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## Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause

Carl S. Beattie

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# **NOTES**

## **APPORTIONING THE RISK OF DELAY IN CONSTRUCTION PROJECTS: A PROPOSED ALTERNATIVE TO THE INADEQUATE "NO DAMAGES FOR DELAY" CLAUSE**

### **INTRODUCTION**

Construction is a risky, competitive, and litigious business.<sup>1</sup> Each new construction venture may bring together hundreds of parties—including owners, architects, engineers of all varieties, general contractors, subcontractors and suppliers—many of whom have never dealt with each other on previous projects. The design of most projects is a new creation, often incomplete when construction begins. Every construction site is unique. Labor conditions, weather, material availability, and any number of other factors are difficult to predict. Knowing little of what the future holds, the parties nonetheless proceed to estimate how much the project will cost, estimate how long it will take, contractually bind themselves accordingly, and hope for the best.

Among the most obvious and common risks in the construction industry is the risk of delay. As one court has noted, "except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in

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1. See BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS 16-6 (Aspen Law & Bus. 3d ed. 2000) (1987) ("Claims have become an institutionalized part of the construction industry."); SMITH, CURRIE & HANCOCK LLP'S COMMON SENSE CONSTRUCTION LAW 202 (Robert B. Ansley, Jr. et al. eds., 2d ed. 2001) ("Claims are a natural outgrowth of a complex and highly competitive process during which the unexpected often happens.").

a huge construction project ....<sup>2</sup> Even the most successful projects—in the sense that all contracting parties walk away financially satisfied—are rarely completed precisely according to the original construction schedule. Despite the fact that delays are commonplace, the reality of a competitive bidding process requires that most contractors carry little or no contingency for delay.<sup>3</sup> Delays can have devastating economic effects on both owners and contractors. In fact, even when other problems occur on a project, the associated delay is usually the most expensive consequence.<sup>4</sup>

Not surprisingly, parties have sought means of shifting the risk of construction delay away from themselves. One mechanism used towards this end is the common contractual provision known as a “no damages for delay” clause. Imposed on general contractors by owners or on subcontractors by general contractors, a no damages for delay clause essentially states that the contractor will not be entitled to monetary damages in the event of a delay. These clauses are often used in connection with a statement that a time extension is the sole remedy for the contractor’s delay.<sup>5</sup> Such a clause may be worded as follows:

In the event that Subcontractor is obstructed or delayed in its performance of its work by Contractor or Owner, Subcontractor will be entitled to a reasonable extension of time. It is agreed that the extension of time will be Subcontractor’s sole and exclusive remedy for such obstruction or delay, and that in no event will the Subcontractor be entitled to recover damages from Contractor or Owner for any such obstruction or delay.<sup>6</sup>

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2. *Blake Constr. Co. v. C.J. Coakley Co.*, 431 A.2d 569, 575 (D.C. Cir. 1981).

3. See ROBERT F. CUSHMAN ET AL., *PROVING AND PRICING CONSTRUCTION CLAIMS* 31 (Aspen Law & Bus. 3d ed. 2001) (1990) (“[I]n order to be the successful bidder, the reality of the marketplace requires that the contractor must compute its bid price assuming that all aspects of the work can be completed in an orderly, unhindered way without delays or serious disruptions ....”).

4. See Kenneth M. Cushman & Joyce K. Hackenbrach, *Construction Project Risk Allocation: The Owner’s Perspective*, in *HANDLING CONSTRUCTION RISKS: ALLOCATE NOW OR LITIGATE LATER* 7, 15 (2002).

5. Kenneth M. Cushman & Bruce W. Ficken, *Delays and Disruptions*, in *CONSTRUCTION LITIGATION* 639, 739-41 (Kenneth M. Cushman et al. eds., 2d ed. 1993); see also BRAMBLE & CALLAHAN, *supra* note 1, at 2-86 (noting that clauses in contracts that provide for time extensions as the sole remedy for delays “are in effect no damages for delay clauses”).

6. JAMES ACRET, *CONSTRUCTION INDUSTRY FORMBOOK* 245 (2d ed. 1990).

No damages for delay clauses can vary widely in scope. At the broadest end of the spectrum, some construction contracts use language that damages are unavailable for delays resulting from "any cause whatsoever."<sup>7</sup> The example quoted above represents a middle ground in which the clause covers delays caused by the contractor or owner. An even narrower clause may apply only to force majeure events.<sup>8</sup>

No damages for delay clauses in construction contracts have always been very controversial. They often lead to inequitable outcomes and harsh results for contractors delayed through no fault of their own. On the other hand, there are numerous practical and theoretical arguments in favor of their enforcement, not the least of which is the foundational principle of freedom of contract.<sup>9</sup> Because these clauses are so exculpatory in nature, courts scrutinize them carefully.<sup>10</sup> Although no damages for delay clauses are not invalid per se in most jurisdictions, close judicial attention has led to the development of numerous well recognized exceptions to their enforcement.<sup>11</sup> One commentator has analogized the evolution of the law in this area to a tennis match, in which no stable and suitable end is in sight.<sup>12</sup>

This Note argues that no damages for delay clauses are an insufficient mechanism for apportioning delay risk in construction contracts due to the convergence of two main factors. First, delay damages can be amazingly complicated, expansive, and difficult to calculate, even *after* a delay has occurred. Second, the enforceability of no damages for delay clauses is sporadic and varies by jurisdiction. The result is an exponential uncertainty, which leaves contracting parties helpless to put any kind of accurate value on

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7. See, e.g., *Chas. T. Main, Inc. v. Mass. Tpk. Auth.*, 196 N.E.2d 821, 827 (Mass. 1964).

8. See BRIAN M. SAMUELS, *CONSTRUCTION LAW* 116 (1996). "Force majeure" generally refers to events or effects that cannot be anticipated or controlled, such as war or extreme weather. Some construction contracts provide an express list of qualifying force majeure events. *Id.*

9. See *infra* Part II.A.

10. See *John E. Green Plumbing & Heating Co. v. Turner Constr. Co.*, 742 F.2d 965, 966 (6th Cir. 1984) ("[B]ecause of their harsh effects, these clauses are to be strictly construed."); *Cushman & Ficken*, *supra* note 5, at 721, 723.

11. See *infra* Part I.

12. See JUSTIN SWEET, *SWEET ON CONSTRUCTION LAW* 342 (1997).

their exposure at the inception of a project, the time when key economic decisions must be made.

Part I of this Note summarizes the current law regarding enforceability of no damages for delay clauses and the judicial exceptions that have developed. Part II examines some of the practical and public policy considerations that have shaped the jurisprudential landscape. Part III provides a brief overview of delay claims and damages generally, the complexity of which must be understood to gain more thorough insight into the ineffectiveness of no damages for delay clauses. Part IV weighs all of the factors introduced in the earlier Parts and concludes that the no damages for delay clause is an undesirable solution to the challenge of managing delay risk in construction contracts. Finally, Part V examines potential alternatives to the no damages for delay clause and suggests that a combination of provisions that *limit* the delay damages recoverable by a contractor—rather than completely denying any recovery—would be a more balanced solution.

