The "No Damages for Delay" Clause

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1. INTRODUCTION[1]

Construction projects involve risks. A well-structured construction contract allocates certain risks to the party that is best able to control those risks.

Delay is a common risk that construction contracts allocate. A delay may increase costs for owners, contractors, and subcontractors to complete a project. Allocation of delay risk typically considers responsibility for a delay, based on three categories of delay:

- **Non-Excusable Delay.** Contractor-caused delay is a risk allocated to the contractor. Typically, a contractor is not entitled to an extension of time to complete a project, bears its own delay costs, and is responsible for the owner's delay costs (either actual delay costs or liquidated damages).
- **Excusable or Non-Compensable Delay.** Most contracts allocate a force-majeure delay such as abnormal weather or an act of God to grant a time extension, but neither party is responsible to the other party for any delay costs.[2]
- **Compensable Delay.** Most contracts allocate delay responsibility to the owner if it causes a compensable delay that increases the contractor's costs and time of performance. In these cases, the contractor receives both a time extension and compensation for its increased time-related costs due to the owner's (or its agent's) delay.

A construction contract expressly states parties' duties and obligations, but there are also implied duties and obligations, such as the duty to cooperate and not hinder the performance of other contracting parties. These expressed and implied duties shift greater liability onto the owner. If the owner does not perform its duties and obligations in a timely manner and, thus, delays the contractor's performance, the contractor may incur increased time-related costs. Owners frequently seek to include "no damages for delay" clauses in construction contracts to avoid being responsible for contractors' increased time-related costs.

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[1] Certain contents of this article have been derived or reproduced, with permission, from the Wolters Kluwer website, VitalLaw.com, and its online publications: *Board of Contract Appeals Decisions*; Michael T. Callahan, *Construction Change Order Claims*, Fourth Edition, CCH Incorporated 2022; Barry B. Bramble and Michael T. Callahan, *Construction Delay Claims*, Seventh Edition, CCH Incorporated 2022; Stanley A. Martin and Leah A. Rochwarg, *Construction Law Handbook*, Fourth Edition, CCH Incorporated 2022; Wickwire, Driscoll, Hurlbut, and Groff, *Construction Scheduling: Preparation, Liability, and Claims*, Fourth Edition, CCH Incorporated 2022; and Michael David Dodd and J. Duncan Findlay, *State-by-State Guide to Design and Construction Contracts and Claims*, Third Edition, CCH Incorporated 2022.

[2] The author is aware of construction contracts where the contractor is entitled to its delay costs as a result of unforeseen government actions, such as shutdown of work due to the COVID-19 pandemic.

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A no damages for delay clause attempts to prevent a contractor from receiving time-related damages from an owner as a result of delay, even if the delay has been caused by the owner. Similarly, the clause may also be used to attempt to prevent a subcontractor from receiving time-related damages from a contractor, even if the delay has been caused by the contractor. The no damages for delay clause applies to delays that affect the contractor's cost of performance, and usually not the owner's time-related costs resulting from delay, and usually provides that the contractor is only entitled to a time extension for delays to its work.[3] A no damages for delay clause may also apply to delays to the notice to proceed date.[4]

The intent of a no damages for delay clause is clear: the owner wants to allocate a specific financial risk to the contractor. Unless the owner directs the contractor to accelerate to overcome delay, by inserting a no damages for delay clause in the contract, the owner intends to avoid paying for delays and is willing to accept late project completion if it is responsible for delays.

From the standpoint of risk assessment, such a no damages for delay clause should alert a bidding contractor that serious financial trouble may lie ahead. Most states usually enforce the clause with certain exceptions. Exceptional states include Colorado, Louisiana, North Carolina, Ohio, Missouri (in public contracts), New Jersey (related to negligence, bad faith, active interference, or other tortious conduct by a public entity), Oregon (if the delay is caused by acts or omissions of the contracting agent or persons acting therefor), Virginia (where such delay is "unreasonable"), Washington (in which the clause has been barred), and Indiana (where such a clause is prohibited in the case of unforeseen conditions encountered during a project).[5]

In *Wells Brothers Co. v. United States*, the Supreme Court observed:

> *Men who take $1,000,000 contracts for government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other panics to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price extended for the work.*[6]

In effect, the Supreme Court recognized the no damages for delay clause as a risk allocation device and that the owner may have paid in the contract price to use such a clause in the contract.

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3 If the owner (or the general contractor as the case may be) also refuses to give a time extension, as is often the case, the clause may be held unenforceable on the ground that the granting of a time extension is a condition precedent to the enforceability of the clause. See *Petrun Constr. Co. v. Harvesters Grp., Inc.*, 918 F.2d 915 (11th Cir. 1990); *see also Findlen v. Winchendon Hous. Auth.*, 28 Mass. App. Ct. 977, 553 N.E.2d 554 (1990).

4 See *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Comm'rs,* 786 N.E.2d 921 (Ohio Ct. App. 7 Dist. 2003).

5 See Section 5 herein for a discussion of the common exceptions to the enforcement of the no damages for delay clause.

6 254 U.S. 83 (1920) at 87.

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Contractors argue that such clauses result in higher bids to cover for the potential for uncompensated owner-caused delays. If a contract also includes liquidated damages provisions, a contractor may be assessed liquidated damages for contractor-caused delay but not be able to recover its time-related costs resulting from owner-caused delays. Owners may also use no damages for delay clauses to prevent one prime contractor from recovering against the owner for delays that other prime contractors caused.[7]

Topics discussed in the following sections include:

- No damages for delay clause examples
- Exceptions in the enforcement of no damages for delay clauses
- The no damages for delay clause and acceleration
- Enforceability of no damages for delay clauses
- Characterizing delay damages
- State-by-state survey
- Use in international construction contracts

2. NO DAMAGES FOR DELAY CLAUSE EXAMPLES

The specific language of a no damages for delay clause may vary, but the clause typically provides that a contractor has no claim or cause of action against an owner for delay and/or that the contractor's sole remedy for delay caused by the owner is an adjustment in the contract time. The clause may include all-encompassing language, such as "for any and all causes."[8]

Examples of a no damages for delay clause are shown below:

> *Except as provided elsewhere in this Agreement, the Owner shall not be obligated or liable to the Contractor for, and the Contractor hereby expressly waives, any claims against the Owner on account of any damages, costs or expenses of any nature which the Contractor may incur as a result of any delay which may occur, regardless of its cause. It is understood and agreed that the Contractor's sole and*

[7] See *Holloway Constr. Co. v. Department of Transp.*, 218 Ga. App. 243, 461 S.E.2d 257 (1995).

