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CONSTRUCTION

RULES FOR SURVIVING NO DAMAGES FOR DELAY

FRANK E. RIGGS
404-885-3353
frank.riggs@troutmansanders.com
www.troutmansanders.com

JONATHAN Y. YI
404-885-3429
jonathan.yi@troutmansanders.com
www.troutmansanders.com

navigant.com

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"Remember that time is money." – Benjamin Franklin, 1748

To mitigate the economic risks of a significant delay in completing a construction project, owners and GCs often include a provision in their contracts and subcontracts known as a no damages for delay clause.

But a multitude of variables affect the application and enforceability of these clauses, including the contract language, actions of the parties, and various state statutes and policies that generate great uncertainty when drafting, evaluating, or assessing the likely impact of no-damages-for-delay clauses. GCs and subcontractors often struggle to develop strategies to combat or limit these risk-shifting contract provisions.

This article aims to provide clarity through a set of suggested risk mitigation "rules" to survive a no-damages-for-delay clause. The first part of this article will provide a framework for identifying the various forms of no-damages-for-delay clauses. We will then cover some of the well-known, court-created exceptions to the enforcement of these clauses.

Next, you'll read about the impact of public policy decisions on the enforceability of such clauses. Finally, you will get some practical advice on your options when you find your company on the receiving end of a no-damages-for-delay contract provision.

RULE 1: LEARN TO IDENTIFY THE VARIOUS FORMS OF NO-DAMAGES-FOR-DELAY CLAUSES

In order to effectively manage a risk, you first must know that it is present. When it comes to no-damages-for-delay clauses, it is important to understand that they come in a variety of shapes and sizes.

Some are obvious disclaimers of any responsibility for delay damages, while others are more subtle. Some attempt to insulate the owner or GC against the cost consequences of all delays, while others are more limited in scope. Familiarize yourself with the following types of no-damages-for-delay provisions:

No Liability for Damages or Costs Resulting from Delays

"The Owner shall not be liable to the Contractor for any damages or additional costs incurred as a result of a delay in the completion of the work."

These short and sweet clauses are generally enforceable, but subject to exceptions.

No Liability for Damages from "Delay-Plus" Clauses

"In no event will the Owner be liable to the Contractor for any additional costs or damages incurred as a result of any delay, disruption, hindrance, interference (active or passive), suspension, acceleration, or re-sequencing (herein collectively 'Delay') of Contractor's work."

This version of the no-damages-for-delay clause attempts to expand the reach of costs and claims intended to be blocked by this provision. For those trying to take advantage of a no-damages-for-delay clause, such an expansion of the clause language is usually advisable, since GCs and subcontractors often (and should) attempt to characterize their losses as something other than "delay" damages in an effort to circumvent such a provision.

This expansion of the clause also may assist the party taking advantage of the no-damages-for-delay clause to avoid one or more of the recognized exceptions to the enforcement of these clauses. As you'll learn later in this article, courts frequently carve out an exception to the enforcement of no-damages-for-delay clauses in the event of an owner's "active" (as opposed to "passive") interference.

Extension of Time as Sole Remedy

"Notwithstanding anything to the contrary in the Contract Documents, an extension of the Contract Time, to the extent permitted in the Contract, shall be the sole remedy of the Contractor for any delay, hindrance, obstruction, interference, or other similar claim (collectively 'Delay') in the performance of the work."

This is a slightly less obvious no-damages-for-delay provision since it does not explicitly state that the contractor will not be entitled to delay damages. Instead, it provides that the contractor's "sole remedy" for delays will be an extension of time. These "sole remedy" clauses are also generally enforceable if clearly written, but still subject to the exceptions discussed in Rule 2.

Exclusion of All Other Remedies

"If the work of the Contractor is delayed for reasons that do not involve the fault or negligence of the Contractor, the Contractor shall promptly seek an extension of time, to the exclusion of all other remedies, in accordance with the time extension provisions of the contract."

Again, the "exclusion of all other remedies" language is intended to achieve the same forfeiture of potential delay damages, without the more obvious no-damages-for-delay vernacular.