### I. ENFORCEABILITY OF NO DAMAGES FOR DELAY CLAUSES AND THE COMMON EXCEPTIONS

In most jurisdictions there is no *per se* rule concerning the enforceability of no damages for delay clauses.<sup>13</sup> Most courts begin with a presumption that these clauses are valid so long as they are clearly drafted.<sup>14</sup> As noted above, however, courts will generally construe no damages for delay clauses strictly, because they are exculpatory in nature and because the consequences of enforcement can be very severe. The result of this careful judicial scrutiny has been the development of a considerable list of widely recognized exceptions under which a no damages for delay clause will not be enforced. Most courts and commentators cite four to six basic exceptions,<sup>15</sup> but some of these are really generalizations that encompass several different considerations. There is, however, a common principle behind all of the exceptions—the fact that many courts simply do not want to enforce a no damages for delay clause

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13. See Cushman & Ficken, *supra* note 5, at 721-24.

14. See *id.* at 722, 724.

15. See, e.g., BRAMBLE & CALLAHAN, *supra* note 1, at 2-89 (citing six exceptions).

when it is unreasonable or inequitable to do so.<sup>16</sup> Consequently, the applicability of specific exceptions varies considerably from state to state and even from court to court. This reality makes it difficult for contracting parties working in multiple jurisdictions to gauge the value of these clauses with any regularity.

### *A. Exception for Delays Not Contemplated by the Parties*

Even if otherwise enforceable, a no damages for delay clause often does not bar claims for delays not contemplated by the parties at the time of contracting.<sup>17</sup> The rationale for this exception is simple. While the contractor may be responsible under the clause for the risk of common and expected delays, some courts find it inequitable also to hold the contractor responsible for delays that were completely unexpected and outside the parties' original contemplation. This exception has been applied to delays resulting from a wide range of occurrences, including: a city's failure to obtain a sewer right-of-way after assuring the contractor it would do so;<sup>18</sup> unexpected default of other contractors;<sup>19</sup> and a state's submission of misleading and inaccurate plans to the contractor.<sup>20</sup> Conversely, the delay *was* considered to have been contemplated by the parties—and the no damages for delay clause enforced—in a case in which the owner expressly advised the contractor of the possibility of unmarked or improperly located utilities.<sup>21</sup> In a somewhat more surprising example, a no damages for delay clause was also enforced when a wall adjacent to a construction site collapsed and killed two

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16. See Richard Gary Thomas & Fred. D. Wilshusen, *How to Beat a "No Damage for Delay" Clause*, 9 CONSTRUCTION LAW 17, 22 (Jan. 1989) (pointing out that the exceptions are often so intertwined that a practitioner may be able to overcome negative authority first by convincing a court it would be unfair to enforce the no damages for delay clause in that case and, second, by advancing any workable legal theory that would allow the court to disregard the negative authority).

17. See, e.g., *Corinno Civetta Constr. Corp. v. City of New York*, 493 N.E.2d 905, 908 (N.Y. 1986).

18. See *Franklin Contracting Co. v. State*, 365 A.2d 952, 953, 956 (N.J. Super. Ct. App. Div. 1976).

19. See *People ex rel. Wells & Newton Co. of N.Y. v. Craig*, 133 N.E. 419, 425-26 (N.Y. 1921).

20. See *Cauldwell-Wingate Co. v. State*, 12 N.E.2d 443, 446-47 (N.Y. 1938).

21. See *DiGioia Bros. Excavating v. City of Cleveland Dep't of Pub. Util.*, 734 N.E.2d 438, 448-49 (Ohio Ct. App. 2000).

workers and construction was delayed until the safety of other walls could be certified.<sup>22</sup>

The difficulty with the "delay not contemplated by the parties" exception is that the dispositive factor is the foreseeability of the specific type of delay that occurs. Reasonable minds may of course differ as to what delays are foreseeable. A strong argument could be made that the players in the construction arena ought to expect the unexpected. In fact, any long established entity would have to look no further than its own project history to discover an amazing array of delays stemming from all causes imaginable. Given this undeniable characteristic of the industry, it may not be reasonable for a contractor to defend his claim for delay damages with the argument that he thought *this job* would be different. In any event, courts will sometimes look to other provisions in the contract in an attempt to determine what specific types of delays were contemplated by the parties.<sup>23</sup> For example, if a contract contains express language dealing with site conditions, as many do, it is not likely that a court will find delays resulting from adverse site conditions to be "not contemplated by the parties" for the purpose of a no damages for delay clause analysis.

The exception for delays not contemplated by the parties is perhaps the broadest of the exceptions. This exception is so broad because many courts find that where another exception applies—for example, that the owner has "actively interfered" with the contractor's work—the delay was also not contemplated. Many opinions that could be based exclusively on other exceptions, therefore, also contain references to the lack of foreseeability of the delay.<sup>24</sup>

The exception for delays not contemplated is also the most varied exception in terms of state-by-state application. Some states have adopted the reasoning outlined above—that merely including a no damages for delay clause provides evidence that the parties have

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22. See *Cunningham Bros. v. City of Waterloo*, 117 N.W.2d 46, 49-50 (Iowa 1962) (holding that any delay by the owner in providing a prepared site to the contractor, regardless of how unexpected the delay was, was one "contemplated by the parties" because the contract provided for "any delay").

23. See *BRAMBLE & CALLAHAN*, *supra* note 1, at 2-93 to 2-94.

24. See, e.g., *Cauldwell-Wingate Co.*, 12 N.E.2d at 446-67 (holding that a delay caused by the state's submission of misleading and inaccurate plans to the contractors was not contemplated by the parties). These facts in *Cauldwell-Wingate Co.*, however, could also fit within the "active interference" exception. See *infra* Part I.B.

contemplated all manner of delay.<sup>25</sup> As a related matter, this exception may also be the most vulnerable to differing clause language. For example, in the case of a no damages for delay clause that applies broadly to "any cause whatsoever,"<sup>26</sup> it may be difficult to conclude that the parties did not contemplate a wide range of unexpected delays. Where the clause is expressly limited to certain types of delay, however, it is more likely that a court will find a given event not to have been contemplated. This analysis for the "delays not contemplated" exception is in contrast to most of the other exceptions, which are based more on equitable and public policy grounds than they are on an interpretation of the actual scope of the clause.

### *B. Exception for Active Interference*

Several states recognize an exception to the enforcement of no damages for delay clauses in cases where the affirmative acts or omissions of the enforcing party unreasonably interfered with the contractor's performance.<sup>27</sup> This exception is based not on a literal interpretation of the clause, but on the equitable principle that an owner or general contractor should not be allowed to exculpate themselves from their own acts that lead to delays. Generally, most courts do not consider ordinary negligence to constitute "active interference" per se.<sup>28</sup> In New York, for example, a party must make a showing of gross negligence before a no damages for delay clause will be invalidated.<sup>29</sup> Similarly, a mere showing of poor project administration by the owner is generally not sufficient.<sup>30</sup> A growing minority of jurisdictions, however, are expanding the "active

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25. See ROBERT F. CUSHMAN & JAMES J. MYERS, CONSTRUCTION LAW HANDBOOK 931 (1999); JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 512-13 (Brooks/Cole Publ'g 6th ed. 2000) (1970).

26. See *supra* note 7 and accompanying text.

27. See Cushman & Ficken, *supra* note 5, at 728.

28. See, e.g., John E. Green Plumbing & Heating Co. v. Turner Constr. Co., 500 F. Supp. 910, 913 (E.D. Mich. 1980) ("Mere negligence is not sufficient to avoid the consequences of the 'no damage for delay' clause."); Anthony P. Miller v. Wilmington Hous. Auth., 165 F. Supp. 275, 283 (D. Del. 1958) (holding that negligent acts are not exempted).

29. *E.g.*, Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413, 416-17 (N.Y. 1983) (requiring gross negligence before a no damages for delay clause will be circumvented).