[8] See *Charles T. Main, Inc. v. Massachusetts Turnpike Auth.*, 347 Mass. 154, 196 N.E.2d 821 (1964); *Erickson v. Edmonds Sch. Dist.*, 13 Wash. 2d 398, 125 P.2d 275 (1942). For example, in *Zachry Constr. Corp. v. Port of Houston Auth.*, 377 S.W.3d 841 (Tex. App. Houston 14th Dist. 2012), petition for review granted, 2013 Tex. LEXIS 634 (Tex. Aug. 23, 2013), the no damages for delay clause defined delays as: *"arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY."* The court ruled that the parties agreed that there are no damages for delay *"regardless of the source."*

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> *exclusive remedy in the event of an excusable delay for which Contractor is entitled to an extension of time shall be an extension of the Scheduled Mechanical Completion Date.*
>
> *In the event the contractor is delayed in the prosecution of its work by an act, omission, neglect, or default of the owner, the contractor agrees to make no claim for damage for delay in the performance of this contract and that any such claim shall be fully compensated for by an extension of time to complete performance.*

In the same contract, however, the changes clause typically provides the contractor the right to request increased compensation for costs due to delay resulting from changes or other events. Therefore, when the contract is read in its entirety, a no damages for delay clause that may limit or deny any relief for delay damages may be offset by other clauses that provide specific relief for delay damages. This ambiguity often results in disputes. Also, the contract notice of delay provision may not apply if the contract contains a no damages for delay clause.[9]

Another example of a no damages for delay clause follows:

> *No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner for any delays or hindrances from any cause whatsoever; provided that the Owner, in the Owner's discretion, may compensate the Contractor for any said delays by extending the time for completion of the Work as specified in the Contract. … Should Contractor sustain any damage through any act or omission of any other contractor having a contract with the Owner or through any act or omission of any Subcontractor of said other contractor, the contractor shall have no claim against the Owner for said damage.*[10]

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[9] See *Hanover Ins. Co. v. E.E. Cruz & Tully Constr. Co.*, 2019 N.Y. Misc. LEXIS 4476, 2019 NY slip op. 32403(U) (Sup. Ct. N.Y. Cty. Aug. 9, 2019). Hanover, the Performance Bond and Subcontract Labor and Material Payment Bond surety for the subcontractor 4J's, requested damages from the general contractor including but not limited to extended jobsite costs and impact costs. The defendant general contractor, CTJV, moved to dismiss on the basis that Hanover failed to provide, as stated in Section 5.5 of its subcontract, notice of its delay impact and other claims: *"Subcontractor shall not be entitled to any such extension of time unless Subcontractor (a) notifies Contractor in writing within forty-eight hours of the causes of such delay, (b) gives written notice of its claim for a time extension as provided herein and (c) demonstrates that it could not have anticipated or avoided such delay and has used all available means to minimize the consequences thereof."* CTJV contended that the Subcontract provided that *"Subcontractor must give written notice to Contractor of any claim by Subcontractor for Increase to the Subcontract Price, extra compensation or damages of any kind, or extension of time as soon as possible and in no event later than forty-eight (48) hours after Subcontractor learns of the act, omission, occurrence or circumstance on which the claim is based."* CTJV also asserted that failure to strictly comply with these conditions is deemed a waiver of such claims. Hanover contended that the notice provisions did not apply to delay damages claims because of the subcontract's no damages for delay clause. The court agreed that CTJV's characterization of Hanover's delay damages effectively mooted its notice arguments.

[10] *Plato General Construction Corp. v. DASNY*, 89 A.D.3d 819, 932 N.Y.S.2d 504 (2011).

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Owners use other clauses to limit a contractor's recovery of delay damages. For example, they can use a clause in a purchase order to explicitly exclude incidental and consequential damages to prevent a contractor from recovering damages for delay.[11] Also, owners can limit the type or amount of delay damages such as certain demobilization and remobilization costs.

General contractors may use no damages for delay clauses to bar delay claims from subcontractors. For example, the following clause was enforced against a subcontractor, preventing it from recovering delay damages against a general contractor:

> *No payment of any kind, for compensation, or for damages, or otherwise, shall be made to Subcontractor because of any such delay even though Subcontractor's extension of time request be granted, unless Owner is obligated to pay Contractor compensation or damages because of such delay, and then, as and when Owner pays such compensation or damages to Contractor.*[12]

Another example of a no damages for delay clause in subcontracts provides the following language:

> *In the event the Subcontractor's performance of this Subcontract is delayed or interfered with by acts of the Owner, Contractor, or other Subcontractors, the Subcontractor may request an extension of the time for the performance of same, as hereinafter provided, but shall not be entitled to any increase in the Subcontract price or to damages or additional compensation as a consequence of such delays or interference, except to the extent that the prime contract entitles the Contractor to compensation for such delays and then only to the extent of any amounts that the Contractor may, on behalf of the Subcontractor, recover from the Owner for such delays.*[13]

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11 See *Potomac Constructors, LLC v. EFCO Corp.*, 530 F. Supp. 2d 731, 2008 U.S. Dist. LEXIS 1602 (D. Md. 2008).

12 *Roy A. Elam Masonry v. Fru-Con Constr. Corp.*, 922 S.W.2d 783 (Mo. App. 1996).

13 *Tetra Tech Constr., Inc. v. Hamon Contractors, Inc.*, 2013 U.S. Dist. LEXIS 105906 (D. Colo. July 29, 2013), where the court considered such a clause in a summary judgment motion and did not find that the clause was invalid but summary judgment was inappropriate for other reasons.

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Such no damages for delay clauses are common in subcontracts and may be enforced against subcontractors when they pursue delay claims against general contractors,[14] especially when the parties fairly and knowingly agreed upon the clause.[15]

In *Harper/Neilsen-Dillingham, Builders, Inc. v. United States*,[16] the court concluded that the "express and unambiguous 'no damages for delay' clause in the subcontract" provided an "iron-bound bar against any potential liability" for a subcontractor's delay claims against the general contractor.

