a friendly forum for no damages for delay clauses may still have problems in certain states enforcing the clause. Practitioners must drill down into the several lawyers of state statutes and contract clauses to determine whether a clause is enforceable in any certain state.

II. Examples of no damages for delay clauses

No damages for delay clauses come in many shapes and sizes, and not always with blinking hazard lights. To be sure, none of them will be titled "no damages for delay clause." Some examples include:

> § The Owner shall not be liable to the Contractor and/or any Subcontractor for claims or damages of any nature caused by or arising out of delays. The sole remedy against the Owner for delays shall be the allowance of additional time for completion of the Work, the amount of which shall be subject to the claims procedure set forth in the General Conditions.
>
> § Owner shall have the right at any time to delay or suspend the work or any part thereof without incurring liability therefore. An extension of time shall be the sole and exclusive remedy of Contractor for any delays or suspensions suffered by Contractor, and Contractor shall have no right to seek or recover from Owner any damages or losses, whether direct or indirect, arising from or related to any delay or acceleration to overcome delay, and/or any impact or effect of such delays on the work.
>
> § The Contractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act or failure to act of the Owner or any of its officers, directors, employees, architects, or other representatives, or because of any injunctions which may be brought against the Owner or its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the Work as provided herein.
>
> § The Contractor shall have no claim against the Owner for an increase in the contract price or a payment or allowance of any kind based on any damage, loss, or additional expense the

[7] Colo. Rev. Stat. §13-21-111.5(6)(g).
[8] Colo. Rev. Stat. §24-91-103.5.

> Contractor may suffer as a result of any delays in prosecuting or completing the work under the Contract, whether such delays are caused by the circumstances set forth in the preceding paragraph or by any other circumstances. It is understood that the Contractor assumes all risks of delays in prosecuting or completing the work under the Contract.
>
> § No claim for damages or any claim other than for an extension of time as herein provided shall be made or asserted against the Owner by reason of the delays hereinafter mentioned: [*list possible delays*].
>
> § Should the Contractor be obstructed or delayed in the commencement, prosecution, or completion of the Work because of conditions attributable to the Owner and which by the terms of the Contract may be grounds for an extension of time, to the exclusion of other remedies, the Contractor shall promptly make claim therefor in writing pursuant to the claims provisions in the General Conditions.
>
> § The Owner for just cause shall have the right at any time to delay or suspend the commencement or execution of the whole or any part of the Work without compensation or obligation to the Contractor other than to extend the time for completing the Work for a period equal to that of such time of suspension.[9]

A. **Standard Industry Form Contracts**

The standard industry form contracts do not contain explicit "no damages for delay" clauses. The basic language in the industry form contracts specifies allowable damages for delays in a way that favors recovery by contractors and not owners. However, attorneys can, and almost always should, amend the templates to fit the circumstances of the particular project and relationship between the parties. Often this includes adding language to limit or restrict claims by contractors for delays caused by either party or a third party to the contract. Examples of amendments to the standard forms to add no damages for delay clauses are noted below for form documents from the American Institute of Architects, ConsensusDOCS, and Engineers Joint Contract Documents Committee.[10]

1. **American Institute of Architects (AIA)**

[9] *See* Legal Guide to AIA Documents – Sabo, Sec. 11.2, Substantial Completion Date: Par 3.3, last updated 7/2012.
[10] The authors do not warrant the enforceability of these suggested examples in any jurisdiction.

Section 8.3 of the AIA A201 general conditions provides that the owner and contractor may seek damages from each other in the event of a delay caused by the other party. It states "Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents."[11] However, Section 15.1.6 limits each party's ability to recover consequential damages and takes away most elements of delay damage for the owner while retaining the ability for the contractor to recover delay damages.[12]

Removing the provision providing for delay damages by either party, Section 8.3.3, may be viewed as impliedly adding a no damages for delay clause.[13] In *Board of Education of Worcester County v. Beka Industries, Inc*., the parties deleted Section 8.3.3 and instead agreed "Extension of time shall be Contractor's sole remedy for delay." Though this was a clear statement of express mutual intent, the Board argued that by deleting Section 8.3.3, the parties demonstrated an intent to eliminate delay damages.[14]

Of course, owners may have more luck in enforcement if the clause affirmatively waives the contractor's right to delay damages. In that case, an owner can amend Section 8.3.1 of the contract to say "Extension of time shall be Contractor's sole remedy for delay."[15]

2. ConsensusDocs

As the ConsensusDocs purport to have been developed by a coalition of industry associations representing owners, contractors, subcontractors, designers and sureties, (only two of which parties have an interest in a no damages for delay clause), the standard template contains no such waiver section. Further, like the AIA A201 Form, the ConsensusDocs 200 Contract contains a

