

No Damage For Delay

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A no-damage-for-delay clause attempts to contractually bar recovery by a contractor or subcontractor in the event project delays result in damages or extra costs. A sample no-damage-for-delay clause is as follows:

The Contractor agrees to make no monetary claim for delays, interferences or hindrances of any kind in the performance of this Contract occasioned by any act or omission to act of the authority of any of its Representatives and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work.

These clauses, as with any limitation of liability agreement, must be unambiguous to be enforceable. In *Williams and Sons Erectors, Inc. v. South Carolina Steel Corp.*, 983 F.2d 1176 (2d Cir. 1993), the court found that the no-damage-for-delay clause was unenforceable because of inconsistencies in the contract. The contract contained both a no-damage-for-delay clause and a clause providing for payment of delay impact costs arising from change orders. If, however, a contradictory provision in the contract states that it applies “notwithstanding any other provision contained in th[e] agreement,” that provision will override the other competing provision. *See also Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 67 F.3d 435 (2d Cir. 1995) (provision allowing subcontractor to recover costs occasioned by delays “notwithstanding any other provision contained in th[e] agreement” overrode no-damages-for-delay provisions).

Provided the clause is unambiguous, a majority of jurisdictions hold that no-damage-for-delay provisions are generally valid and enforceable with a few exceptions. Each jurisdiction has its own rules for interpreting no-damage-for-delay clauses, but the most common exceptions to enforcing these clauses are where: (1) delays are caused by the protected party’s bad faith or its willful, malicious, reckless, or grossly negligent conduct; or (2) delays are unanticipated.

U.S. for Use and Benefit of Evergreen Pipeline Const. Co., Inc. v. Merritt Meridian Const. Corp., 95 F.3d 153 (2d Cir. 1996), provides an example in which the court found that willful and malicious conduct by the contractor precluded its reliance upon a no-damage-for-delay provision as a defense to a subcontractor’s claim. In that case, the contractor failed to make full payment to the subcontractor preventing the subcontractor from hiring sufficient personnel, the contractor grossly inflated backcharges, and the contractor stole the subcontractor’s material. Another example is *U.S. Steel Corp. v. Missouri Pac. R. Co.*, 668 F.2d 435 (8th Cir. 1982), where the owner directed the contractor to proceed knowing that necessary work would not be completed on time because of a large number of commitments which the contractor would have to make on the basis of the proceed order. The court held that this amounted to bad faith and active interference with the contractor’s ability to timely complete the contract, and thus, the owner was liable for damages incurred because of delay.

This willful conduct exception also includes willful concealment of foreseeable circumstances which impact timely performance. In *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.*, 71 Cal App. 4th 38, 83 Cal. Rptr. 2d 590 (2d Dist. 1998), the city knew that excavation materials would have to be deposited at a special dump and that federal agencies intended to prohibit construction for a period of time, but did not disclose this information to the bidders. As a result of this willful concealment, the court refused to allow the city to enforce the no-damage-for-delay clause in its contract. Also, in *Triple R Paving, Inc. v. Broward County*, 774 So. 2d 50 (Fla. Dist. Ct. App. 4th Dist. 2000), delays resulted from a design flaw that the designer knew about but failed to disclose to the contractor. Similarly, the court declined to enforce a no-damage-for-delay clause.

The other exception to enforcement of a no-damage-for-delay clause is when the delay is not reasonably contemplated by the parties. In *McGuire & Hester v. City and County of San Francisco*, 113 Cal. App. 2d 186, 247 P.2d 934 (1st Dist. 1952), delays were caused by the city's failure to procure the necessary right of way, which it was contractually obligated to provide. Although the no-damage-for-delay clause stated that no damages would be allowed on account of delays or hindrances from any cause, the court nevertheless refused to enforce this provision because it found that the cause for this delay was not within the contemplation of the parties.

Another example of a delay that was not contemplated by the parties is found in *Blake Const. Co., Inc. v. C.J. Coakley Co., Inc.*, 431 A.2d 569 (D.C. 1981), where a spray fireproofing subcontractor was not able to perform its work because of a series of mix-ups in the sequence of plans prepared by the contractor. The court found that this was a delay not contemplated by the parties and refused to enforce a no-damage-for-delay clause.

As stated previously, each jurisdiction has its own rules for enforcing a no-damage-for-delay clause. For example, there are a few jurisdictions, such as Maryland and South Carolina, that take a literal enforcement approach, holding that such an exculpatory clause is enforceable even if the delay is unanticipated by the parties. *State Highway Admin. v. Greiner Engineering Sciences, Inc.*, 83 Md. App. 621, 577 A.2d 363 (1990); *U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric Constructors, Inc.*, 325 S.C.129, 480 S.E.2d 447 (1997). In sum, although the previously stated exceptions to no-damage-for-delay clauses are the most common, the relevant jurisdiction's specific rules should always be researched prior to relying on such a clause.