A flow-down clause may provide the general contractor the same rights against the subcontractor that the owner has against the general contractor. Thus, a flow-down no damages for delay clause in the general contract may be enforced in a subcontract unless there are conflicting subcontract provisions,[17] the delay does not fall within the terms of the subcontract's no damages for delay clause,[18] exceptions are found, statutes prohibit the clause's application, or the delay is a type of delay the parties did not contemplate when entering the subcontract.[19]

Where an owner/prime contractor agreement contains a no damages for delay clause, prime contractors may be able to bind subcontractors to the clause even if the clause is not in the subcontract. In *L&B Construction Co. v. Ragan Enterprises, Inc.*,[20] the court held that the subcontract's "flow down clause" incorporated the no damages for delay provision from the prime contract, thus barring the subcontractor's action to recover delay damages. In addition, prime contractors sometimes include a no damages for delay clause in their subcontracts regardless of whether the prime contract with the owner contains the clause.[21]

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14 See *Landis & Gyr Powers, Inc. v. Berley Indus., Inc.*, 298 A.D.2d 435, 750 N.Y.S.2d 82 (2002); *Suntech of Conn., Inc. v. Lawrence Brunoli, Inc.*, 143 Conn. App. 581, 72 A.3d 1113 (2013); Steven G.M. Stein, 164 Constr. Law Digest 19 (Nov. 2013); *Trafficware Grp., Inc. v. Sun Indus.*, L.L.C., No. 15-106-SDD-EWD, 2017 U.S. Dist. LEXIS 39478 (M.D. La. Mar. 20, 2017); Green Int'l, Inc. v. Solis, 951 S.W.2d 384 (Tex. 1997) (no damages for delay enforced against subcontractor); Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1983).

15 See *The Law Co. v. Mohawk Constr. & Supply Co.*, 523 F. Supp. 2d 1276, 2007 U.S. Dist. LEXIS 91258 (D. Kan. 2007). See also *Welsbach Elec. Corp. v. Judlau Contracting, Inc.*, 2018 NY slip op. 31416(U) (Sup. Ct.)

16 81 Fed. Cl. 669 (2008).

17 See *L&B Constr. Co. v. Ragan Enters., Inc.*, 482 S.E.2d 279 (Ga. 1997); *Burt Welding & Automotive Repair, Inc. v. U.W. Marx, Inc.*, 272 A.D.2d 737, 707 N.Y.S.2d 548 (2000). Also see *Stellar J. Corp. v. Smith v. Loveless*, 2010 U.S. Dist. LEXIS 79187 (D. Or. Aug. 4, 2010).

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

19 See *Mid-State Precast Sys., Inc. v. Corbetta Constr. Co.*, 202 A.D.2d 702, 608 N.Y.S.2d 546 (1994).

20 482 S.E.2d 279 (Ga. 1997; see also *Burt Welding & Auto. Repair, Inc. v. U.W. Marx, Inc.*, 272 A.D.2d 737, 707 N.Y.S.2d 548 (2000). Compare *Morse Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435 (2d Cir. 1995) (subcontract allowed subcontractor to recover delay damages "notwithstanding any other provision" in the contract); *Atlantic Coast Mech. v. R.W. Allen Beers Constr.*, 592 S.E.2d 115 (Ga. 2003) (subcontract inconsistent with prime contract's no damages for delay provision).

21 See *J.A. Jones Constr. Co. v. Leher McGovern Bovis, Inc.*, 89 P3d 1009 (Nev. 2004); *Landis & Gyr Powers, Inc. v. Berley Indus., Inc.*, 298 A.D.2d 435, 750 N.Y.S.2d (2002). Also see *Dynalectric Co. v. Whittenberg Constr. Co.*, 2010 U.S. Dist. LEXIS 110136 (W.D. Ky. Oct. 13, 2010), where the electrical subcontractor sued the prime

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Some no damages for delay clauses in subcontracts make an exception allowing a subcontractor to recover delay damages where the general contractor or higher tier contractor recovers from the owner for the delay costs claimed by the subcontractor. An example of such a subcontract no damages for delay clause follows:

> *NO DAMAGES FOR DELAY: The Subcontractor expressly agrees not to make, and hereby waives, any and all claims for damages on account of any delay, obstruction, or hindrance for any cause whatsoever, including but not limited to the aforesaid cause, and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of time fixed for completion of the Work [unless and to the extent that the Contractor recovers delay damages from the Owner which are directly allocable to the Subcontractor].*

A subcontractor seeking to recover for delay damages against a prime contractor may be barred from such recovery until such time as when (and if) the contractor recovers delay damages from the owner, and then only to the extent that the recovery from the owner includes the subcontractor's delay damages.[22]

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contractor for delay, disruption, and acceleration damages relating to the construction of a performing arts center. The prime contractor contended that certain of the subcontractor's executed lien waivers and a no damages for delay clause barred the subcontractor's claims. The court held that the no damages for delay provision barred the subcontractor's claims and rejected the subcontractor's waiver, estoppel, cardinal change, unjust enrichment, and active interference arguments.

[22] See *United States ex rel. Kogok Corp. v. Travelers Cas. & Sur. Co. of Am.*, 2015 U.S. Dist. LEXIS 128188 (N.D. W. Va. Sept. 24, 2015). A sub-subcontractor sought to recover its delay damages from the higher tier subcontractor, and the sub-subcontract contained a no damages for delay clause. The court ruled that the subcontractor was not liable to the sub-subcontractor for delay damages because the exception within the no damages for delay clause allowed the sub-subcontractor to recover delay damages from the subcontractor only if the subcontractor recovered delay damages from the owner, and if those delay damages recovered from the owner were directly allocable to the sub-subcontractor. The court also ruled that the exception in the no damages for delay clause was inapplicable because the subcontractor had not yet recovered such delay damages from the owner and granted the subcontractor's motion for summary judgment on the sub-subcontractor's delay claim. Also, in *Suntech of Connecticut, Inc. v. Lawrence Brunoli, Inc.*, 2015 Conn. Super. LEXIS 2037 (Sup. Ct. Hartford, July 31, 2015), the subcontract contained a provision to the effect that the subcontractor agreed not to assess any delay damages or claims against the general contractor "unless the owner accepts responsibility, and payment." The subcontractor sued the general contractor, alleging that it *"was forced to contend with various disruptions, delays, suspensions, scope changes and changed conditions caused by or controlled by [the general contractor] due to numerous project change orders, proposal requests, architect's supplemental instructions, construction change directives, requests for information, and nonpayment"* in an attempt to get around the no damages for delay clause. The evidence showed that the principal reasons for delay were design issues between the owner and the architect, that the general contractor did not intentionally or deliberately fail to coordinate or manage the work of subcontractors, and that there was no credible evidence that supported the subcontractor's claim of interference by the general contractor. The general contractor passed on the subcontractor's delay claims to the owner, the owner rejected them, and the owner did not grant an extension of time to finish the project or