Limited Eligible Damages for Delay

"To the extent that the Contractor is delayed or disrupted in the performance of its work by acts or omissions for which the Contractor is not responsible, then the Contractor's sole remedy for any additional costs or damages incurred shall be a) an extension of the contract time to the extent of any demonstrable critical path delay and b) Contractor's reasonable, additional, direct site overhead costs attributable solely to the delay."

This is one of the more recent approaches to no-damages-for-delay clauses by some owners and GCs. Instead of outlawing all delay-related damages – and therefore increasing the risk of judicial scrutiny or statutory prohibitions – these clauses expressly permit a recovery for delay damages, but severely limit the type or amount of the eligible damages. Other popular and similar approaches would protect the owner or GC from delay damages incurred prior to a specific written notice from the delayed party or attempt to liquidate or cap the recoverable delay damages – or a combination of the two.

It's important for GCs and subcontractors to remember that no-damages-for-delay clauses come in different forms, and that careful attention is required to ensure all such limitations on delay damages are identified prior to signing the contract. If you know that your company faces a no-damages-for-delay clause risk in its contract, then be sure to implement measures to minimize that risk.

RULE 2: UNDERSTAND THE ENFORCEMENT EXCEPTIONS

Because no-damages-for-delay clauses operate to fully shift the project delay risk onto the shoulders of a GC or subcontractor that is not responsible for the delay and was not in a position to either avoid or foresee the delay, courts and arbitration panels are often sympathetic and frequently strictly construe no-damages-for-delay clauses against the owner or GC attempting to take advantage of these forfeiture clauses.

While the court's treatment of these clauses varies greatly among jurisdictions, the following exceptions to the enforcement of these clauses are generally found:

A Delay Caused by the Active Interference of the Party Seeking Protection

Although GCs and subcontractors on the receiving end of a no-damages-for-delay clause almost always view the delay as an active interference with the work schedule, courts frequently distinguish between passive delays and active interference.

A passive delay might be found in an owner's unintentional error in judgment, simple mistake, lack of total effort, or lack of complete diligence. In many jurisdictions, delays resulting from such unintended and passive acts would not be labeled as active interference with the contractor's work.

However, if the delay results from an arbitrary act by the owner, or by the owner's committing some affirmative, bad faith, or willful act that impacts the contractor's work plan, then courts are more likely to term that delay as an active interference and therefore beyond the intended scope of a traditional no-damages-for-delay clause.

Again, these classifications and distinctions are very subjective and jurisdiction-specific, so the law that will be applied to a disputed project delay may vary greatly from state to state and depend on the particular circumstances surrounding the delay.

A Delay of an Unreasonable Duration

If the delay is so long as to constitute an "abandonment" of the work in the eyes of the court or arbitration panel, then the no-damages-for-delay may be unenforceable. Of course, there are many court decisions that enforce no-damages-for-delay clauses in spite of unusually long delays. And so, what is or is not a delay of an "unreasonable duration" is subjective and depends on the circumstances of the case as well as the degree to which a court is motivated to scrutinize such harsh risk-shifting provisions.

A Delay Not Contemplated by the Parties

Somewhat akin to an "unreasonable duration" holding, this exception reflects a subjective judgment (often without an articulated rational foundation) as to which project delays were "anticipated" by the parties when they agreed to the no-damages-for-delay provision.

As one court has observed in failing to recognize this exception, "the adoption of a 'no-damage-for-delay' clause shows that the parties realize that some delays cannot be contemplated at the time of the drafting of the contract."[1] Courts in a number of states have also reached similar conclusions. Still, where the drafting party has created an ambiguity in defining the scope of the no-damages-for-delay provision, or where a sympathetic court decides that the delay was so unusual or could not have been anticipated by the parties, there is potential relief in the assertion of this exception.

A Delay Resulting from an Intentional, Fraudulent, or Bad Faith Act

The law reads an implied duty of good faith and fair dealing into every contract. If a project delay is the product of bad faith, fraud, or willfully harmful conduct by the party attempting to hide behind the no-damages-for-delay clause, courts in many jurisdictions have refused to enforce this provision.

Demonstrating the actual presence of fraud or intentionally willful misconduct is frequently difficult. Nevertheless, under the proper circumstances, this exception may be able to shield against a no-damages-for-delay clause.