[11] AIA A201 2009.
[12] THE Construction Contracts Book: How to Find Common Ground in Negotiating the 2007 Industry Form Contract Documents at 119-20 (Daniel S. Brennan, Michael J. Hanahan, Jennifer A. Nielsen, John I Spangler eds., 2d ed. 2008) [hereinafter "Dan Brennan, et al., Construction Contracts Book"].
[13] *See Bd. of Educ. of Worcester Cnty. v. Beka Indus., Inc.*, 989 A.2d 1181, 1219-20 (2010) *cert. granted*, 997 A.2d 789 (2010) and *aff'd in part, rev'd in part sub nom*. *Beka Indus., Inc. v. Worcester County Bd. of Educ.*, 18 A.3d 890 (2011) (deleting §8.3.3 from the A200 AIA agreement, which would have allowed damages for delay, was further indication that the parties intended that there be no damages for delay and precluded the contractor from recovering delay damages).
[14] *Id*. ("Moreover, § 8.3.3 of the form AIA agreement, which would have allowed damages for delay provided for in other provisions of the contract, was crossed out.")
[15] *Id*.

waiver of consequential damages that all but eliminates an owner's claim for delay damages while preserving several types of delay damages for the contractor.[16]

3. Engineers Joint Contract Documents Committee (EJCDC)

EJCDC, a joint venture of the ACEC, AGC, ASCE, and NSPE, also produces a version of standard general conditions for construction, the C-700. The language in the EJCDC document presumes that only contractors will have delay claims and allows for an adjustment of contract price and schedule for delays not "within the control of the Contractor."[17]

B. Alternative Clauses Used by Owners

ABA's publication THE Construction Contracts Book (How to Find Common Ground in Negotiating the 2007 Industry Form Contract Documents) provides a number of "owner-sided" sample clauses for use in negotiating delay provisions.[18] Two such examples are:

1. No Damages for Delay unless there is an "active interference" as defined by the contract.

> Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under the Contract Documents, shall be the sole remedy of the Contractor for any (i) delay in the commencement, prosecution or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims (collectively referred to as "Delay") whether or not such Delay is foreseeable, unless the Delay is caused by acts of the Owner constituting active interference with the Contractor's performance of the Work, and only to the extent such acts continue after the Contractor furnishes the Owner with nocitve of such interference. In no event shall the Contractor be entitled to any compensation or recovery of any damage in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or direction, suspension, rescheduling or correction of the Work), regardless of the extent or frequency of Owner's exercise of such

[16] Dan Brennan, et al., Construction Contracts Book at 120-21.
[17] Dan Brennan, et al., Construction Contracts Book at 121-22.
[18] Dan Brennan, et al., Construction Contracts Book at 123.

> rights or remedies, shall not be construed as active interference with the Contractor's performance of the Work.[19]

An "active interference" exception waives a contractor's right to delay damages unless the delay is attributable to the Owner's "active interference." Although this can be a very tempting option for an owner wanting to protect himself against claims for price and schedule adjustment by a contractor for delays due to causes other than the owner's "active interference" (especially when a court will likely apply this exception as a matter of law), application of the waiver could pose more problems than it solves.[20] First, contractors will likely increase their bid for a project involving this type of clause to account for the increased risk they will likely incur. Second, many sophisticated general contractors will refuse to agree to a contract containing a no damages for delay clause for a fixed-price or guaranteed maximum price contract.[21] Third, it is difficult in practice to determine what constitutes "active interference" by an owner.[22] Thus, a contractor is likely to assert the delay claim regardless of the active interference exception, causing the owner to defend.

2. No Damages for Delay during a "Grace Period" after which delay damages can be incurred.

> Notwithstanding anything to the contrary in the Contract Documents, the Contractor's sole remedy for any (i) delay in the commencement, prosecution or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims (collectively referred to as "Delay") whether or not such Delay is foreseeable, shall be an extension of time in which to complete the work if permitted under the Contract Documents and, to the extent permitted under the Contract Documents, an adjustment in the Contract Sum. Except as provided below, Contractor shall not e entitled to any other compensation or recovery of any damages of any kind due to a Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages or other similar remuneration.
>
> The Contractor shall be permitted an adjustment in the Contract Sum if any Delays, either individually or taken in the aggregate, cause the Contract Time to be increased by more than ___ days (the "Grace Period"). Any adjustment in the Contract Sum under

[19] Dan Brennan, et al., Construction Contracts Book at 123.
[20] *See U.S. Steel Corp. v. Missouri Pac. R.R. Co.*, 668 F.2d 435 (8th Cir. 1982)
[21] Dan Brennan, et al., Construction Contracts Book at 123.
[22] *See* section 4(a) below for the varied circumstances in which courts have found active interference.

> this Subparagraph shall be limited to the increase, if any, of direct costs incurred by the Contractor in performing the Work as a result of that portion of any Delay or Delays which cause the Contract Time to be increased beyond the Grace Period. Direct costs for the purposes of this Subparagraph are (i) those items specifically set forth in Exhibit __ attached to the Agreement, and (ii) do not include profit or overhead.