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The American Institute of Architects (AIA) construction industry documents and federal construction contracts do not include a no damages for delay provision. The AIA general conditions document does not contain a no damages for delay clause but does provide for a mutual waiver of "consequential" damages, some of which clearly relate to damages for delay.[23] If fully enforced, this provision of the AIA contract will preclude the recovery of most types of owner delay damages and damages associated with a contractor's extended home office overhead Eichleay type claim.[24] United States federal contracts specifically provide for the recovery of delay damages by the contractor under the suspension clause.[25]

3. EXCEPTIONS IN THE ENFORCEMENT OF NO DAMAGES FOR DELAY CLAUSES

No damages for delay provisions attempt to allocate delay risk to contractors, who may be unable to control delay risks. Recognizing the potential inequity of this provision, courts and legislatures have either eliminated the use of such clauses or created exceptions that negate their enforcement. The potential exceptions that could negate enforcement of the clause include:

1. The terms of the clause do not cover the delay.[26]
2. The project specifications contain a no damages for delay clause, but a subcontractor to one prime contractor seeks to recover delay damages against a separate prime contractor.[27] A narrow interpretation of no damages for delay clauses applied by courts does not extend their protection to unnamed third parties. The language of a no damages for delay clause in a contract between a general contractor and a public owner in Florida that denied any third-party benefit under the contract did not extend the waiver of delay damages to other parties, primarily the architect.[28]

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otherwise accept delay responsibility. For these reasons, the court ruled in favor of the general contractor on the subcontractor's delay claim.

23 See AIA Document A201-2007, ¶15.1.6; AIA Document A201 2017, ¶15.1.7. The essence of the clause is to exclude all owner's delay-related damages and to eliminate some of the contractor's delay costs, primarily the home office overhead costs typically associated with Eichleay formula damages.

24 See AIA A201 § 15.1.7 (2017). See, *e.g.*, *Big-D Signature Corp. v. Sterrett Props., LLC*, 288 P.3d 72 (Wyo. 2012) (waiver of consequential damages, including losses of income, use, and profit, in an AIA contract for construction of a luxury home, barred an owner's claims for delay damages associated with missing market opportunity and lost profits).

25 See 48 C.F.R. § 52.242-14 (2010).

26 See *Giammeta Assocs., Inc. v. J. J. White, Inc.*, 573 F. Supp. 112 (E.D. Pa. 1983); *Wright & Kremers, Inc. v. State*, 263 N.Y. 616, 189 N.E. 724 (1934).

27 See *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc*., 321 Ark. 303, 902 S.W.2d 760 (Ark. 1995).

28 See *Perez-Gurri Corp. v. McLeod*, 238 So. 3d 347 (Fla. Dist. Ct. App. 2017) (A general contractor was awarded a contract for a renovation project with the City of Miami ("City"). The City's prime consultant on the project

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3. The parties did not contemplate the delay when entering into the agreement. Such delays may include delays in obtaining rights-of-way,[29] delays caused by the default of other contractors,[30] and delays caused by unavailability of the contemplated transportation method for material.[31]
4. The delay was so inordinate in duration,[32] it was equivalent to contract abandonment.
5. The delay was due to an owner's (or owner's agent's) active interference with a contractor's work activities or an act of bad faith by the owner (or owner's agent).[33]
6. The contractor did not adhere to the requirements of other contract clauses to provide notice.
7. The delay clause was waived expressly or by the owner's actions.
8. The delay was contrary to public policy and statutes.

Courts often first determine that it would not be equitable to enforce the clause under the totality of the circumstances of a given case, and only then attempt to classify the case into one of the exceptions to avoid the appearance of judicially rewriting the parties' contract.[34] In arbitration, specific findings and statements of law are not required of arbitrators when awarding delay damages; thus, an arbitrator may ignore or enforce a no damages for delay clause in the contract.[35]

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subcontracted with an architect. Because of delay, the general contractor sued multiple architects, engineers, and consultants. The general contractor alleged that the architect committed professional malpractice that delayed the construction. The architect argued it played no role in the project, and the claim against it was contractually barred by the no damages for delay clause in the contract between the general contractor and the City of Miami, which the court agreed with even if the architect played a role in the project. The no damages for delay clause stated, *"the Contractor agrees to make no claim for damages for delay of any kind in the performance of the Contract Documents whether occasioned by any act or omission of the City or any of its representatives."* The language did not state who the beneficiary of the waiver was. While the contract between the general contractor and the City of Miami expressly provided that the general contractor waived its right to seek delay damages, the contract waived delay damages only against the City and not against other parties. The no damages for delay clause contained in the contract between the general contractor and the City of Miami did not insulate the architect from delay liability.

29 See *McGuire & Hester v. San Francisco*, 113 Cal. App.2d 186, 247 P.2d 934 (1952); *Franklin Contracting Company v. New Jersey*, 365 A.2d 952 (N.J. Super. Ct. 1976).

30 See *People ex. rel. Wells & Newton Co. v. Craig*, 232 N.Y. 125, 133 N.E. 419 (1921).

31 See *Ozark Dam Constructors v. United States*, 127 F. Supp. 187 (Ct. C1. 1955).

32 See *American Bridge Co. v. State*, 245 A.D. 535, 283 N.Y.S. 577 (1935); *Cunningham Brothers, Inc. v. City of Waterloo*, 254 Iowa 659, 117 N.W.2d 46 (1962).

33 See *Johnson v. State*, 5 A.D.2d 919, 172 N.Y.S.2d 41 (1958); *Grant Constr. Co. v. Burns*, 443 P.2d 1005 (92 Idaho 1968); *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co.,* 355 F. Supp. 376 (S.D. Ia. 1973); *United States Steel Corp. v. Missouri Pacific Railroad Co.*, 668 F.2d 435 (8th Cir. 1982).