30. *E.g.*, Martin Mech. Corp. v. P.J. Carlin Constr. Co., 518 N.Y.S.2d 166, 168 (App. Div. 1987).



interference" exception to cover acts that could be classified as ordinary negligence, making judicial enforcement even more uncertain.<sup>31</sup>

The "active interference" exception has been invoked, and circumvention of a no damages for delay clause allowed, in cases in which: the owner failed to keep a lake drained as required to allow for the contractor's work;<sup>32</sup> the owner severely mismanaged the project by failing to deliver drawings on time or sign key directives;<sup>33</sup> and the owner denied site access by giving priority to other contractors.<sup>34</sup> Many courts also hold that a breach of any essential contract obligation by the owner may constitute active interference.<sup>35</sup> Some courts use similar reasoning to find that an owner's failure to grant time extensions for excusable delays, if required by contract, serves to waive a no damages for delay clause.<sup>36</sup>

### *C. Exception for Fraud, Bad Faith, or Other Wrongful or Willful Conduct*

Even in states where the "active interference" exception is not expressly recognized, few courts will allow an owner or general contractor to escape liability for delays caused by "intentional[ly]

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31. See Steven B. Lesser & Daniel L. Wallach, *Risky Business: The "Active Interference" Exception to No-Damage-for-Delay Clauses*, 23 CONSTRUCTION LAW. 26, 28-29 (Winter 2003) (noting that this minority includes Florida and that New York may be heading in the minority's direction).

32. See *Coatesville Contractors & Eng'rs v. Borough of Ridley*, 506 A.2d 862, 867-68 (Pa. 1986).

33. See *Newberry Square Dev. Corp. v. S. Landmark*, 578 So. 2d 750, 752 (Fla. Dist. Ct. App. 1991).

34. See *Phoenix Contractors v. Gen. Motors Corp.*, 355 N.W.2d 673, 676-77 (Mich. Ct. App. 1984).

35. See *Northeast Clackamas County Elec. Coop. v. Cont'l Cas. Co.*, 221 F.2d 329 (9th Cir. 1955) (citing cases); accord *Marriott Corp. v. Dasta Constr. Co.*, 26 F.3d 1057, 1067-68 (11th Cir. 1994) (noting that a refusal to grant a time extension after a proper request can constitute sufficient fraud or active interference to overcome a no damages for delay clause); *Carlo Bianci & Co. v. State*, 230 N.Y.S.2d 471, 475-76 (1962) (holding that the no damages for delay clause did not bar recovery, because the state breached its contractual obligation to use due diligence to make the site available).

36. See Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW. 32, 35-36 (Fall 2002). See *infra* Part I.E. for a discussion of waiver.

false or fraudulent statements or acts."<sup>37</sup> This exception is particularly common in cases where the owner has misrepresented site conditions and then refused to compensate the contractor for the delay and extra work required to prepare the site.<sup>38</sup> Other specific instances in which an owner's bad faith has barred its reliance on a no damages for delay clause include a case in which the Pennsylvania Department of Transportation knew but did not disclose to its public contractor that the contractor would not have access to a portion of the road for a fourteen-week period,<sup>39</sup> and a delay caused when an owner gave its bridge superstructure contractor notice to proceed while knowing that the substructure work was not complete.<sup>40</sup>

In addition to an exception for fraudulent statements, courts often exempt delays caused by "other wrongful, willful, deliberate, or arbitrary and capricious conduct from application of a no damages for delay clause."<sup>41</sup> For example, a federal court allowed recovery for delay damages, despite the existence of a no damages for delay clause, in a case in which the government knew a particular strike was probable yet took no steps to attempt alternative procurement of needed materials.<sup>42</sup> The same result occurred in a case in which the general contractor failed to provide contractually required survey work for the subcontractor and intentionally misled the subcontractor in bad faith.<sup>43</sup>

The distinction between the "active interference" exception and the "willful misconduct" exception, where one exists at all, is merely a matter of degree. In many jurisdictions that recognize the former, it is discussed in terms that embrace the cases involving fraud and bad faith discussed above.<sup>44</sup> The distinction has significance, though,

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37. Cushman & Ficken, *supra* note 5, at 733.

38. *See id.* at 733-34.

39. *See* Commonwealth Dep't of Transp. v. S.J. Groves & Sons Co., 343 A.2d 72, 76-77 (Pa. Commw. Ct. 1975).

40. *See* U.S. Steel Corp. v. Mo. Pac. R.R. Co., 668 F.2d 435, 439 (8th Cir. 1982).

41. Cushman & Ficken, *supra* note 5, at 735.

42. *See* Ozark Dam Constructors v. United States, 127 F. Supp. 187, 191 (Ct. Cl. 1955).

43. *See* United States *ex rel.* Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 158 (2d Cir. 1996).

44. *See, e.g.,* Pellerin Constr. Inc. v. Witco Corp., 169 F. Supp. 2d 568, 583 (E.D. La. 2001) ("[A]ctive interference' ... 'clearly implies that more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence is needed ....'" (citing Peter Kiewit & Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376, 397, 399 (S.D. Iowa 1973) (holding that active

in states where courts do not expressly recognize an exception for "active interference," but will nonetheless invalidate a no damages for delay clause if the owner's conduct leading to the delay was truly wrongful.<sup>45</sup>

#### *D. Exception for Unreasonable Delays*

A quantitative exception recognized in some cases is that a no damages for delay clause does not apply to delays that are "unreasonable" in duration.<sup>46</sup> Some courts rationalize the need for this exception by finding a lengthy delay tantamount to abandonment of contract,<sup>47</sup> but the better reasoning is to categorize unreasonably lengthy delays among those not contemplated by the parties.<sup>48</sup> In fact, while the theory that certain *causes* of delay were not contemplated may be problematic,<sup>49</sup> the theory that unreasonably *lengthy* delays were not contemplated, regardless of the cause, is more realistic. The application of this exception requires courts to use their discretion in determining what length of delay is "unreasonable." This discretion understandably leads to unpredictable results, as there is no bright line rule.<sup>50</sup> In general though, the claimant

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interference requires "some affirmative, willful act, in bad faith, to unreasonably interfere with plaintiff's compliance with the terms of the construction contract").

45. See, e.g., ABA SUBCOMM. ON SURVEY OF STATE LAWS FOR THE CONSTR. INDUS., FIFTY STATE MONOGRAPH ON THE ENFORCEABILITY OF "NO DAMAGES FOR DELAY CLAUSES" 152, 190 (1998) [hereinafter ABA FIFTY STATE MONOGRAPH] (listing Louisiana and Mississippi among the states where an active interference exception has never been expressly articulated but where exculpatory clauses generally are subject to invalidation if an owner commits fraud or acts in bad faith).

46. See Cushman & Ficken, *supra* note 5, at 736.

47. See Gatlin, *supra* note 36, at 34 (citing *United States ex rel. Williams Elec. Co. v. Metric Constructors, Inc.*, 480 S.E.2d 447, 450 (S.C. 1997) and *Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761, 771 (Tex. App. 1996)).