The "grace period" exception attempts to share the delay risk between owner and contractor. Under such a clause, the contractor would shoulder the risk for delays between zero days and the number of days in the grace period, and the owner would shoulder the risk for any delay beyond the grace period. Less harsh than a strict no damages for delay clause, this type of provision can provide bidders with a time frame to use for estimating a contingency for delay damages that may be incurred on the project.[23]

C. Public Contracts

Some states prohibit no damages for delay clauses through legislation. In Virginia, "[a]ny provision contained in any public construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonably delay…shall be void and unenforceable as against public policy."[24] Courts in Virginia have refused to enforce no damages for delay clauses based upon this statute.[25]

States that have not enacted legislation prohibiting no damages for delay clauses will hold the opposite, that the public policy of freedom of contract trumps any potential right of a contractor for delay damages against a public entity.[26]

There are no known instances upon which a state prohibits a no damages for delay clause in a private project, but will allow such a clause in a public project.

D. Overreaching Clauses May Backfire

Like the examples above, typical no damages for delay clauses allow for additional time but no additional money. However, if the contractor is not granted additional time, it may be entitled

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[23] Dan Brennan, et al., Construction Contracts Book at 123-24.
[24] Va. Code Ann. §2.2-4335(A).
[25] *Blake Const. Co., Inc. v. Upper Occoquan Sewage Auth*., 587 S.E.2d 711 (Va. 2003).
[26] *See Markwed Excavating, Inc. v. City of Mandan*, 791 N.W.2d 22 (N.D. 2010) (no damages for delay clauses, when broad and unambiguous, must be upheld to reflect the North Dakota legislature's preference for construing contracts with public entities in favor of the public entity).

to recover money damages from a delay.[27] In *U.S., for Use & benefit of Pertun Const. Co. v. Harvesters Group, Inc*., the Court, noting no damages for delay clauses are enforceable in Florida, refused to enforce the clause because the contractor failed to satisfy a condition precedent: granting the subcontractor an extension of time. The clause stated:

> Should Subcontractor be delayed in the prosecution of the work by the act, neglect or default of Contractor, owner or architect, or by any damage caused by fire, lightning, earthquake, cyclone, or any casualty for which Subcontractor is not responsible, then the time fixed for the completion of the work pursuant to the terms of the agreement shall be extended for a period equivalent to the time lost by reason of the cause aforesaid.... Subcontractor agrees that such extension of time for completing the work precludes, satisfies and cancels any and all other claims on account of such delay.

E. Design Professional-caused delay

Design professionals are not immune to the impact felt by a no damages for delay clause, and such a clause in an Owner-Contractor contract may not protect a design professional from a contractor's claim for delay.

No damages for delay clauses can also be enforceable when included in an owner-architect agreement for design services. A Maryland Appellate Court held that a no damages for delay clause in an agreement between the owner and architect for design services prevented the architect from recovering for cost overruns from "interruptions to the normal process of preparing the contract documents" and "extensive administration."[28] There, the court also held that the "not contemplated by the parties" exception did not apply because the no damages for delay clause was unambiguous, the exception was not recognized by courts in Maryland, and there was no "intentional wrongdoing or gross negligence" in this case.[29]

III. Enforcement of No Damages for Delay Clauses

A. No damages for Delay Clauses are Typically Enforceable

[27] *See U.S., for Use & benefit of Pertun Const. Co. v. Harvesters Group, Inc*., 918 F.2d 915, 920 (11th Cir. 1990) (a no damages for delay clause allowing for schedule extension and disallowing money damages, cannot preclude a subcontractor's recovery of money damages when a subcontractor is wrongfully and prematurely terminated).
[28] *State Highway Admin. v. Greiner Eng'g Scis., Inc.*, 577 A.2d 363, 364-66 (Md. Ct. Spec. App. 1990).
[29] *State Highway Admin.* at 371-72.

A no damages for delay clause will generally be enforceable if the requirements for a valid contract are satisfied.[30] "The parties to the contract are free to agree upon any terms that are not illegal."[31] As an initial matter, often the court will impose on the owner the burden to prove that the contractor's damage claim falls within the scope of the contract's no damages for delay clause.[32] Some courts require the party seeking enforcement show that both parties to the contract are sophisticated, and that the contract clearly contemplated the transfer of risk for the usual types of delay.[33]

Likewise, where the contract between the parties is clear and unambiguous, and the contractor did not make timely requests, in writing, for extensions of time, the contractor is charged with realizing it was to bear the expenses for any delays in construction and the "no damage" clause should be given full effect.[34] Similarly, in *Brown Bros. v. Metropolitan Gov't*, the contractor was delayed by the utility company.[35] The court rejected a claim for extra costs because the contract specifically anticipated such delays.[36]