34 See Matthew Bender, Authority: Real Estate Law, 942 Release 6, Jan. 1998.

35 See *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. App. Ct. 1006, 533 N.E. 2d 1284 (1990).

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3.1 THE TERMS OF THE CLAUSE DO NOT COVER THE DELAY

Courts often strictly interpret a no damages for delay clause. Therefore, a claimant may be able to recover its delay damages notwithstanding the no damages for delay clause if the nature of the delay that has been encountered is not within the stated causes of delay specified in the clause.

Examples of the court's interpretation of no damages for delay clauses where the cause of delay was not clearly identified in the clause include but are not limited to the following:

1. A no damages for delay clause in one subcontract covered delays caused by the owner, architect, and contractor, but not delays by the material supplier. Therefore, the subcontractor was able to recover its costs that resulted from the material supplier's delays.[36]
2. A no damages for delay clause contained the phrase, *"delays in the progress of the work."* A contractor was denied site access, which delayed the start of its work. The court ruled that the clause did not apply because the delay occurred before there was any work progress.[37]
3. A no damages for delay clause provided that any waiver of damages by the trade contractors was conditional on several factors, including that the delay had to be beyond the city's control, and the city was obligated to grant the contractors an extension of time for the delay. However, the trade contractors did not waive damages for delay if the delay was within the city's control.[38]

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[36] See *Giammetta Assocs., Inc. v. J.J. White, Inc.*, 573 F. Supp. 112 (E.D. Pa. 1983).

[37] See *Wright & Kremers, Inc. v. State*, 263 N.Y. 616, 189 N.E. 724 (1934). Also, in *United States ex rel. Ash Equip. Co. v. Morris, Inc.*, 2017 U.S. Dist. LEXIS 126509 (D.S.D. Aug. 8, 2017), a subcontractor sub-subcontracted hydro-demolition work on a Corps of Engineers project. The sub-subcontract limited the sub-subcontractor's remedies to only an extension of time and barred recovery of delay damages. The subcontractor was to provide scheduling, and the sub-subcontract stated that if the sub-subcontractor fell behind, the subcontractor could require the sub-subcontractor to accelerate work without additional compensation. No claims for additional compensation or damages for delays were permitted if caused by the subcontractor, including conduct amounting to a breach of the agreement, and a mutually agreed upon extension of time for completion was the sole remedy for the sub-subcontractor. But other provisions of the sub-subcontract provided remedies in addition to an extension of time, such as where the subcontractor failed to make payment to the sub-subcontractor within 30 days of when payment was due, and additional cost, extensions of time, and *"damages for delay or other causes,"* such as if the subcontractor suspended, delayed, or interrupted the sub-subcontractor's work. The sub-subcontract provided for money damages if the subcontractor caused idle or standby time. The court found that the no damages for delay language was an artifact from the form contract to which the court refused to give effect.

[38] See *Lee Masonry, Inc. v. City of Franklin*, 2010 Tenn. App. LEXIS 301 (Tenn. Ct. App. Apr. 28, 2010). On a multi-prime municipal project, the grading contractor and concrete contractor encountered problems with the soil at the site, resulting in delays and schedule changes for other contractors, including Lee Masonry and Stansell Electrical. The masonry contractor and electrical contractor alleged that the city failed to coordinate, manage, and schedule the various trade contractors, and filed separate loss of productivity and other claims against the city. The city relied on a no damages for delay clause in the contracts as a defense to the contractors' action for

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4. A no damages for delay clause prevented recovery for delays caused by a utility but not for delays caused by the owner's own performance problems.[39]
5. An ambiguity in a no damages for delay clause may enable a contractor to recover its delay damages.[40]
6. A conflict between a no damages for delay clause and other provisions of a contract may result in the clause not being enforced.[41]

In contracts with no damages for delay clauses, contractors should be careful as to how they describe their damages. If the contractor describes its damages to be delay-related costs, even though the increased costs are a result of additional work or disruption but not the result of delay, the court may deny the claim because of a no damages for delay clause in the contract.[42]

Contractors may contend and some courts have agreed that a contractual no damages for delay clause does not waive increased costs resulting from loss of productivity/disruption caused by owner changes in the schedule because the clause deals with delay damages, not lost labor productivity damages.[43] The argument is that the disruption claim is intended to recover increased

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damages. The court found that the delays were not the result of adverse weather conditions, as the city alleged, but instead were caused by the city's selection of an unsuitable project site with poor soil conditions of which the city was aware based on a geotechnical report prior to the masonry and electrical contracts being awarded. The city directed the trade contractors to begin work without having an overall schedule in place but did not require the grading contractor or concrete contractor to adhere to the schedule when they encountered adverse site conditions. The city took no proactive measures to mitigate or eliminate delays, failed to grant time extensions to the electrical contractor and masonry contractor, and failed to maintain their construction activities in the same sequence and duration as originally scheduled, thus forcing the electrical contractor and mechanical contractor to perform work in a more costly sequence than anticipated. The court ruled that because the project's delays and disruptions were within the city's control, the city could not rely on the no damages for delay clause, and that the electrical contractor and masonry contractor were entitled to damages.

39 See *Scoccolo Constr. Co. v. City of Renton*, 9 P.3d 886 (Wash. Ct. App. 2000).

40 See *Port Chester Elec. Constr. Corp. v. HBE Corp.*, 894 F.2d 47 (2d Cir. 1990).

41 See *Shintech Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144 (Tex. Ct. App. 1985). In *Ragan Enters., Inc. v. L & B Constr. Co.*, 228 Ga. App. 852, 492 S.E.2d 671 (1997), a subcontractor's claim for money damages for delay was barred where there was a no damages for delay clause in the prime contract between the contractor and owner and a flow-down clause in the subcontractor agreement, even though the subcontract itself did not contain a no damages for delay clause. Even if the subcontract contains a flow-down clause, however, a no damages for delay provision may not be enforceable if it conflicts with other clauses in the subcontract, as found in *Atlantic Coast Mech. v. R.W. Allen Beers Constr.*, 264 Ga. App. 680, 592 S.E.2d 115 (2003), where the court ruled that a no damages for delay clause did not flow down and was unenforceable against the subcontractor where the subcontract contained inconsistent provisions allowing the subcontractor to recover for delays.