48. See Cushman & Ficken, *supra* note 5, at 736.

49. See *supra* Part I.A.

50. See, e.g., *E.C. Nolan Co. v. State*, 227 N.W.2d 323, 327 (Mich. Ct. App. 1975) (determining that a nine-and-a-half month delay on a project originally scheduled for twenty-four months was unreasonable); *Am. Bridge Co. v. State*, 283 N.Y.S. 577, 584 (App. Div. 1935) (stating that it was doubtful that the clause applied to a delay of twenty-one months). *But see* *Endres Plumbing Corp. v. State*, 95 N.Y.S.2d 574, 580 (Ct. Cl. 1950) (holding that a six-month delay "was not so unreasonable as to constitute abandonment").

must show that the delay was unknown, uncommon, or unreasonable *in the context of the particular type of work involved*.<sup>51</sup>

*E. Delays Not Covered by the Terms of the Clause and Waiver*

Some no damages for delay clauses apply only to delays resulting from certain enumerated causes, without a catch-all phrase such as "any cause whatsoever."<sup>52</sup> In these cases the clause may be circumvented, not because it is invalid but because it does not cover the specific delay that occurred. In that regard, this analysis does not result in an actual *exception* to the enforcement of a no damages for delay clause. It is worth consideration, however, because it provides another discretionary means by which courts deal with challenges to these clauses.

The reasoning that the clause does not cover certain types of delays has been applied to allow recovery when a delay was caused by a material supplier and the no damages for delay clause only covered delays resulting from acts of the owner, architect, and general contractor.<sup>53</sup> It has also been applied to delays caused by the prime contractor's steel supplier, when the clause only covered those delays caused by "other contractors or subcontractors."<sup>54</sup> Additionally, courts have found *implied* limitations on the scope of a no damages for delay clause where it conflicts with other terms of the contract.<sup>55</sup>

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51. See *Howard Contracting Inc. v. G.A. MacDonald Constr. Co.*, 83 Cal. Rptr. 2d 590, 596 (Ct. App. 1999) (holding that a four-month delay by the owner in obtaining initial permits was unreasonable); *Dickinson Co. v. Iowa State Dep't of Transp.*, 300 N.W.2d 112, 115 (Iowa 1981).

52. See *BRAMBLE & CALLAHAN*, *supra* note 1, at 2-86, 2-91.

53. See *Giammetta Assocs. v. J.J. White, Inc.*, 573 F. Supp. 112, 113-14 (E.D. Pa. 1983).

54. *United States Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 539, 543 (D.C. Cir. 1982).

55. See, e.g., *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 438 (2d Cir. 1995) (holding that a clause that allowed for certain delay damages "notwithstanding any other provision contained in th[e] agreement" overrode the absolute bar established by the no damages for delay clause); *Shintech Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144 (Tex. Ct. App. 1985) (holding that a no damages for delay clause was not a complete bar to recovery when the contract also included a provision creating liabilities for the owner for acts that upset the contractor's schedule). But see *PYCA Indus., Inc. v. Harrison County Waste Water Mgmt. Dist.*, 177 F.3d 351, 365-66 (5th Cir. 1999) (holding that a no damages for delay clause was an additional requirement and did not conflict with EPA special conditions that were incorporated in the contract by reference and were purported to allow delay damages).

Waiver is an additional concept sometimes employed by courts to avoid the harsh effects of enforcing a no damages for delay clause. Like many contract terms, a no damages for delay clause can be waived by actions of the parties inconsistent with the intent to enforce the clause.<sup>56</sup> For example, the owner's refusal to grant appropriate time extensions for excusable delays has been said to constitute a waiver of a no damages for delay clause in some cases.<sup>57</sup>

### *F. Legislation*

In addition to the considerable number of judicial exceptions to enforcement of no damages for delay clauses, some states have also enacted legislation regarding this issue.<sup>58</sup> Although these statutes vary in scope, a majority of them declare no damages for delay clauses per se invalid in specific circumstances, such as public works projects.<sup>59</sup> Washington and Ohio have enacted farther-reaching statutes that invalidate no damages for delay clauses in *all* contexts to the extent that they seek to exculpate an owner from liability for delays occasioned by its own acts.<sup>60</sup>

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56. See, e.g., *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 776 F.2d 198, 202-03 (7th Cir. 1985) (stating that a no damages for delay clause was waived by the owner through repeated oral promises that they would reimburse the contractor for damages occasioned by delay notwithstanding the clause); *Findlen v. Wichendon Hous. Auth.*, 553 N.E.2d 554, 555-56 (Mass. App. Ct. 1990) (holding that the owner waived a no damages for delay clause by virtue of earlier payments for delay damages made in contravention of the provision).

57. See *supra* notes 35-36 and accompanying text.

58. For a general discussion of the various legislative responses to no damages for delay clauses, see Susan Sisskind Dunne, *Legislative Update: "No Damage for Delay" Clauses*, 19 CONSTRUCTION LAW 38, 39-40, 47 (Apr. 1999).

59. See, e.g., ARIZ. REV. STAT. § 41-2617 (2004) (requiring public contracts to allow for negotiation of certain delay damage claims and therefore prohibiting blanket no damages for delay clauses); CAL. PUB. CONT. CODE § 7102 (West 2004) (stating that provisions in public contracts that provide for time extension as the sole remedy for delay shall not be construed to prevent recovery of damages in cases in which a delay was unreasonable and not within the contemplation of the parties); COLO. REV. STAT. § 24-91-103.5 (2002) (voiding, as against public policy, any no damages for delay clause in a public contract that purports to limit a contractor's recovery of damages for delays caused by the public entity contracting the work); MO. REV. STAT. § 34.058 (2001) (same); N.C. GEN. STAT. § 143-134.3 (2003) ("No contractual language [in a public construction contract] forbidding or limiting compensable damages for delays caused solely by the owner or its agent may be enforced ....").

60. OHIO REV. CODE ANN. § 4113.62(c)(1) (West 2001) ("Any provision of a construction contract ... that waives or precludes liability for delay ... when the cause of the delay is a proximate result of the owner's act or failure to act ... is void and unenforceable as against public policy."). Washington has a similar statute that states:

*G. Other Factors Creating Uncertainty*

The exceptions and rules of enforceability highlighted above are broad generalizations. In practice, the question of whether a no damages for delay clause is enforceable is very fact- and jurisdiction-specific. A complete state-by-state survey of the law regarding these clauses is beyond the scope of this Note but has been done effectively by other practitioners and commentators.<sup>61</sup> In reality, any attempt to generalize or codify the law regarding no damages for delay clauses may be a hollow academic pursuit. Courts frequently intertwine the various rationales and base their decisions largely on discretionary and equitable grounds.<sup>62</sup> As one pair of commentators has noted, "it appears that these exceptions function as legal fictions to allow the judicial sense of fairness to mitigate a perceived harsh result."<sup>63</sup>

There are also several factual circumstances that sometimes make the enforcement of a no damages for delay clause more or less likely. Some courts are more inclined to enforce the clause when it is combined with language guaranteeing time extensions as a remedy for excusable delays.<sup>64</sup> Another example is that no damages for delay clauses may provide more protection for public owners than private.<sup>65</sup> Judicial tendencies on these points are hardly consistent, however, and the presence or absence of such factors in

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Any clause in a construction contract ... which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable.

WASH. REV. CODE § 4.24.360 (1988).

61. See ABA FIFTY STATE MONOGRAPH, *supra* note 45 (presenting a survey of all fifty states and the District of Columbia in which individual authors addressed eleven predetermined issues regarding the validity of no damages for delay clauses in their states); CUSHMAN & MYERS, *supra* note 25, at ch. 26 (discussing a survey of case law from twenty-eight states from 1979 to 1999).

62. See Cushman & Ficken, *supra* note 5, at 721 ("[F]ew if any generalizations about no-damage-for-delay cases are entirely reliable .... The courts, attempting to do justice in individual cases, have applied varying rationales.").