In *Unicon Mgmt. Corp. v. City of Chicago,* the contract had a no-damage-for-delay clause that included delay caused by the owner (with the possible exception of bad faith by the owner).[37] The City of Chicago was potentially responsible for some of the delay because of their failure to approve certain submittals and have portions of the project ready for the contractor.[38] However, the parties bargained on the agreement including the no damages for delay clause, so the contractor waived any right to damages for the delays.[39]

Some courts will try to avoid strict application of a no damages for delay clause by approaching enforcement from a position favoring the contractor. "[B]ecause of their harsh

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[30] *See* 13 Am.Jur.2d Building and Construction Contracts §§58-59 (2009).
[31] *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co*., 355 F.Supp. 376, 396 (S.D. Iowa 1973).
[32] *Hawley v. Orange County Flood Control Dist.,* 211 Cal. App. 2d 108, 27 Cal. Rptr. 478 (1963); *F.D. Rich Co. v. Wilmington Housing Authority,* 392 F.2d 841 (3d Cir. 1e.g.,68).
[33] *See Ace Stone, Inc. v. Wayne Twp.*, 221 A.2d 515.519 (1966) ("[w]here parties enter into a construction contract with a customary no-damage clause they clearly contemplate…that the contractor himself will bear the risks of the 'ordinary and usual types of delay' incident to the progress and completion of the work.").
[34] *Peter Keiwit Sons' Co. v. Iowa D. Utilities Co.*, 355 F. Supp. 376, 401 (S.D. Iowa 1973).
[35] *Brown Bros. v. Metropolitan Gov't*, 877 S.W.2d 745, 746 (Tenn. Ct. App. 1993),
[36] *Brown Bros*. at 746. *See also Burgess Constr. Co. v. M. Morrin & Son Co*., 526 F.2d 108 (10th Cir. 1975) (delay must be one contemplated and excused by the contract), *cert. denied*, 429 U.S. 866 (1976).
[37] *Unicon Mgmt. Corp. v. City of Chicago*, 404 F.2d 627 (7th Cir. 1968).
[38] *Unicon Mgmt. Corp.*, 404 F.2d at 628.
[39] *Id.* at 630.

effects, these clauses are to be strictly construed."[40] In *Buckley & Co. v. State*, the court stated that "a no-damage provision ought not be construed as exculpating a contractee from that liability unless the intention to do so is clear."[41]

B. Exceptions for Enforcement

1. Conditions Precedent

First, as a matter of general contract interpretation, enforcement is conditioned on the owner satisfying any conditions precedent in the clause. If the no damages for delay clause includes a provision (as many or most do) allowing extra time as the sole remedy, then the owner must actually grant extra time to the delayed party in order to benefit from the exculpatory provision.[42]

2. State Legislation

A 50-state survey on state law related to no damages for delay clauses is outside of the scope of this paper.[43] However, we have listed below some state statutes prohibiting no damages for delay clauses to varying degrees.

a. State Legislation Enforcing No Damages for Delay Clauses Under Certain Circumstances

Several states enforce no damages for delay clauses but only under certain circumstances. Arizona allows for "negotiations" between a contractor and the state for delay damages caused by the state entity, but only under the circumstances of an unreasonable delay that was not within the contemplation of the parties to the contract.[44] California's statute uses similar exception language (only if the "delay is unreasonable under the circumstances" and "not within contemplation of the parties"), but does not use the unique "negotiations" language.[45] Similar

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[40] *John E. Green Plumbing and Heating Co., Inc. v. Turner Const. Co*., 742 F.2d 965, 966 (6th Cir. 1984). *See also F.D. Rich Co. v. Wilmington Hous. Auth*., 392 F.2d 841 (3rd Cir. 1968).
[41] *Buckley & Co. v. State*, 140 N.J. Super. 289, 356 A.2d 56 (1975); *Ace Stone, Inc. v. Township of Wayne,* 47 N.J. 431, 221 A.2d 515 (1966); *Giametta Assoc., Inc. v. T.T. White, Inc.,* 573 F. Supp. 112 (E.D. Pa. 1983).
[42] *Bates & Rogers Const. Corp. v. n. Shore Sanitary Dist.*, 414 N.E.2d 1274, 1279-81 (Ill. App. Ct. 1980).
[43] *See* 50 State Survey Pay-if-Paid / Pay-When-Paid, and No Damage for Delay, Woods and Aiken, available at: http://www.woodsaitken.com/wp-content/uploads/2011/12/PayIfPaid_PayWhenPaid_NDFD-Provisions.pdf (last visited Oct. 31, 2012).
[44] Ariz. Rev. Stat. Ann. §41-2617.
[45] Cal. Pub. Cont. Code §7102.

