

No-Damage-for-Delay Contract Clauses

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No-damage-for-delay clauses are found in both private construction contracts and in contracts awarded by a number of state and local governments. No such clause is presently utilized by the federal government in its standard form construction contracts. In legal terminology, a no-damage-for-delay provision excuses one of the parties to a contract from liabilities which it would otherwise incur in the event of a delay on a project. Such clauses are ordinarily upheld as valid by courts, but they are strictly interpreted and limited to their literal terms in order to avoid forfeitures.

The liability sought to be avoided by the use of a no-damage-for-delay clause is the obligation to pay financial compensation for delay, disruption, or interference suffered by a contractor during performance of a construction contract. Normal rules of contract law will ordinarily impose liability for owner-caused (or, in the case of subcontracts, prime contractor-caused) delays in a variety of circumstances absent such a clause. Use of no-damage-for-delay clauses, therefore, represents an attempt by owners and prime contractors to avoid these and related liabilities.

Among the rights potentially forfeited by such clauses are:

- Compensation for delays caused by the other party to a contract;
- Compensation for delays caused by third parties to a contract; and
- Compensation under a clause granting time extensions for delays but which is silent as to money.

Waiving these potential rights carries harsh monetary results for a contractor. Accordingly, courts closely scrutinize the language of such clauses, refusing application beyond their precise terms, and resolving any ambiguities in favor of the contractor. As a result, several well-defined exceptions to no-damage-for-delay clauses have been developed by the courts. Before considering those exceptions, however, there are some preliminary factors that must be assessed.

Preliminary Factors in Assessing Applicability

Whenever a delay situation is encountered during performance of a contract containing a no-damage-for-delay clause, three basic inquiries must be made in order to determine the applicability of the clause to the type of damage suffered. The first and most important area to be examined is the scope of the clause as evidenced by its express language. The clause may reference not only delay but hindrance, interference, and disruption of work as well. Recovery may also be limited by language including avoidable as well as unavoidable delays and reasonable and unreasonable delays.

Second, examine the specific type of damage which has occurred. Some distinction has been made by the courts between simple delays, which merely postpone the completion date of a contract, and increased costs from piecemeal performance or other disruptions, which do not necessarily extend the performance date.

Finally, the type and source of the delay must be reviewed. Delays of a type generally encountered during performance of a construction contract will, in general, be covered by the clause, while unusual delays not contemplated by the parties will not be. Similarly, delays caused by willful misconduct or fraud by one of the parties will usually be beyond the protection of the clause as will delay caused by active interference.

Exceptions to the Clause

Recognized exceptions to the no-damage-for-delay clause can be grouped into four categories: delays not contemplated by the parties, active interference by the party seeking to rely on the clause, unreasonable delays, and fraud or bad factor.

Delays Not Contemplated by the Parties

Once the preliminary inquiries have been made, the primary question in ascertaining whether a claim is precluded by the no-damage-for-delay clause is whether, at the time the contract was entered into, the parties intended that the specific type of delay was to be covered by the clause. Generally, types of delay not contemplated by the parties at the time of the contract will not be exempt from liability.

The most common situation in which delay is held to be beyond the contemplation of the parties involves denial of job-site access. Absent express contract language, the delays contemplated are generally considered to be delays in the progress of the work, not failure to allow work to begin. Site-availability delays are usually held to be beyond the scope of the clause.

Accordingly, a party may recover for delay costs related to a party's failure to commence work, such as obtaining rights-of-way or granting site access.

Also, certain delays encountered during contract performance may also be beyond the contemplation of the parties. In determining whether a particular type of delay is within the contemplation of the parties, the precise language and scope of the no-damage-for-delay clause will be the controlling consideration.

Active Interference

The no-damage-for-delay clause is often used to insulate a party from liability for delay caused by his own negligence or his failure to act in fulfillment of a legally recognized duty. Such a clause ordinarily will not relieve a party from the consequences of his own negligence *unless* the word "negligence" expressly appears in the terms of the clause.

Even when a no-damage-for-delay clause successfully insulates a party for his own negligence, however, acts or omissions of that party which actively interfere with the progress of the work will often be beyond the protection of the clause. This active interference may take many forms.

Various acts (or failures to act) have been found to constitute active interference so as to avoid the effects of a no-damage-for-delay clause. For example, an owner's failure to provide heat for a construction site as required by the contract was held to be active interference, thus allowing the contractor to recover his cost for resultant delays despite the existence of a no-damage-for-delay clause. Other acts which have constituted active interference include opening a roadway, on which the contractor claiming delay was working, to other contractors; delay in awarding a contract for other work necessary to completion of the claimant's work; and issuance of notice to proceed when necessary materials were two years late in delivery.

Unreasonable Delays

A third exception to the no-damage-for-delay clause are delays of unreasonable duration. There is no firm rule as to what length of time must be involved for a delay to be considered reasonable. All the facts and circumstances involved in a particular situation will be examined by a court in determining when a delay is so unreasonably long that it precludes application of a no-damage-for-delay clause.

To be entitled to delay damages, a contractor is ordinarily not required to terminate his performance or abandon the contract in cases involving unreasonable delays. He may usually continue his performance and also collect damages. The unreasonable delay exception is closely related to the exception established for delays beyond the contemplation of the parties. The parties clearly cannot be held to have contemplated the occurrence of delays so serious in nature as to strike at the heart of a contract.

Fraud or Bad Faith

The final major exception to the no-damage-for-delay clause occurs where delays result from fraud or bad faith by one of the parties. The courts will not allow a party to escape liability under a no-damage-for-delay clause when the delay is caused by his own intentionally false statement or acts. Stipulations against liability for fraudulent acts are uniformly unenforceable as being against public policy.

The fraud or bad faith exception is most often applied where intentionally false statements are made in order to induce the other party to enter into the contract. It is a general rule of law that the innocent party may rescind the fraudulently induced contract or continue his performance and seek recovery for any damages suffered as a result of the fraud. The no-damage-for-delay clause does not alter this general rule, and a contractor's right to delay damages is ordinarily preserved even though he continues to perform the fraudulently induced contract.

Conclusion

Remember that the exceptions to the coverage of the no-damage-for-delay clause are themselves quite narrow. The question of what delay was contemplated by the parties at the time the contract was executed is one of fact and contract interpretation. The vast majority of delays – those which are most commonly encountered – will, by their very nature, be within the contemplation of the parties at the time of contract. Delays must be very carefully analyzed and characterized in order to bring them within one of the exceptions to the clause.

