Who Pays for Delay? How Enforceable is a No Damage for Delay Clause?

Delays are an all too common occurrence on construction projects. And they almost always cost money. So who pays for the increased costs caused by delays? This is one of the most durable issues in all of construction contract law. The answer is—it depends. It depends first on whether the risk of delay is addressed in the parties’ contract. Owners and contractors frequently use No Damage for Delay clauses to push down the risk of delay costs. It may also depend on the law of the state where the project is performed. No Damage for Delay clauses are not uniformly enforced in different jurisdictions.

Construction delays are not only common, they are also complicated. Some would argue that the cost of delay should always be paid by the party causing the delay. Unfortunately, causation is not always clear. As we discussed in our last edition, two or more parties may be responsible for independent, concurrent delays. How to analyze responsibility for delay is an issue we will address in a future edition. In this article we will focus on No Damage for Delay clauses. Properly drafted in the right jurisdiction, a No Damage for Delay clause can make an expensive fight over responsibility unnecessary. Contractors and subcontractors faced with No Damage for Delay clauses can adjust their prices to account for increased risk or, in some cases, elect to pursue other opportunities.

Contracts Matter

Allocating risk for delay caused costs can be part of the contracting process. Construction contracts frequently include some type of No Damage for Delay clause. For example:

No payment or compensation of any kind shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays are avoidable or unavoidable; or,

Contractor agrees that it may be subject to delay in the progress of the work and that the sole remedy for such delay shall be an extension of time; or,

In the event the subcontractor’s performance of this subcontract is delayed by acts or omissions of the owner, contractor or other subcontractors, subcontractor may request an extension of time for the performance of this subcontract, but shall not be entitled to any increase in the subcontract price or to damages or additional compensation as a consequence of such delays.

Subject to some exceptions, the more typical of which are discussed below, courts generally enforce No Damage for Delay clauses. One way for contractors and subcontractors to avoid such clauses is to use an unmodified industry form agreement such as ConsensusDocs 200 - Agreement and General Conditions between Owner and Constructor or ConsensusDocs 750 - Agreement.
between Constructor and Subcontractor which do not have No Damage for Delay clauses. But many owners and contractors will use their own form which will frequently include a No Damage for Delay clause.

Even if the contract includes a No Damage for Delay clause, the clause may prove to be unenforceable.

Understanding the Legal Exceptions to No Damage for Delay Clauses

Most jurisdictions throughout the country recognize the validity of No Damage for Delay clauses. Some states however have enacted statutes limiting such clauses. For example, in public construction contracts in California, Colorado, Kansas, Louisiana, Minnesota, Missouri, New Jersey, North Carolina, Oregon, and Virginia, under certain circumstances, if the delay is caused by the public entity, No Damage for Delay clauses are void.[1] In Kentucky, Ohio, and Washington, under certain circumstances, No Damage for Delay clauses are void in both private and public construction contracts.[2]

Most jurisdictions where No Damage for Delay clauses are enforced have also developed several judicially created exceptions to the clause’s enforceability. The most common exceptions typically involve delays caused by:

1. active interference, fraud, misrepresentation, other bad faith; or gross negligence by the party seeking to enforce the No Damage for Delay clause;
2. delay which has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract;
3. delay that was not contemplated by the parties; and
4. delay resulting in a breach of a fundamental obligation of the contract.

These exceptions are generally based on the implied obligation of good faith and fair dealing in all contracts including the implied promise not to hinder or impede performance. They are highly fact specific and their application, as well as the availability of additional exceptions, varies from jurisdiction to jurisdiction.

Active interference, fraud, misrepresentation, or other bad faith or grossly negligent conduct.

Courts have not provided a uniform definition as to what constitutes active interference. In most jurisdictions, proving active interference requires a showing of some affirmative, willful conduct which is greater than ordinary negligence or passive omission. A simple mistake, oversight, error in judgment, lack of effort, or lack of diligence will generally not suffice to invalidate the clause.[3]

For example, one court found that active interference can be established where a party issues a notice to proceed to the contractor despite knowledge of delay-causing conditions which increased costs because of the contractor’s premature commencement of the work.[4] Conversely, a claim of active interference was not supported where the party issuing the notice to proceed was unaware of the delay-causing conditions.[5]
Bad faith typically involves a conscious doing of a wrong.[6] For example, a design professional’s knowledge of a defect in the plans and failure to apprise contractor of the problem while simultaneously agreeing to investigate the issue during the value engineering process was sufficient to submit the issue of delay damages to the jury.[7] However, mere mistakes in judgement or mismanagement of the project are not typically sufficient to establish bad faith.[8]

Similarly, gross negligence typically differs from ordinary negligence and involves a showing of conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.[9]

**Delay justifying abandonment of the contract.**

Courts have not identified a minimum quantity of delay which is necessary to qualify as delay justifying abandonment of the contract. A 90-day delay has been found not unreasonable[10] while a 2 ½ year delay was deemed sufficiently unreasonable to submit the issue to the jury.[11] This exception is highly fact specific and the length of delay is not dispositive. Rather, oftentimes courts examine if the delay was so unreasonable as to signal a relinquishment of the contract by the party now seeking to enforce the No Damage for Delay clause.[12] Thus, evidence that the party seeking to enforce the No Damage for Delay clause was working in good faith to complete the project could potentially support enforcement of a No Damage for Delay clause.

**Delay uncontemplated by the parties.**

There is a split among the various jurisdictions as to the viability of this exception.[13] While some courts recognize this exception, others have found that uncontemplated delays are the main reason for including a No Damage for Delay clause. Where the exception is recognized, the party seeking to establish delay damages must show that the delays were not reasonably foreseeable by both parties to the contract.[14] To that end, courts have held that, for example, poor planning by the owner, a general contractor’s inept administration of its contract, other prime contractors’ inaction and faulty performance are all contemplated delays.

**Delay resulting in a breach of a fundamental obligation of the contract.**

This exception is fairly rare. To establish this exception, a party must prove that the other party violated a provision going to the very heart of the contract thereby depriving the other party of its ability to perform under the contract. One example would be an owner’s failure to obtain title to the work site or make it available to the contractor so that it may commence construction.[15]

**Acting With A Purpose**

The final step in minimizing risk of paying for delays involves being proactive during the project to protect your rights. Understand the law in your jurisdiction with respect to No Damage for Delay claims and you can put yourself in a favorable position to prosecute or avoid a claim.

For example, if you are the owner, do not wrongfully withhold payment. Agree to consider all properly supported claims. At the same time, be sure not to waive your No Damage for Delay defense
by paying the contractor for delays covered by the No Damage for Delay clause during the project or promising the contractor that you will not seek to enforce the No Damage for Delay clause. Similarly, if the contract requires you to provide an extension of time be sure you actually do so after proper requests under the contract have been made. Even if delays have occurred, be sure that you have documentary evidence showing that you are continuing to diligently work toward completing the project.

If you are the contractor or subcontractor, it is important to meticulously document, and provide timely notices of, the nature and cause of the delay, active interference, fraud, misrepresentation, gross negligence or bad faith by the other party. In the event of litigation, such documentation will frequently make the foundation of a winning case.

No Damage for Delay clauses and related jurisprudence are fraught with traps for the unwary. Project participants can gain an advantage by having competent counsel at their side throughout the process.


[vii] Triple R Paving, Inc. v. Broward County, 774 So. 2d 50, 56 (Fla. 4th DCA 2000).


[xii] Corinno Civetta Construction Corp. v. City of New York, 67