statutes are in place in Colorado,[46] Minnesota,[47] Missouri,[48] New Jersey,[49] North Carolina,[50] Oregon,[51] and Virginia.[52]

b. State Legislation Refusing to Enforcing No Damages for Delay Clauses

Other states simply prohibit no damages for delay clauses without exception. In Kansas, "[a]ny provision in a contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract shall be void, unenforceable and against public policy."[53] In Washington, also, clauses prohibiting delay damages are "void and unenforceable" as they are "against public policy."[54] Similar statutes are in place in Kentucky,[55] and Ohio.[56]

3. Traditional Contract Arguments

If the state's statutory scheme will enforce the no damages for delay clause, the damaged party's next argument is to attack using traditional contract arguments: waiver, duress, rescission, mistake, unconscionable terms, and ambiguity. The contractor has the burden to prove that an exception exists.[57]

Extrinsic evidence, for example, may assist in striking the clause. Where a conflict exists between a contract clause providing for delay impact costs arising from change orders and a general no damages for delay clause, extrinsic evidence may show the parties intended for contractor compensation in the case of delay.[58] In *Williams & Sons Erectors*, the contractor presented evidence that the owner paid delay impact costs related to change orders.[59] In doing so, the owner could not be awarded summary judgment on the no damages for delay clause.[60]

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[46] Colo. Rev. Stat. §24-91-103.5.
[47] Minn. Stat. §15.411.
[48] Mo. Rev. Stat. §34.058.
[49] N.J. Rev. Stat. §2A:58B-3.
[50] N.C. Gen. Stat. §143-134.3.
[51] Or. Rev. Stat. Ann. §279C.314.
[52] Va. Code. Ann. §2.2-4335.
[53] Kan. Stat. Ann. §16-1907.
[54] Wash. Rev. Code. Ann. §4.24.360.
[55] Ky. Rev. Stat. Ann. §371.405.
[56] Ohio Rev. Code Ann. §4113.62.
[57] *Dickinson Co. v. Iowa State Dep't of Transportation,* 300 N.W.2d 112 (Iowa 1981).
[58] *Williams & Sons Erectors, Inc. v. South Carolina Steel Corp.*, 983 F.2d 1176, 1184 (2d Cir. 1993).
[59] *Williams & Sons Erectors, Inc.* at 1184.
[60] *Williams & Sons Erectors, Inc.* at 1184.

4. Extraordinary Circumstances May Lead to Compensable Delay

In highlighting the "freedom to contract" as one rationale behind enforcing no damages for delay clauses, courts often talk about how the parties of relatively equal bargaining power can negotiate for their risk before executing the contract. And one way to negotiate for risk is to provide a higher price when faced with a no damages for delay clause, to serve as a contingency in case of delay. In *Ozark Dam Constructors v. United States*, the court harshly criticized this practice.[61]

> A contract for immunity from the harmful consequences of one's own negligence always presents a serious question of public policy. That question seems to us to be particularly serious when, as in this case, if the Government got such an immunity, it bought it by requiring bidders on a public contract to increase their bids to cover the contingency of damages caused to them by the negligence of the Government's agents. Why the Government would want to buy and pay for such an immunity is hard to imagine. If it does, by such a provision in the contract, get the coveted privilege, it will win an occasional battle, but lose the war…
>
> If the plaintiffs really included in their bid an amount to cover the contingency of such inconsiderate conduct on the part of the Government's representatives, the Government was buying and the public was paying for things that were worth less than nothing.[62]

Despite the *Ozark* court's recognition that a contractor could price its risk for delay caused by negligence, the contractor could not contemplate, nor price the risk for, negligence that "is almost willful" and "showed a complete lack of consideration for the interests of the" contractor.[63]

Indeed, certain causes for delay, which vary from state to state, are recognized as exceptions to enforcement of a no damages for delay clause.[64] The causes can include owner's fraud, bad faith, active interference, gross negligence, or abandonment of the contract.[65]

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[61] *Ozark Dam Constructors v. United States*, 127 F.Supp 187 (Ct. Cl. 1955)
[62] *Ozark Dam Constructors v. United States*, 127 F.Supp 187, 190-91 (Ct. Cl. 1955).
[63] *Ozark Dam Constructors* at 191.
[64] *Proving and Pricing Construction Claims* at 299-300.
[65] *Proving and Pricing Construction Claims* at 299-300.