63. BRAMBLE & CALLAHAN, *supra* note 1, at 2-89.

64. This inclination may be based on the fact that the time extension clause is viewed as consideration for the no damages for delay clause. See Cushman & Ficken, *supra* note 5, at 739.

65. See BRAMBLE & CALLAHAN, *supra* note 1, at 2-88.

a particular case does little to increase the certainty with which the enforceability of the clause can be predicted.

The question of whether any given no damages for delay clause is judicially enforceable is ultimately a very difficult one. In a few states, the highest court has issued an opinion outlining the exact exceptions applicable in that state to provide guidance for uncertain lower courts.<sup>66</sup> In most states, however, confusion continues to be the rule and certainty the exception. The next Part considers the conflicting policy arguments that have prevented courts from reaching a consensus in this area.

## II. CONFLICTING POLICY ARGUMENTS THAT HAVE SHAPED THE UNCERTAIN JUDICIAL LANDSCAPE

That the law regarding the validity of no damages for delay clauses has developed into such an uncertain form is indicative of the fact that there are strong arguments on both sides as to whether no damages for delay clauses should be used and enforced. There are many arguments, grounded in both pragmatic and policy concerns, that weigh in favor of the use and enforcement of these clauses. There are also persuasive arguments weighing against enforcement. It is no surprise that the judicial reception of no damages for delay clauses has become so uncertain, and the host of exceptions now in place show that courts have strived to compromise between the two positions. This Part outlines some of the arguments on each side.

### *A. Arguments for the Enforcement of No Damages for Delay Clauses*

The most obvious, and perhaps strongest, argument for enforcement of no damages for delay clauses is the concept, long idealized in American jurisprudence, of freedom of contract.<sup>67</sup> One aspect of

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66. See JAMES ACRET, CONSTRUCTION LITIGATION HANDBOOK 7-22 to 7-23 (2d ed. 2003) (discussing *Corinno Civetta Constr. Corp. v. New York*, 493 N.E.2d 905, 909-10 (N.Y. 1986) and *United States ex rel. Williams Elec. Co. v. Metric Constructors, Inc.*, 480 S.E.2d 447, 448 (S.C. 1997)).

67. SWEET, *supra* note 12, at 340 (arguing that no damages for delay clauses cannot be categorized as unfair, because the contractor "made a contract, perhaps at a higher bid price,

this principle is that both parties sign the contract knowing the potentially severe consequences that the clause may have. In fact, the very inclusion of a no damages for delay clause in the contract may carry considerable weight in the determination of contract price. Consequently, the contracting process is an area in which courts should not be quick to interfere. An owner or general contractor should be entitled to pass the risk of delay and exercise economic control over the project if he desires and the other contracting party is willing. Similarly, there is a belief that owners have a right to know the total cost of a project at its inception. This is especially true for public projects, when tax money and complex bond and appropriations issues are likely involved.<sup>68</sup>

As a practical matter, no damages for delay clauses are said to help prevent contractors from asserting vexatious claims.<sup>69</sup> It is an unfortunate but undeniable fact that many contractors in the modern construction industry begin projects knowing that much, if not all, of any profit they make will be made through the claims process. When each contractor on a large project is allowed to claim damages every time they are minimally delayed by another party, the effect on the economics and administration of the project can be devastating.

It follows that no damages for delay clauses also provide a strong incentive for contractors to prevent delay.<sup>70</sup> A contractor who is able to sit back and collect delay damages at the end of a project is likely to do just that. Conversely, a contractor who knows he holds the monetary risk of any delay is much more likely to take a proactive role in preventing delay. As a result, no damages for delay clauses can be an invaluable tool in encouraging cooperation and coordination among contractors.

An additional practical argument in favor of using no damages for delay clauses is that they force contractors to include contingency for the risk of delay in their estimates, and bid accordingly. In theory, this process prevents the unfair situation in which delay damages are allowed and one bidder decreases its bid up front,

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knowing a particular risk would be his").

68. See ROBERT A. RUBIN ET AL., CONSTRUCTION CLAIMS: PREVENTION AND RESOLUTION 84 (3d ed. 1999); SWEET, *supra* note 25, at 511-12.

69. See Cushman & Ficken, *supra* note 5, at 722.

70. See BRAMBLE & CALLAHAN, *supra* note 1, at 2-87.



planning to recover for delays later.<sup>71</sup> A final argument is that other contractual mechanisms sufficiently allow for recovery of extra costs, because delays often occur in association with other compensable events, such as changes in the work.<sup>72</sup> These mechanisms may include differing site conditions clauses and change order markup.<sup>73</sup>

### *B. Arguments Against the Enforcement of No Damages for Delay Clauses*

The freedom of contract argument in favor of enforcing no damages for delay clauses may be overly idealistic. In reality, owners occupy a much stronger bargaining position than the contractors who work for them. In many cases the bidding contractors have no choice but to accept no damages for delay clauses and other owner-friendly contract provisions if they wish to participate in the work.

It also may be naïve to say that contractors weigh the risk of delay and simply add sufficient contingency to their initial estimates. Most contractors cannot accurately price the risk of owner interference or other unpredictable delays, especially on a new project, under new circumstances, and perhaps with an owner with whom they have not dealt before.<sup>74</sup> Perhaps even more important is that, in reality, bidders must often forego adding any contingency if they want to win a bid.<sup>75</sup> Essentially, "the contract becomes a gambling proposition," where one side often receives a windfall.<sup>76</sup> Rarely will the contingency amount exactly equal the eventual costs of delay. Either the contractor includes too much money and receives a windfall, or more commonly, the contractor does not include enough and the owner receives a tremendous bargain.

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71. See RUBIN ET AL., *supra* note 68, at 84-85.

72. See *id.* at 86.

73. When the scope of a contractor's work on a project is changed through design modification or owner request, the contractor is generally allowed a certain markup on the cost of the additional work. Although this markup is typically designated as "overhead and profit," some in the industry argue that it also accounts for minor delay and inefficiency costs occasioned by the change.

74. See SWEET, *supra* note 12, at 341.

75. See SWEET, *supra* note 25, at 512.

76. Gatlin, *supra* note 36, at 32.

In a larger public policy context, some argue that it is unconscionable for owners and general contractors to exculpate themselves ahead of time for the costs of delays they cause subcontractors.<sup>77</sup> This view has been influential in the few states that have passed legislation invalidating no damages for delay clauses in certain circumstances.<sup>78</sup>

The potential inequities of these clauses manifest themselves even more clearly in situations where the contract also includes a clause allowing the owner to recover liquidated damages for delay. It is conceivable that a contractor delayed by the owner or some other cause beyond its control could, first, not recover its own damages due to a no damages for delay clause and, second, have to pay liquidated damages to the owner.<sup>79</sup> Commentators have also argued that no damages for delay clauses foster an adversarial relationship among contracting parties,<sup>80</sup> creating a disincentive for owners to resolve project issues expeditiously.<sup>81</sup>

Another potential impact is that bids on a project may be higher than necessary as contractors put a premium on the risk that there might be delays for which they will not be compensated.<sup>82</sup> This precaution arguably adds unnecessary overall cost to the project. Of all the arguments against enforcement, however, this is among the least persuasive, because no damages for delay clauses frequently result in a *decrease* in total project cost, as contractors fail to include enough contingency to cover the actual costs of delay.

Far from resolving the debate over no damages for delay clauses, the arguments on both sides of the issue demonstrate why courts have been so hesitant to establish a firm rule one way or the other. Further, this analysis of the competing arguments shows that a no damages for delay clause is not an appropriate mechanism for apportioning delay risk in construction projects.