42 See *Edward E. Gillian Co. v. City of Lake Forest*, 3 F.3d 192 (7th Cir. 1993). The contractor sued the owner to recover "delay damages," even though many of the costs incurred were associated with additional work. The construction contract contained a no damages for delay clause, and the court granted summary judgment in favor of the owner. On appeal, the court acknowledged that some of the costs were probably not delay costs but held that the contractor had failed to raise this point in a timely manner and, therefore, would not be able to assert this claim.

43 See *Hagen Constr., Inc. v. Whiting-Turner Contr. Co.*, 2019 U.S. Dist. LEXIS 18012, 2019 WL 454097 (D. Md. Feb. 4, 2019) where Whiting-Turner Contracting Co. (W-T) hired Hagen Construction as a subcontractor on the

contractor costs because the work was made more difficult and expensive to perform, while the delay claim is intended to recover the contractor's time-related costs.[44] However, not all courts have agreed with the contractor's argument that its lost labor productivity due to owner changes and interference was distinct from owner-caused delay.[45] In another case,[46] the agreement provided that the general contractor would be entitled to an extension of time only in the event of any delay that was not the fault of the contractor. The agreement also stated that the contractor would not be entitled to additional payment on account of delay, including "direct, indirect or impact damages" and "costs of acceleration because of hindrance or delay for any cause

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construction of Nemours-Alfred I. DuPont Hospital for Children Outpatient Center in Deptford, New Jersey. Because it allegedly encountered delays and disruptions on its work due to W-T, Hagen filed suit against W-T on three counts: breach of contract, including a labor inefficiency claim; violation of New Jersey's Prompt Pay Act; and unjust enrichment. The court granted W-T's motion for partial summary judgment as to Hagen's labor inefficiency claim in which W-T asserted three reasons for entitlement: (1) Hagen failed to provide timely notice and substantiation as required by the subcontract; (2) Hagen's execution of releases barred Hagen's labor inefficiency claim; and (3) the labor inefficiency claim was a delay claim and was barred by the subcontract's no damages for delay clause. The court found no merit in the third argument. Article 4 of the subcontract provided:

To the fullest extent permitted by applicable law, Contractor shall have the right at any time to delay or suspend the work or any part thereof without incurring liability therefore. An extension of time shall be the sole and exclusive remedy of Subcontractor for any delays or suspensions suffered by Subcontractor, but only to the extent that a time extension is obtained from the Owner, and Subcontractor shall have no right to seek or recover from Contractor any damages or losses, whether direct or indirect, arising from or related to any delay or acceleration to overcome delay, and/or any impact or effect of such delays on the Work.

The court said that Hagen's claimed damages due to labor inefficiencies were not based upon delay but were based upon the additional work that Hagen said was necessitated by W-T's allegedly poor management of the project. Mere delay was not what was at issue. However, the court concluded that Hagen's labor inefficiency claim was barred by its failure to give proper and timely notice and by its execution of unqualified Partial Releases.

Also see *John E. Green Plumbing & Heating v. Turner Constr. Co.*, 742 F.2d 965, 966-967 (6th Cir. 1984); *Buckley & Co. v. State*, 140 NJ. Super. 289, 356 A.2d 56, 60-62 (Law Div. 1975); *Lichter v. Mellon-Stuart Co.*, 305 F.2d 216 (3d Cir. 1962); *Kenco Constr., Inc. v. Porter Bros. Constr., Inc.*, 2018 Wash. App. LEXIS 1323, 2018 WL 2966785 (Wash. Ct. App. June 11, 2018). Compare *Cleveland Constr., Inc. v. Ohio Public Employees Ret. Sys.*, 2008 Ohio 1630 (Ohio Ct. App. 2008), where an Ohio statute prohibiting no damages for delay provisions also applied to provisions attempting to prohibit acceleration and lost efficiency damages.

44 See *Atlantic Coast Mech.*, 592 S.E.2d at 120.

45 See *Reynolds Brothers, Inc. v. Commonwealth*, 412 Mass. 1, 586 N.E.2d 975 (1992). See also *Weydman Elec., Inc. v. Joint Schs. Constr. Bd.*, 140 A.D.3d 1605, 33 N.Y.S.3d 609, 2016 NY slip op. at 04509 (2016), where an owner did not have to pay a contractor when a disruption caused a delay on a contract for a school renovation project that included a no damages for delay clause. The owner made no payment for the contractor's additional performance costs that resulted from a disruption. The contractor contended that there was a material distinction between damages caused by delay and those caused by disruption, and that the no damages for delay clause did not bar the disruption damages it argued. In favor of the owner, the court ruled that the distinction rested on nothing more than semantics and that the provision barred the contractor's claims because the out-of- sequence and poorly coordinated work and the design changes were clearly contemplated by the exculpatory provisions of the contract.

46 See *Atlantic Coast Mechanical v. R.W. Allen Beers Construction*, 592 S.E.2d 115, 264 Ga. App. 680 (2003).

whatsoever." The subcontract with the mechanical subcontractor had a flow-down clause providing that the subcontractor would be bound by the terms of the agreement between the general contractor and the owner. On appeal, the Court of Appeals of Georgia recognized the distinction between a delay claim and a disruption claim and denied the subcontractor's claim.[47]

3.2 BENEFIT DOES NOT EXTEND TO THIRD PARTIES

Enforcement of a no damages for delay clause in project specifications may not apply when a subcontractor to one prime contractor seeks to recover delay damages against a separate prime contractor.[48] Courts may not extend the protection of a no damages for delay clause to unnamed third parties. For example, the no damages for delay clause in the contract between a general contractor and a public owner in Florida did not extend the waiver of delay damages to other parties, primarily the architect.[49]

3.3 DELAY NOT CONTEMPLATED BY THE PARTIES

No damages for delay clauses have been drafted to be more inclusive, and some clauses have even covered any delays or hindrances from any cause whatsoever.[50] With such language, the court was unable to find that a delay was not literally within the terms of the clause.[51] Thus, the courts created another exception, *i.e.*, the parties did not contemplate a delay when they entered into an agreement. The question to be resolved is, "Are such delays outside the scope of the no damages for delay clause by the intentions of the parties, not the terms of the clause?"[52] However, the exception to the no damages for delay clause for unanticipated delays may be found in the contract provisions.[53] Also, exception may apply as provided in certain statutes.[54]

Thus, courts may apply a "reasonable foreseeability" test to determine whether claimed delay-causing events were in the contemplation of the parties. Also see *Asset Recovery Contracting, LLC v. Walsh Constr. Co.*,[55] where the appellate court ruled that the trial court properly applied a "reasonable foreseeability" test and determined the various delays claimed by the contractor were

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47 See also *U. S. Industries v. Blake Construction*, 671 F.2d 539 (D.C. Cir. 1982).