Courts many also frame the exceptions as they did in the following case: In *Plato General Const. Corp. v. Dormitory Auth. of N.Y.*, the contract contained a no-damages-for-delay clause, but the contractor sought damages for delays attributed to a number of causes.[66] Despite a no damages for delay clause, a contractor can recover if the delay "(1) was of a kind not contemplated by the parties, (2) amounted to an abandonment of the contract, (3) was caused by bad faith, or (4) was caused by active interference."[67]

However, such a clause exonerates an owner for delays caused by inept administration or poor planning, a failure of performance by the owner in ordinary, garden variety ways, or a failure of performance resulting from ordinary negligence, as distinguished from gross negligence.[68]

a. Fraud, Bad Faith, Willful, Malicious, or Grossly Negligent Conduct, and Active Interference

Few contract clauses favoring the owner can overcome the owner's very bad acts. In every no damages for delay clause (in many jurisdictions, anyway), the law implies a "promise and obligation not to hinder or impede performance."[69] Often, courts limit use of the clause if the delay was caused by the owner's "bad faith or its willful, malicious or grossly negligent conduct" or fraud.[70] The common thread to the line of cases finding certain exceptions to enforcing the no damage to delay clause is that the clauses are strictly construed, and the parties could not have contemplated these circumstances at the time of contract.

Where the contractor fraudulently and continuously tells the subcontractor that the no damages for delay clause will not apply to delays on a project, the clause may be waived despite the existence of a clause prohibiting oral waivers.[71]

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[66] *Plato General Const. Corp. v. Dormitory Auth. of N.Y.*, 932 N.Y.S.2d 504 (2011).
[67] *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co*., 355 F.Supp. 376 (S.D. Iowa 1973).
[68] *Peter Kiewit Sons' Co*. *See also Corinno Civetta Const. Corp. v. City of New York*, 493 N.E.2d 905, 909-10 (N.Y. 1986).
[69] *Newberry Square Development Corp. v. Southern Landmark, Inc*., 578 So.2d 750, 752 (Fla. App. 1991).
[70] *Corinno Civetta Const. Corp. v. City of New York*, 493 N.E.2d 905, 909-10 (N.Y. 1986) (bad faith, willful, malicious, or grossly negligent conduct) and *M.A. Lombard & Son, Co. v. Public Building Commission of Chicago*, 428 N.E.2d 889, 892 (Ill. App. 1981) (fraud); *see also Ozark Dam Constructors v. United States*, 127 F.Supp. 187, 191 (Ct. Cl. 1955).
[71] *See Chicago Coll. of Osteopathic Med. v. George A. Fuller Co.*, 766 F.2d 198 (7th Cir. 1985).

A contractor's failure to make full payment to a subcontractor, thereby preventing it from obtaining sufficient labor; gross inflation of backcharges; and theft of subcontractor's material may constitute willful and malicious conduct sufficient to void the no damages for delay clause.[72] An owner who directed a contractor to proceed knowing that work could not be completed on time acted in bad faith and actively interfered with the contractors ability to timely complete contracted work, and was therefore liable for delay damages despite a no damages for delay clause in the contract.[73] An owner's willful concealment of information that excavation materials would need to be deposited at a particular location to which federal agencies intended to delay access constituted willful concealment of foreseeable circumstances and prevented enforcement of the no damages for delay clause.[74]

An owner's active interference can also be grounds on which to award delay damages despite an exculpatory clause.[75]

> The active interference exception arises from the notion that in a contract [where] time is of the essence, yet the [contractor's] liability for delay is limited through a no damage clause-there is implied an obligation on the part of the [owner] to refrain from anything that would unreasonably interfere with the contractor's opportunity to proceed with its work in the manner provided by the contract and to permit the contractor to carry on that work with reasonable economy and dispatch.[76]

In *Blake Construction Co. v. C.J. Coakley Co*., the contractor failed to coordinate trades, provide temporary heat, provide a clear work area, and to ensure that other trades would not damage the subcontractor's completed work.[77] Despite characterizing these failures as resulting from the contractor being "disorganized and confused in its efforts to complete a job of such magnitude," the court found active interference and delay not contemplated by the parties.[78]

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[72] *U.S. for Use and Benefit of Evergreen Pipeline Const. Co., Inc. v. Merritt Meridian Const. Corp.*, 95 F.3d 153 (2d Cir. 1996).
[73] *U.S. Steel Corp. v. Missouri Pac. R.R. Co.*, 668 F.2d 435 (8th Cir. 1982).
[74] *Howard Contracting, Inc. v. G.A. MacDonald Const. Co., Inc.*, 71 Cal. App. 4th 38 (1998).
[75] *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co*., 355 F.Supp. 376, 399 (S.D. Iowa 1973).
[76] *United States Steel Corp. v. Missouri Pacific Railroad Co*., 668 F.2d 435, 438 (8th Cir. 1982) (but noting that active interference is not mere interference caused by another trade, or delay arising from "a simple mistake, error in judgment, lack of total effort, or lack of complete diligence").
[77] *Blake Construction Co. v. C.J. Coakley Co*., 431 A.2d 569, 579 (D.C. App. 1981).
[78] *Blake Construction Co.* at 577 and 579.