A Delay Resulting from a Breach of a Fundamental Contract Obligation

Less frequently encountered and not widely accepted is the argument that a no-damages-for-delay provision should not be enforced because the delay resulted from a GC or owner action, which rises to the level of a breach of an essential or fundamental contract obligation.

Only a few courts have latched onto this exception, and the rationale they have provided is so diverse and fact-specific that it is difficult to articulate a controlling set of circumstances which justify a court's refusal to enforce a no-damages-for-delay provision on the basis of a "fundamental breach."

In one reported decision, a court refused to apply the clause because the owner failed to make the site available to the contractor in a timely manner, thus breaching a "fundamental obligation" assumed by the owner under the contract, according to the court.[2]

Failure to Observe Implied Conditions Precedent to the Clause Enforcement

This less-common exception also illustrates the strict construction of no-damages-for-delay clauses by many courts. Suppose that a no-damages-for-delay provision provides that the owner or GC will be entitled to a time extension, but no money, as a result of an excusable delay.

If the GC or subcontractor satisfies the contract requirements for requesting a time extension and is factually entitled to such extension, but the owner or GC failed to grant that time extension, then some courts have held that the failure to grant a time extension justifies the court's refusal to enforce the no-damages-for-delay clause. In effect, if a GC or subcontractor is left with only one inadequate remedy for a delay, then it must at least be provided with the benefit of that bargain if the owner or GC intends to take advantage of a no-damages-for-delay clause.

RULE 3: RECOGNIZE THE IMPACT OF PUBLIC POLICY DECISIONS

In addition to the court-created exceptions and strict constructions of no-damages-for-delay clauses, those faced with the enforcement of such clauses may also find protection in the public policy statutory enactments in a growing number of states. Although a properly drafted no-damages-for-delay clause is still enforceable in many jurisdictions, some states have decided, as a matter of public policy, that no-damages-for-delay clauses violate the state's public policy and are therefore unenforceable.

However, the public policy approaches taken by these states are not uniform; some states have merely codified the court-created exceptions to the enforceability of no-damages-for-delay clauses. For example, the Oregon statute reads (in part) as follows:

> Any clause in a public improvement contract that purports to waive, release, or extinguish the rights of a contractor to damages or an equitable adjustment arising out of *unreasonable delay* in performing the contract, if the delay is caused by the acts or omissions of the contracting agency, or persons acting therefore, is against public policy and is void and unenforceable.[3] (emphasis added)

Thus, Oregon has prohibited the enforcement of no-damages-for-delay clauses only in connection with public contracts and only if the clause is being used to excuse "an unreasonable delay."

Other states have adopted statutes that bar the enforcement of no-damages-for-delay clauses in public contracts. For example, North Carolina's statute provides:

> No contractual language forbidding or limiting compensable damages for delays caused solely by the owner or its agent may be enforced in any construction contract let by any board or governing body of the State, or any institution of State government or of any county, city, town or other political subdivision thereof.[4]

This statute has been interpreted to apply not only to prime contracts, but also to subcontracts – to the extent the subcontract contains language insulating the owner from damages for delay caused "solely by the owner." Although state statutes vary greatly, GCs and subcontractors operating in at least the following states will find some degree of protection from no-damages-for-delay clauses in public contracts: Arizona, California, Colorado, Minnesota, Missouri, New Jersey, North Carolina, Oregon, and Virginia.

At present, Kansas, Kentucky, Ohio, and Washington appear to be the only states that have passed laws invalidating no-damages-for-delay clauses in both public and private contracts.[5] Keep in mind that these statutory schemes vary greatly, are subject to past and future judicial interpretations, and may change in

unpredictable ways as courts and legislatures revisit these risk-shifting provisions.

Still, a growing number of states have looked, or are now looking, at restrictions on the enforcement of no-damages-for-delay clauses. And, if a GC or subcontractor finds itself in the right jurisdiction and right circumstances, then a state statute may rescue it from the impact of a no-damages-for-delay clause.