48 See *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (Ark. 1995).

49 See *Perez-Gurri Corp. v. McLeod*, 238 So. 3d 347 (Fla. Dist. Ct. App. 2017).

50 Again, see *Charles T. Main, Inc. v. Massachusetts Turnpike Auth.*, 347 Mass. 154, 196 N.E.2d 821 (1964); *Erickson v. Edmonds Sch. Dist.*, 13 Wash. 2d 398, 125 P.2d 275 (1942); *Zachry Constr. Corp. v. Port of Houston Auth.*, 377 S.W.3d 841 (Tex. App. Houston 14th Dist. 2012), petition for review granted, 2013 Tex. LEXIS 634 (Tex. Aug. 23, 2013).

51 See *John E. Gregory & Sons, Inc. v. A. Guenther & Sons Co.*, 147 Wis. 298, 432 N.W.2d 584 (1988).

52 See, *e.g.*, *Corinno-Civetta Constr. Co. v. City of New York*, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986); *Dickinson Co. v. Iowa State Dep't of Transp.*, 300 N.W.2d 115 (Iowa 1981); *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 246 Ill. App. 3d 523, 617 N.E.2d 405 (1993).

53 See *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 83 Cal. Rptr. 2d 590, 71 Cal. App. 4th 38 (1999).

54 See Cal. Pub. Cont. Code § 7102 (1985 & Supp. 1990).

55 980 N.E.2d 708, 366 Ill. Dec. 615 (App. Div. 2012), appeal denied, 982 N.E.2d 767, 367 Ill. Dec. 617 (Ill. 2013).

reasonably foreseeable. Also, in *F.D. Rich Co. v. Wilmington Housing Authority*,[56] a contractor sought to recover delay damages from a public agency when bad soil conditions delayed the project. The court rejected the contractor's argument that this delay was not reasonably foreseeable and, as such, the no damages for delay clause barred the contractor's claim for delay damages.

In a New York case,[57] a construction agreement included a no damages for delay clause. Contractor-alleged delays included: the owner's failure to timely obtain easements for electrical and drain sewer installations; failure of the owner's construction manager to adequately supervise and coordinate the work of various contractors; failure to prepare coordinated construction schedules and drawings; termination of both the construction manager and the general contractor; and the owner's decision to hire 30 subcontractors instead of replacing the general contractor. The appellate court found that the project impediments were wholly unanticipated and of a character and magnitude not ordinarily encountered or anticipated by parties to a contract of this nature and ruled that the clause should only cover delays that were reasonably foreseeable or normally encountered in construction. However, another court did not recognize this exception even though the delay was not contemplated, ruling that unforeseen events prompt broad language of such clauses, and any foreseeable event would have been subject to specific contract language.[58]

The following other types of delays have been held not to have been contemplated by the parties:

- Delays in obtaining rights of way;[59]
- Delays caused by the default of other contractors;[60]
- Delay caused by the unavailability of the contemplated transportation method for material;[61]
- Delays resulting from the failure of the general contractor to expedite the revisions of drawings needed for the subcontractor to perform the foundation work due to encountering unanticipated subsurface rock;[62]
- Delays resulting from the owner's mismanagement of multiple trade contractors;[63] and
- A separate contractor's failure to demolish structures on a project site that interfered with the contractor's work; discovery of asbestos-containing material above what

56 392 F.2d 841 (3d Cir. 1968) (applying Delaware law).
57 See *Clifford R. Gray Inc. v. City School District,* 277 A.D.2d 843, 716 N.Y.S.2d 795 (2000). See also *Arnell Constr. Corp. v. N.Y.C. Sch. Constr. Auth.*, No. 712005 2017, 2018 N.Y. Misc. LEXIS 3308 (Sup. Ct. July 13, 2018).
58 See *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*, 147 Wis. 2d 298, 432 N.W.2d 584 (1988).
59 See *McGuire & Hester v. San Francisco*, 113 Cal. App. 2d 186, 247 P.2d 934 (1952)
60 See *People ex rel. Wells & Newton Co. v. Craig*, 232 N.Y. 125, 133 N.E. 419 (1921).
61 See *Ozark Dam Constructors v. United States*, 127 F. Supp. 187 (Ct. Cl. 1955)
62 See *MacQuesten General Contracting, Inc. v. HCE, Inc.*, 296 F. Supp. 2d 437 (S.D.N.Y. 2003).
63 See *Clifford R. Gray, Inc. v. City Sch. Dist. of Albany*, 277 A.D.2d 843, 716 N.Y.S.2d 795 (2000).

was identified in the environmental survey; the prime contractor's failure to disconnect utility lines under allegedly mistaken understanding that the utility company was to disconnect the lines.[64]

The burden of proof is upon the claimant to demonstrate that such delays were unanticipated and thus not covered by the clause.[65] Thus, courts will examine the specific delays encountered on a project and the specific contract clauses to determine whether the parties did not contemplate the delays.[66]

Courts have also found various delays to have been contemplated by the parties and, thus, the no damages for delay clause bars recovery for the delays. Examples are summarized below:

- Delays resulting from design defects based on faulty architectural drawings were held to be *"precisely within the contemplation of the exculpatory clause."*[67]
- A contract for abatement, decontamination, and deconstruction services explicitly stated that the contractor assumed the risks of delays related to *"all regulatory and other Governmental Authority."* The no damages for delay clause in the contract was held to bar the contractor's claims for delays resulting from interference by regulators monitoring the abatement portion of the project.[68]
- A court also noted that the risk of disruption and coordination of multiple prime contractors on a project was something that could be contemplated especially where

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64 See *Berger Enters. v. Zurich Am. Ins. Co.*, 845 F. Supp. 2d 809 (E.D. Mich. 2012).