In *Newberry Square Development Corp. v. Southern Landmark, Inc*., the court found active interference when the owner delayed providing plans and specifications to the contractor, delayed in providing amended plans and specifications, delayed in approving change orders (and then forbid the contractor from working without an approved change order), and failed to make timely payment.[79] By way of color for the circumstances of the owner's behavior on the project, evidence showed the owner told the contractor he'd "break me before he'd pay."[80]

Taken from the dictionary definition, active interference requires "some degree of aggressiveness or commission" to "run at cross-purposes" against the contractor.[81] It "implies that more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence is needed."[82]

In some cases, active interference, without some "willful wrongdoing" or further evidence of intent, is not enough to overcome a no damages for delay clause.[83] In what appears to be the minority view, "[i]n order to constitute interference there must be reprehensible conduct of the [owner] which is in collision with or runs at cross purposes to the work of the contractor."[84]

The Sixth Circuit used the term "hindrance" to describe delays to the subcontractor's work "created by" the contractor.[85] These hindrances were a "failure to properly coordinate work on the project and failure to ensure that temporary heat was provided," thus providing support that a subcontractor could recover for impact due to out of sequence work despite a no damages for delay clause.[86] The court noted that the clause at issue, unlike many other clauses it reviewed, did not specifically waive delay damages caused by "hindrances."[87]

Sometimes, a no damages for delay case can impact even a project that finished on time. In *Phoenix Contractors, Inc. v. General Motors Corp*., the GM retained multiple primes, and

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[79] *Newberry Square Development Corp. v. Southern Landmark, Inc*., 578 So.2d 750, 752 (Fla. App. 1991).
[80] *Newberry Square Development Corp. at 752*.
[81] *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co*., 355 F.Supp. 376, 399 (S.D. Iowa 1973).
[82] *Peter Kiewit Sons' Co. at 399.*
[83] *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 417 (N.Y. App. 1983).
[84] *Allen-Howe Specialties Corp. v. U.S. Construction, Inc*., 611 P.2d 705, 709 (*citing Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council*, 276 P.2d 52, 59 (Cal. App. 1954)).
[85] *John E. Green Plumbing and Heating Co., Inc. v. Turner Const. Co*., 742 F.2d 965, 967 (6th Cir. 1984).
[86] *John E. Green Plumbing and Heating Co., Inc*. at 967
[87] *John E. Green Plumbing and Heating Co., Inc*. at 967

gave precedence in the work to one prime contractor instead of Phoenix.[88] Phoenix who was damaged by the delays completed his portion of work on time, but with substantial additional cost.[89] Although there was a no damages for delay clause in the contract, the court held that a jury issue existed as to whether the delay was either not the kind contemplated by the parties or caused by GM's active interference by the owner.[90]

Bad conduct by the owner is not always required to invalidate a no damages for delay clause. When both parties incorrectly (but innocently) assume the owner had obtained the necessary right-of-way, it demonstrates they did not contemplate right-of-way issues in entering into the no damages for delay clause.[91] But when the owner makes no affirmative representation of right-of-way status, and the contract places on the contractor the burden of obtaining permits, there can be no mistake as to the parties' intention to waive damages for such delays.[92]

b. Unreasonable Delay and Abandonment

An unreasonable delay can be the basis for a court to refuse to enforce a no damages for delay clause. "[T]he clause will not be enforced where the delay . . . is of such a duration as to justify the contractor in abandoning the contract."[93] And likewise, where the delay is so long as to constitute an owner's abandonment, the no damages for delay clause is not enforceable.[94]

In *Earthbank Co., Inc. v. City of New York*, the City failed to obtain the proper permit needed for the contractors work.[95] The court determined that situations in which the owner failed in their obligation to make the work site available to the contractor fall within the exception to enforcement of "breach of a fundamental obligation of the contract."[96] When the

[88] *Phoenix* at 675-76.
[89] *Phoenix* at 677.
[90] *Phoenix* at 676-77.
[91] *Carrabine Construction Co. v. Chrysler Realty Corp*., 495 N.E.2d 952 (Ohio 1986) (citing *Nix, Inc. v. Columbus*, 171 N.E.2d 197 (Ohio App. 1959)).
[92] *Carrabine Construction Co*., 495 N.E.2d at 957. *But see Appeal of Volpe-Head, Joint Venture,* ENG BCA No. 4726 (July 14, 1989)(even unreasonable government delay, if concurrent with contractor's own delay, is not compensable under no damages for delay clause).
[93] *Cunningham Brothers, inc. v. City of Waterloo*, 117 N.W.2d 46, 49 (Iowa 1962).
[94] *A Kaplen & Son, Ltd. v. Housing Authority of the City of Passaic*, 126 A.2d 13, 16 (Superior Ct. N.J. 1956).
[95] *Earthbank Co., Inc. v. City of New York*, 549 N.Y.S. 2d 314, 315 (1989) *aff'd as modified*, 172 A.D. 2d 250 (1991).
[96] *Id.* at 316.