RULE 4: DEVELOP STRATEGIES FOR MINIMIZING THE RISKS OF AN ENFORCEABLE NO-DAMAGES-FOR-DELAY CLAUSE

If you cannot avoid the inclusion of a no-damages-for-delay clause in your contract or subcontract, and if you are not in a jurisdiction in which the state legislature has afforded some or absolute protection from no-damages-for-delay clauses, there may still be steps that your company can take in order to lessen the potential consequences of the application of that clause to an excusable project delay. Consider, for example, the following possible approaches:

Strike Out the No-Damages-for-Delay Clause

This is the miracle cure, but a very unlikely option. Still, some owners and GCs include no-damages-for-delay clauses in their standard form agreements with the expectation that no solvent GC or subcontractor would agree to such a one-sided, risk-shifting provision. So, don't be afraid to give it a shot.

Insist on a Standard Form Agreement

If you can convince the other party to your contract to use an *unmodified* AIA Contract Document or ConsensusDocs agreement, then you will be able to avoid a no-damages-for-delay clause. Of course, even a standard form agreement can be modified.

Even if your contract does not contain a no-damages-for-delay clause, you must be diligent in verifying that other contract documents incorporated into your contract or subcontract do not contain a no-damages-for-delay provision. Still, if you start with a standard form agreement, then your opportunity to avoid a no-damages-for-delay clause is greatly enhanced.

Negotiate for Limited Delay Damage Rights

You might argue, for instance, that your company should be entitled to recover at least the jobsite overhead or general conditions costs associated with an excusable delay. Such a modification to the no-damages-for-delay clause would avoid a total forfeiture of all GC or subcontractor delay-related costs and damages, although still may fall short of making a GC or subcontractor whole in the face of an extended project delay.

Frankly, such modified no-damages-for-delay clauses may also provide some protection for the owner or GC seeking protection from delay damages, because allowing at least some recovery of delay damages will improve the odds that the clause will survive a judicial challenge.

Negotiate a Liquidated Damages Amount for Delay Damages

Owners are often concerned that contractor delay claims will reflect attempts to recover unallocated home office overhead, lost profits, inefficiency costs, and other big-ticket delay damages. You might be able to sell an owner on the concept of liquidating your delay damages to a reasonable, daily damage amount, which gives the owner protection against unpredictably large and exaggerated delay damage claims.

Negotiate for Delay Damages Protection from Lengthy Delays

If you cannot avoid the consequences of a no-damages-for-delay clause altogether, then attempt to negotiate for some level of recovery after a "damages free" delay period. For example, you might concede that your company will bear the consequences of short delays (e.g., three days or fewer for each occurrence or two weeks in the aggregate), but preserve its right to seek delay damages for the more serious delays that exceed this "damages free" zone.

Attempt to Negotiate for Unclear & Ambiguous No-Damages-for-Delay Language

If you cannot get rid of a no-damages-for-delay clause, then consider suggesting modifications that either narrow the scope of the clause or render it ambiguous since courts generally will enforce these clauses if they are clearly written and unambiguous.

Many courts will look for an opportunity to strictly construe a no-damages-for-delay clause, but they may need your help in creating a crack in the language armor sufficient to permit judicial intervention.

Add a Favorable Choice of Law Provision to Your Contract

As mentioned, several states have taken a dim view of no-damages-for-delay clauses by either outlawing them entirely or more freely applying exceptions to their enforcement through judicial strict construction of these clauses. It may be possible to include a provision that makes the law of one of these favorable jurisdictions applicable to the interpretation of your contract.

Such provisions require careful drafting. And, in some jurisdictions (e.g., Colorado), statutes may require the application of the state's law to construction projects taking place in that state, regardless of an attempt by the parties to contractually adopt the laws of a different state.

Document Your Project Problem as Something Other Than "Delay"

If you still are faced with a no-damages-for-delay clause in spite of your best negotiating efforts, then make certain that your project management team members understand that the clause is present, and help them understand the advantage of documenting their job problems as something other than "delay" issues. Problem descriptions can be accurate and still not include the word "delay."

For example, in a daily log or in a notice letter to the owner, your PM should never refer to a problem as a "delay." Instead, the problem might be referred to as a denial of access to the site, a re-sequencing of the contractor's work plan, active interference or disruption of the contractor's forces, acceleration of the work, or a disruption that causes a loss of productivity.