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77. See BRAMBLE & CALLAHAN, *supra* note 1, at 2-87; RUBIN ET AL., *supra* note 68, at 85-86; J. Bert Grandoff, *The "No Damage for Delay" Clause: A Public Policy Issue*, 75 FLA. B.J. 8, 8-11 (2001).

78. See *supra* Part I.F.

79. See BRAMBLE & CALLAHAN, *supra* note 1, at 2-87.

80. See RUBIN ET AL., *supra* note 68, at 85.

81. See *id.*; SWEET, *supra* note 25, at 512.

82. BRAMBLE & CALLAHAN, *supra* note 1, at 2-87; RUBIN ET AL., *supra* note 68, at 85.

### III. THE COMPLEXITIES OF CONSTRUCTION DELAY

#### *A. Why Delay Risk Is Different from Other Types of Risks*

The preceding discussion of the public policy considerations implicated by the use of no damages for delay clauses and their enforceability calls for an analysis of why delay damages are so special. Construction entities use the contracting process to achieve all manner of risk allocation. The fact that a contract clause purports to place all of a certain type of risk on one party is not so unusual, yet courts have become very skeptical when delay risk is treated in this manner. The reason for this different treatment of delay risk, and the reason why no damages for delay clauses are an inadequate mechanism, is better understood in light of two important attributes of construction delay risk. First, delay is the most prevalent and most costly risk in the industry. Second, delay causation and damages are often complicated and difficult to prove, even without considering the uncertainty of a no damages for delay clause. What follows is a brief overview of construction delay claims and damages, which is necessary to understand the complete context in which no damages for delay clauses operate.

Simply put, "[d]elays are a way of life in the construction industry."<sup>83</sup> The inevitability of delay immediately raises concerns over whether a "stick your head in the sand" approach taken through the use of a no damages for delay clause is adequate. It is one thing to completely allocate the risk of minor eventualities for administrative ease, but to do this so casually in the case of all delay risk on a project may be unreasonable.

As a general matter, all delays can be categorized as excusable or non-excusable, depending on whether the contractor is entitled to a time extension, and as compensable or non-compensable, depending on whether the contractor is entitled to damages for the delay.<sup>84</sup> The parties to a contract may, of course, define these categories any way they choose. No damages for delay clauses purport to make all delays non-compensable, regardless of whether they are excusable.

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83. RUBIN ET AL., *supra* note 68, at 81.

84. See CUSHMAN ET AL., *supra* note 3, at 33-36; *id.* at 86-88.

*B. Causes of Delay and Components of Delay Damages*

The virtually infinite list of potential causes of construction delay is one factor that explains both the inevitability and the complexity of proving delay claims.<sup>85</sup> Causes that might be compensable, assuming the absence of a no damages for delay clause, include: differing site conditions from what was disclosed by the owner, defective drawings or specifications, the owner's failure to provide access, improper site preparation, failure to provide owner-supplied materials, the architect's failure to approve shop drawings, the owner's or general contractor's failure to coordinate other contractors, failure to make timely payments, failure to inspect, excessive change orders, or failure to accept completed work.<sup>86</sup> Delays that are commonly excusable, though not *compensable*, may include those caused by bad weather and other acts of nature or certain labor problems, such as a completely unanticipated strike. Not surprisingly, delays resulting from causes that are under the contractor's own control are generally non-excusable *and* non-compensable. Common examples of such delays include a contractor's failure to provide sufficient manpower or sufficient material quantities.<sup>87</sup>

A simple recitation of the potential monetary components of delay damages serves to demonstrate how expansive the impact of a significant delay can be. Direct delay damages may include field and home office overhead, idle equipment or labor costs, inefficiencies or loss of productivity, equipment and material storage costs, additional mobilization or demobilization, extended insurance and bonding costs, and escalation costs due to increases in material and labor costs during the period of delay.<sup>88</sup> In addition to the long list of potential direct costs, there are also several categories of consequential damages. These damages can include loss of profits on

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85. See SWEET, *supra* note 12, at 318 ("The many possible causes of delay can make delay claims complicated and difficult to sustain.")

86. For further discussion of these and other potential causes of construction delay, see SMITH, CURRIE & HANCOCK LLP, *supra* note 1, at 166-70; SWEET, *supra* note 12, at 317-18.

87. See SWEET, *supra* note 12, at 317.

88. For further discussion of these and other components of delay damages, see CUSHMAN ET AL., *supra* note 3, at 57-62; RUBIN ET AL., *supra* note 68, at 119-28; SMITH, CURRIE & HANCOCK LLP, *supra* note 1, at 174-75; Cushman & Ficken, *supra* note 5, at 690-720; Ian A.L. Strogatz et al., *Pricing the Delay: Whom Do I Sue and What Do I Get?*, 17 CONSTRUCTION LAW. 4, 8-10 (Oct. 1997).

current or future projects, loss of bonding capacity, prejudgment interest and financing costs, and occasionally even legal fees.

### *C. Difficulties in Calculating and Proving Delay Claims*

There are additional factors, beyond the lengthy lists of potential causes and damage components, that make the proof and calculation of delay claims very uncertain. One notable factor that plays a significant role in the proof of causation is the notion of concurrent delay. When a contractor is delayed, there may be a variety of causes that all played a part, some compensable and others not. As noted by one commentator, "delays by their very nature are ongoing, intertwined, intermittent, and very difficult to segregate between those caused by the defendant and those caused by the plaintiff."<sup>89</sup> The early judicial position on concurrent delays was that no recovery was allowed, but modern courts often try to apportion the delay damages if the claimant can show a clear division of the costs attributable to each party.<sup>90</sup>

Proof of delay causation may also be complicated by questions regarding the duties of a contractor to mitigate delay damages. Owners often assert that a contractor could have mitigated damages by taking steps such as reallocating idle resources to other projects. In practice, these alternatives are rarely as simple as defendants suggest.<sup>91</sup> A contractor's orchestration of manpower and equipment across many projects is often a complicated matter, and rarely can idle resources be simply shifted to another site at no cost when a project is delayed.

Even in cases in which delay causation can be established sufficiently, calculation and proof of damages is very complicated.<sup>92</sup>

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89. Strogatz et al., *supra* note 88, at 13.

90. See CUSHMAN ET AL., *supra* note 3, at 36-39; SMITH, CURRIE & HANCOCK LLP, *supra* note 1, at 171-72.

91. Michael K. Love, *Theoretical Delay and Overhead Damages*, 30 PUB. CONT. L.J. 33, 48 (2000) (presenting six broad considerations that affect any decision for potential mitigation plans).

92. See CUSHMAN ET AL., *supra* note 3, at 51-54 (presenting a detailed ten-step "time impact analysis procedure," most of which requires a scheduling expert); SMITH, CURRIE & HANCOCK LLP, *supra* note 1, at 176 (outlining eighteen potential sources of project data that are crucial in preparing a delay claim); SWEET, *supra* note 12, at 411-15 (discussing the crude formulas that have developed as proxies when calculation of actual damages is not possible); Love, *supra* note 91, at 51 (arguing the insufficiency of the widely used Eichleay formula that

Identifying and quantifying the precise costs that resulted from a particular delay is not an easy task, and the process usually involves significant use of experts. Even the contractor who wades successfully through the numbers will have to overcome tough evidentiary issues before he can present the results at trial.<sup>93</sup>

The proof and calculation of delay damages is further complicated by the fact that all these efforts are dependent on the regularity and accuracy of the records kept by the project management staff during construction. It is easy to assert from the sidelines that proper documentation of project events should be simple, but a "construction project by its very nature is dynamic."<sup>94</sup> The focus of the project team during construction is often drawn away from record keeping, as it struggles to deal with arising issues and keep the project moving forward. In the end though, the certainty with which even the best experts and attorneys can prepare a delay claim is heavily dependent on the quality of documentation kept during the project.