contract contains no time limit, the contractor has a "reasonable time" to complete the work, and even a significant delay may not constitute an unreasonable delay or abandonment.[97]

What delay is too long? A six-month delay in obtaining a permit, then failing to allow access to the site constituted an unreasonable delay caused by a contractor in a suit brought by the sub-contractor.[98] But a 17-month delay is reasonable, when the parties contemplated the necessity of re-zoning the property.[99]

c. Uncontemplated Delays

An uncontemplated or unforeseen delay of reasonable duration could also be grounds to invalidate a no damages for delay clause. With the background that the intent of the parties is expressed by the entire contract, the delay at issue must have been contemplated by the parties to be within their intent.[100] Specifically, a contractor delay due to the owner's failure to procure right-of-way on a highway project was not a delay contemplated by the parties at the time of contract.[101] And a three-year delay is so great as to constitute abandonment.[102]

The court in *State Highway Admin. v. Greiner Engineering Scientists., Inc.*, explained the various approaches to recognizing and ignoring the "uncontemplated delay" exception to the no damages for delay clause.[103] The so-called "New York Approach" provides an exception to the no damages for delay clause for situations where the parties did not contemplate the potential causes for the delay at the time of contracting.[104] The reasoning of this approach is that the contractor could not have possibly meant to bargain away its right to bring a claim for damages resulting from delays which the parties did not contemplate at the time."[105] According to the *Greiner* court, jurisdictions other than New York that follow the New York Approach in 1990

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[97] *General Sprinkler Corp. v. Loris Industrial Developers, Inc*., 271 F.Supp 551, 558 (D. S.C. 1967).
[98] *River Cities Const. Co. v. Barnard & Burk, Inc.*, 444 So.2d 1260, 1266 (Lou. App. 1984).
[99] *Yale Development Co. v. Aurora Pizza Hut*, 420 N.E.2d 823, 825 (Ill. App. 1981).
[100] *Dep't of Trans. v. Arapaho Const., Inc*., 357 S.E.2d 593, 594 (Ga. 1987); *contra John E. Gregory & Son, Inc. v. A. Guenther & Sons*, Co., 432 N.W.2d 584 (1988).
[101] *Dep't of Trans*. at 594. *See also Ace Stone, Inc. v. Township of Wayne*, 221 A.2d 515, 520 (N.J. 1966) (remanding to allow jury to determine whether approximately seven-month delay in obtaining right-of-way was contemplated by the parties).
[102] *People ex rel. Wells & Newton Co. v. Craig*, 133 N.E. 419, 426 (N.Y. App. 1921).
[103] *State Highway Admin. v. Greiner Engineering Scientists., Inc.*, 577 A.2d 363, 367 (Md. Ct. Spec. App. 1990)
[104] *State Highway Admin.*, 577 A.2d at 368.
[105] *State Highway Admin.*, 577 A.2d at 368-69 (citing *Corinno Civetta Const. Corp. v. City of New York*, 493 N.E.2d 905, 909-10 (N.Y. 1986)).

include Washington, Alabama, Delaware, Michigan, Pennsylvania, Georgia, Iowa, Idaho, New Jersey, California, and Ohio.[106]

The "Literal Enforcement Approach" adopted by the Maryland court in *Greiner* does not allow for recovery of money damages for delay even when there the delay is not contemplated by the parties.[107] The reasoning is that parties can assent to such a clause without contemplating in particular all of the potential causes of delay.[108] "It is the unforeseen events which occasion the broad language of the clause since foreseeable ones could be readily provided for by specific language."[109] According to the *Greiner* court, jurisdictions that follow the Literal Enforcement Approach in 1990 include Maryland, Texas, Wisconsin, Utah, Illinois, and Massachusetts.[110]

IV. Conclusion

While no damages for delay clauses are prevalent, the arguments for sidestepping these clauses at trial are equally prevalent. As more and more states curtail an owner's ability to eliminate legitimate delay damages, the exceptions may swallow the general rule. For now, unless the project happens to be governed by friendly law, contractors and subcontractors must stick to the basics – flow down clauses and clear drafting to make sure all parties in the project are playing by the same rules, even if those rules provide that time is not money.

[106] *State Highway Admin.*, 577 A.2d at 368-69.
[107] *State Highway Admin.*, 577 A.2d at 369-70.
[108] *State Highway Admin.*, 577 A.2d at 370 (citing *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*, 432 N.W.2d 584 (1988)).
[109] *State Highway Admin.*, 577 A.2d at 368-69 (citing *City of Houston v. R.F. Ball Const. Co., Inc.*, 570 S.W.2d 75, 78 (Tex. Civ. App. 1978), internal citations omitted).
[110] *State Highway Admin.*, 577 A.2d at 370-71.