Although this may sound like word games, keep in mind that many courts are looking for opportunities to help you avoid an unreasonable risk-shifting provision, but may find it difficult if you have not given them some help in circumventing a clause that is agreed upon by the contracting parties. Document the job problems in a way that at least preserves your company's ability to make an argument that its damages are beyond the intended scope of the no-damages-for-delay clause.

Preserve Your Right to a Time Extension

Almost every no-damages-for-delay clause provides the GC or subcontractor with a time extension remedy in lieu of damages for delay. Some court decisions illustrate that if an owner refuses to grant a properly requested time extension, then a good argument can be made that the owner has waived or forfeited its right to insist on the protections of the clause.

And, where there is any argument about the cause or extent of a job delay, owners are frequently reluctant to grant GCs time extensions, and GCs are even more reluctant to grant such extensions to subcontractors. To take advantage of this potential escape route, it is critical to understand the time extension requirements in the contract and follow them precisely and in a timely fashion.

CONCLUSION

The cost consequences of construction project delays are the biggest dollar risk typically encountered by a GC or subcontractor on a construction project. Learning to identify no-damages-for-delay clauses in their various forms and prior to signing a contract is an essential first step in surviving a clause.

Understanding the various judicially created enforcement exceptions should be part of the skill set of every project management team. Gaining an appreciation for the "lay of the land" – that is, the manner in which the legislatures and courts in

the project's jurisdiction address no-damages-for-delay clauses – can also be important to surviving a no-damages-for-delay provision. (See the summary chart on page 17 of the typical treatment of these clauses in various states.)

Finally, developing a company strategy for attempting to negotiate away or limit the consequences of no-damages-for-delay clauses, as well as formulating policies to ensure that project documentation practices do not increase the likelihood of a delay damage forfeiture, are valuable assets that a CFM can contribute to the survival and wellbeing of his or her construction company.

ABOUT THE AUTHORS

Frank E. Riggs is Chair of the Construction Practice Group for the Atlanta-based firm of Troutman Sanders. With more than 35 years of experience representing the interests of owners, specialty contractors, GCs, CMs, and suppliers, Frank's practice involves drafting and negotiating construction and design contracts, as well as the handling of construction contract disputes. Frank has been named the 2012 Atlanta Construction Law Lawyer of the Year by *Best Lawyers,* as well as one of the nation's leading lawyers for construction law by *Chambers USA.* He is a frequent speaker and writer and a longtime author for *CFMA Building Profits.* He is a member of CFMA's Georgia Chapter Board of Directors and the AGC Contract Documents Committee.

Phone: 404-885-3353
E-Mail: frank.riggs@troutmansanders.com
Website: www.troutmansanders.com

Jonathan Y. Yi a Senior Associate in the Construction Practice Group at Troutman Sanders in Atlanta, GA. Admitted to practice law in Georgia, Florida, and New York, he represents clients in high-stakes construction disputes in state and federal courts and in large-scale arbitrations. Jonathan received his BA from the University of Florida and his JD from the University of Chicago Law School.

Phone: 404-885-3429
E-Mail: jonathan.yi@troutmansanders.com
Website: www.troutmansanders.com

ENDNOTES

1. John E. Gregory & Son, Inc. v. A. Guenther & Sons Co., 432 N.W.2d 584 (Wis. 2d 1988).
2. Carlo Bianchi and Company, Inc. v. State of New York, 230 N.Y.S.2d 471 (App. Div. 2d 1962).
3. 2011 ORS §279C.315.
4. North Carolina Statute §143-134.3 No damages for delay clause.
5. Revised Code of Washington (RCW) 4.24.360, Ohio Rev. Code (ORC) 4113.62(C)(1-2), Kansas Statutes Annotated (K.S.A.) 16-1907, and Kentucky Revised Statutes 371.405.
6. The "State Approaches to Evaluating No-Damages-for-Delay Clauses" chart relies heavily on the "50 State Matrix: Pay-If-Paid, No Damage for Delay" chart published by the Nebraska law firm of Woods & Aitken LLP, and available at: www.woodsaitken.com/wp-content/uploads/2012/02/Survey_50-State-Matrix_Pay-If-Paid_No-Damage-for-Delay.pdf. Some changes in the laws of some states, as set out in the Woods Aitken chart and in the summary chart included in this article, should be expected. This chart is not intended as, and does not constitute, legal advice.