#### IV. NO DAMAGES FOR DELAY CLAUSES ARE NOT THE ANSWER

Given the considerable economic impact that delays may have on a construction project, it is not surprising that parties seek to apportion the risk of delay. The no damages for delay clause is one popular mechanism employed for that purpose. Unfortunately, no damages for delay clauses "do not provide reliable security to owners seeking some degree of certainty as to their potential liability for delay."<sup>95</sup>

First, the risk of delay is an enormous issue in construction, and the proof and calculation of delay damages can be extraordinarily challenging, even *after* a delay has occurred.<sup>96</sup> Because delay claims can potentially have huge economic impacts on owners and contractors alike, a blanket ban on recovery under a no damages for delay clause is an enormous and almost unquantifiable risk. Valuation of this risk at the beginning of a project is extremely difficult. There

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serves as an approximation of home office overhead costs resulting from construction delays).

93. See Strogatz et al., *supra* note 88, at 12-14 (discussing the use of summaries, the use of expert testimony, and hearsay complications).

94. CUSHMAN ET AL., *supra* note 3, at 49.

95. Gatlin, *supra* note 36, at 36.

96. See *supra* Part III.

are simply too many variables. Even if there were some method of valuation that was even remotely reliable, it is unclear what impact that would have on actual contracting practices. In most cases, even the contractor armed with what he believed to be an accurate valuation of the delay risk on a particular project would face pressure to reduce or eliminate any contingency from his bid in order to win the contract.

Second, the no damages for delay clause comes with a host of its own questions and uncertainties regarding enforceability.<sup>97</sup> Because these clauses have been subject to so much criticism and judicial scrutiny, parties are forced to weigh not only the uncertainty of the delay risk on a project generally, but also the risk that the clause may not be enforced. Owners began using no damages for delay clauses out of concern that their potential liabilities to contractors for delay was so uncertain. The fix was to simply force the contractor to accept all risk of delay. Unfortunately, while the clause may bring peace of mind at the beginning of a project, it ultimately makes owners' liabilities for delay dependent on a judicial coin toss. Considering that the purpose of a no damages for delay clause is to provide *increased* certainty as to each party's liability for delay, the clause fails more often than not.

Due to the complexity of trying to put a value on such an enormous risk in an uncertain legal setting, inequitable outcomes are inevitable.<sup>98</sup> According to the summation of one commentator, "[t]he uncertainty of their application, their exculpatory effect, and the difficulty of pricing the risk make [no damages for delay clauses] inappropriate."<sup>99</sup> The following Part discusses several alternative mechanisms for the apportionment of delay risk in construction contracts to alleviate these concerns.

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97. See *supra* Parts I-II.

98. Gatlin, *supra* note 36, at 32 (describing how no damages for delay clauses usually result in a windfall for one side).

99. SWEET, *supra* note 12, at 342.

## V. ALTERNATIVES TO THE NO DAMAGES FOR DELAY CLAUSE

A. *Liquidated Delay Damages*

Liquidated damages are commonly used in regard to the *owner's* delay damages, suffered when the contractor fails to deliver the project on time, but occasionally construction contracts also include liquidated damage clauses regarding the *contractor's* delay damages.<sup>100</sup> Liquidated damages are generally expressed in terms of a daily rate.

The standard rules of enforceability for liquidated damages provisions apply in the construction industry. The amount must be a reasonable estimation of expected actual damages at the time the contract is signed,<sup>101</sup> and actual damages must be difficult to prove.<sup>102</sup> If these two requirements are not met, the clause is unenforceable as a penalty.<sup>103</sup> Some courts also consider whether the clause was the result of actual bargaining or whether it was imposed on a party of inferior bargaining strength.<sup>104</sup>

Liquidated damages have several advantages, including ease of calculation and simplification of litigation. They relieve contractors of the uncertainty and expense of proving actual damages.<sup>105</sup> They also simplify project administration, as detailed record keeping is necessary only for the time and causation elements of delay, not the cost issues. Liquidated damages give owners a firm basis for predicting the scope of their potential liabilities up front.<sup>106</sup> The fact that contractor delay damages are even more difficult to calculate than owner damages might create an additional judicial incentive

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100. See CUSHMAN & MYERS, *supra* note 25, at 1179-80. For a discussion of the use and benefits of liquidated damages provisions in the more typical context of owners' delay damages, see R. Harper Heckman & Benjamin R. Edwards, *Time is Money: Recovery of Liquidated Damages by the Owner*, 24 CONSTRUCTION LAW. 28 (Fall 2004).

101. See CUSHMAN & MYERS, *supra* note 25, at 1172-75.

102. See *id.* at 1175-78.

103. See SWEET, *supra* note 25, at 504-05 (presenting *Bethlehem Steel Corp. v. Chicago*, 350 F.2d 649 (7th Cir. 1965), as representative of the modern judicial attitude); see also Heckman & Edwards, *supra* note 100, at 29-30.

104. See ACRET, *supra* note 66, at 7-33; SWEET, *supra* note 25, at 506.

105. See ACRET, *supra* note 66, at 7-32.

106. See Gatlin, *supra* note 36, at 36; see also Heckman & Edwards, *supra* note 100, at 29 (listing among the benefits, "the creation of firm expectations for all parties involved about what damages for delay will be").



to enforce liquidated damage clauses in that setting.<sup>107</sup> Finally, most parties involved in construction are familiar and comfortable with the use of liquidated damages.<sup>108</sup>

Unfortunately, there are also many disadvantages to liquidating a contractor's delay damages. First, widespread use of this mechanism may not be practical, because owners usually have superior bargaining power and rarely want to give contractors what some may view as an easier way to collect damages.<sup>109</sup> Liquidating a contractor's delay damages may also create a disincentive for contractors to avoid delays if they have a favorable liquidated damages rate. Additionally, this approach may not be as simple in administration as it initially appears. Even with a liquidated damages clause in place, a claimant will still need to have experts examine complicated causation issues, such as interferences and concurrent delays, to determine how many days of liquidated damages should be awarded.<sup>110</sup> It may also be argued that liquidated damages clauses are not all that much better than no damages for delay clauses in terms of judicial certainty.<sup>111</sup>

### *B. Liquidated Delay Damages with a Cap*

Another alternative is to use a modified liquidated damages clause that includes some sort of cap, either at a specific dollar amount or a specified percentage of the contract price.<sup>112</sup> Most of the general points regarding liquidated damages still apply, but this alternative carries additional advantages and disadvantages. On the favorable side, a liquidated damages clause with a cap eases some of the difficulties of apportioning causation in the event of a lengthy delay. If the cap is exceeded, it becomes less important to fight over

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107. See SWEET, *supra* note 25, at 514.

108. See CUSHMAN & MYERS, *supra* note 25, at 1171 ("[T]he use of liquidated damages provisions is just an outgrowth of the prevailing culture in construction to agree formally in advance about contingencies that might arise during the construction project.").

109. See *id.* at 1180.

110. See *id.*

111. See ACRET, *supra* note 66, at 7-32 ("Decisions can be found that support almost every imaginable shade of opinion as to the propriety, practicality, utility, and enforceability of liquidated damages clauses.").

112. See *Reed & Martin, Inc. v. Westinghouse Elec. Corp.*, 439 F.2d 1268, 1274 (2d Cir. 1971) (involving an electrical equipment contract with a clause allowing liquidated damages not in excess of five percent of the original equipment price); SWEET, *supra* note 25, at 509.

the exact division of liability for concurrent delays, because no further recovery is attainable. This type of mechanism also benefits owners who want to know their maximum exposure to liability at the beginning of the project and avoid open-ended liability.<sup>113</sup>

On the other hand, a contractor still faces considerable risks from larger delays under a capped liquidated damages clause. Incentives may also still be a problem, as the contractor would have little motivation to avoid delays until the cap is reached. A cap on delay damages could also be used in the absence of a liquidated damages clause.<sup>114</sup> Most of the same arguments would apply, regardless of whether the recoverable damages were actual or liquidated.

### *C. Elimination Period*

Some commentators have suggested an alternative that is, in some ways, the opposite of a liquidated damages clause with a cap. Instead of an *upper* limit on recovery, the contract can fix a *lower* limit—not with respect to the dollar amount of the damages, but with respect to the duration of delay.<sup>115</sup> This "elimination period," as it has been described, would serve as a deductible—recovery would not begin until the cumulative impact of all delays reaches a certain number of days. These clauses have also been referred to as "corridor provisions."<sup>116</sup>

The advantages of such a provision are clear. First, it reduces some of the harshness of an absolute no damages for delay rule, as the contractor is protected in the event of truly significant delays. This protection leads to the practical advantage that bids need only include contingency for minor and typical delays, for which valuation is much easier.<sup>117</sup> The use of an elimination period also produces a good balance of incentives. Owners are encouraged to administer the project efficiently to avoid surpassing the elimination period, while contractors still have incentive to avoid delays knowing that they hold the risk until the delays become lengthy.

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113. See SWEET, *supra* note 12, at 342.

114. See *id.*

115. See JAMES E. STEPHENSON, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS 296 (1990); SWEET, *supra* note 12, at 342.

116. See Gatlin, *supra* note 36, at 36.

117. See *id.*

This mechanism, like all the alternatives, cannot satisfy all of the concerns of both parties. Owners would still be subject to open-ended liability once the elimination period is surpassed. Also, the contractor's incentive to avoid further delay disappears once the elimination period has run and all damages become recoverable. Additionally, some may argue that this system still does not address equitable concerns, because contractors would still be forced to swallow delay damages for the shorter delays that were out of their control. This argument is considerably weaker, however, under an elimination period clause than it is under a no damages for delay clause, because by removing the contractor's exposure to the risk of longer delays, it becomes much more likely that an adequate contingency will be carried and no inequitable harm will be suffered.

It is important to note that this—or any of the alternatives—can be modified to cover only certain causes of delay,<sup>118</sup> or can be combined with the other alternatives. As will be argued below, it may be that the best solution employs a combination of approaches.

#### *D. Limit Recovery to Specified Direct Costs*

The alternatives suggested to this point have all been directed at the temporal or causal aspects of delay. An equally plausible solution may be to allow all provable delay claims but to limit recovery to certain direct costs, as expressly identified in an exhibit to the contract, and not to allow consequential damages.<sup>119</sup> Like some of the other alternatives, this mechanism would serve to reduce the harshness of an absolute no damages for delay clause, which would in turn likely yield increased enforceability as compared to a no damages for delay clause. Owners would know that they can avoid potentially astronomical consequential damage awards.<sup>120</sup> A system by which only direct costs were recoverable would also provide a good balance of continual incentives on both sides. Owners would have the incentive to administer the project

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118. This is actually the case in the clause suggested by James Stephenson, which only includes direct costs for excusable delays, not those that are owner-caused. See STEPHENSON, *supra* note 115, at 296.

119. See Kenneth M. Cushman & Joyce K. Hackenbrach, Delays and Disruptions, PLI Advanced Construction Claims Workshop 24-25 (Oct. 1990).

120. See STEPHENSON, *supra* note 115, at 297.

effectively to avoid the direct cost liability, whereas contractors would have an incentive to avoid the lengthy delays that would lead to the accrual of unrecoverable consequential costs. Of course, under such a clause the contractor still bears a certain risk that lengthy delays might occur and consequential damages might result, but this outcome is considerably less harsh than that which results under a traditional no damages for delay clause.

*E. A Proposed Provision That Couples an Elimination Period with a Limitation on the Types of Damages Recoverable*

The goal in determining the best mechanism for apportioning delay risk in construction contracts must be to achieve the greatest balance of certainty, practicality, and incentives. No damages for delay clauses have proven to be deficient in all three categories.<sup>121</sup>

Because of the enormous impact that construction delays can have, it is essential that any alternative to the no damages for delay clause provides an increased level of certainty and judicial predictability. It is no surprise that owners, given the choice, will seek to shift as much risk as possible down to their contractors. The no damages for delay clause is such a severe risk-shifting mechanism, however, that judicial enforcement is largely unpredictable.<sup>122</sup> An alternative that apportions the risk in a more balanced fashion would likely produce increased certainty and reliability for owners, while still allowing parties to evaluate their potential liabilities at the beginning of the project.

Any suitable alternative to the no damages for delay clause must also be practical. A mechanism that might solve the academic concern over judicial certainty does little good if it cannot be employed in practice. This is where an option such as liquidating the contractor's delay damages likely falls short, as owners would have little reason to use such a system.<sup>123</sup> Finally, the proper solution should provide the best balance of incentives for all parties to avoid construction delay.

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121. See *supra* Part IV.

122. See *supra* Part I.

123. See *supra* Part V.A.

Given all of these competing concerns, the best solution includes a combination of an elimination period coupled with a limitation on the types of delay damages that are recoverable.<sup>124</sup> This system would allow for a more balanced apportionment of the risk, which should yield enhanced judicial certainty, as many of the policy arguments against no damages for delay clauses disappear.<sup>125</sup> There would also be a good balance of incentives for all parties to avoid delays. Owners would not be entirely shielded from liability, while contractors would still carry the risk associated with shorter delays and consequential damages. All parties, therefore, would be encouraged to cooperate in an attempt to avoid the common causes of delay. The greatest potential drawback to this solution is the practical question of whether owners would be inclined to adopt the system in favor of the broader shield of a no damages for delay clause. Careful analysis shows, however, that no damages for delay clauses are not nearly as impenetrable as they sound. Owners may be well-served to step back to this more compromising alternative, where some of their liabilities may be higher, but where their protection from open-ended claims is much more certain and judicial enforcement more predictable.

### CONCLUSION

The use of no damages for delay clauses to apportion delay risks in construction contracts has proven deficient. The risk of delay has an enormous economic impact on construction contracting, and the calculation and proof of delay claims is extremely complicated. The no damages for delay clause requires parties to perform the nearly impossible task of placing a monetary value on that risk at the inception of a project, all the while having little certainty as to whether the clause will be enforced. In addition to these practical difficulties, no damages for delay clauses simply lead to inequitable results.

The construction industry is all about risk management. The use of no damages for delay clauses developed from owners' desire to control their liabilities, but their use has proven unpredictable in

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124. *See supra* Parts V.C-D.

125. *See supra* Part II.

practice. This Note proposes an alternative provision that would establish an elimination period—a minimum duration of total delay before damages are recoverable—coupled with a provision limiting the contractor's delay damages to specified direct costs. This alternative to the no damages for delay clause would provide better certainty, practicality and incentives, and a more appropriate balance of risk exposure for all parties.

*Carl S. Beattie*