65 See *Manshul Constr. Corp. v. Board of Educ.*, 160 A.D.2d 644, 559 N.Y.2d 261 (1990). Also, in *Lakhi Gen. Contractor, Inc. v. N.Y.C. Hous. Auth.*, 2019 NY slip op. 31315(U) (Sup. Ct.), where the court found that the contractor had not provided a factual basis to determine that the delays were "wholly" unanticipated.

66 See *Plato General Constr. Corp./EMCO Tech Constr. Corp. v. Dormitory Auth. of State*, 89 A.D.3d 819, 932 N.Y.S.2d 504, 2011 N.Y. slip op. at 8134 (2011).

67 See *LoDuca Assocs., Inc., v. PMS Constr. Mgmt. Corp.*, 91 A.D.3d 485, 936 N.Y.S.2d 192 (App. Div. 2012). Also see *Federated Fire Prot. Sys. Corp. v. 56 Leonard St., LLC*, 2019 N.Y. Misc. LEXIS 3806, 2019 NY slip op. 32010(U) (Sup.Ct. N.Y. Cty. July 2, 2019). In this case, the express provisions of the contract precluded the plaintiff from seeking such delay damages. The court found that the plaintiff's allegations regarding the concrete subcontractor and the defendants' directives to begin installing piping without the top rack and to install the curtain wall in the interior of the building were delays contemplated by the contract, which expressly excluded delay damages caused by the defendant's directives to subcontractors and the scheduling and coordination of work. The plaintiff's allegations that its work was delayed because the defendant failed to provide adequate schedules (including CPM schedules) for the progress of the work were also insufficient to fall within the exceptions to the no damages for delay. The court said such allegations merely constituted *"inept administration and poor planning,"* which does not negate the application of the no damages for delay provisions. Finally, the court said that the plaintiff's allegations that the defendants' issuance of change orders delayed its work indicated the type of delay contemplated by the contract, which contained express provisions regarding change orders. The court noted that the no damages for delay clause itself expressly contemplated such delays and stated that the plaintiff was not entitled to recover damages for any delay caused by "changes in the Work."

68 See *Bovis Lend Lease (LMB) Inc. v. Lower Manhattan Dev. Corp.*, 108 A.D.3d 135, 966 N.Y.S.2d 51 (App. Div. 2013).

the contract terms provided that *"the work of this trade may not be continuous"* and that the subcontractor *"may be required to work out of sequence."*[69]

- A contract required a contractor to check for subsurface obstructions. Thus, the court ruled that the parties had contemplated delays due to such problems at the time of signing the contract and, therefore, they were within the scope of the no damages for delay clause.[70]

Other contract clauses pertaining to other owner-caused delays indicate that the parties contemplated the delays and should be barred by the no damages for delay clause. Examples include:

- Contract clauses dealing with re-sequencing of the work may bar delay claims caused by the owner's re-sequencing;[71]
- Clauses that allow the owner's approval of subcontractors may bar delay claims resulting from the owner's delays in approving subcontractors;[72]
- Change order clauses may bar delay claims caused by the owner's late processing of change orders;[73]
- Change orders to another trade contractor who was performing additional abatement work for the owner or delay resulting from the *"failure of one or more Trade Contractor or Subcontractors to perform"* may bar a contractor's delay and disruption claim;[74]

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69 See *Premier-New York Inc. v. Travelers Property Casualty Corp.*, Supreme Court of New York, New York Cnty., 2008 N.Y. Misc. 603043, 240 N.Y.L.J. 27 (July 8, 2008).

70 See *Davis Constr. Corp. v. County of Suffolk*, 149 A.D.2d 404, 539 N.Y.S.2d 757 (1989); *Buckley & Co. v. City of New York*, 121 A.D.2d 933, 505 N.Y.S.2d 140 (1986); *Blau Mech. Corp. v. City of N.Y.*, 158 A.D.2d 373, 551 N.Y.S.2d 228 (1990); *APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 110 N.C. App. 664, 431 S.E.2d 508 (1993).

71 See *Phoenix Contracting Corp. v. New York City Health & Hosps. Corp.*, 118 A.D.2d 477, 499 N.Y.S.2d 953 (1986).

72 See *Martin Mech. Corp. v. RJ. Carlin Constr. Co.*, 132 A.D.2d 688, 518 N.Y.S.2d 166 (1987).

73 See *Honeywell, Inc. v. City of New York*, 108 A.D.2d 125, 488 N.Y.S.2d 386 (1985), aff'd, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986); *Blau Mech. Corp. v. City of New York*, 158 A.D.2d 373, 551 N.Y.S.2d 228 (1990).

74 See *C&H Elec., Inc. v. Town of Bethel*, 2012 Conn. Super. LEXIS 1565 (Super. Ct. D. Hartford June 15, 2012), where the no damages for delay clause explicitly included barring claims for *"(1) delay in the commencement, prosecution or completion of the work, (2) hindrance or obstruction in the performance of the work, (3) loss of productivity, or (4) other similar claims whether or not such delays are foreseeable, contemplated, or uncontemplated."* The court held that the contractor's claims for loss of productivity due to the impact of required asbestos removal on the project were precluded.

- The parties to a contract contemplated delays for utility relocation, and the resulting claims were barred;[75] and
- An owner expressly advised a contractor of the possibility of unmarked or inaccurately located utility lines, and delays caused by such utility lines were barred.[76]

The provision of an exhaustive list of potential delays contemplated by the parties could potentially be used to determine if delays should have been contemplated by the parties, and thus be used to enforce a no damages for delay clause. However, the City of New York listed over 30 possible delay-causing events, as well as a broad catchall clause, in one of its contracts.[77] Some city agencies rescinded this clause, and it was replaced by a provision that allows contractors to recover for delays caused by the owner's failure to provide access to the site, the issuance of a stop work order, or a change order. The new clause also limited the type of damages that may be recovered.[78]

3.4 DELAY WAS SO INORDINATE IN DURATION

Contractors may avoid the consequences of a no damages for delay clause if they encounter unusually long delays on the basis that the parties could not have contemplated or intended such delays to be covered by the no damages for delay clause. However, the contractor must present evidence that the duration of the delay was unknown, uncommon, or unreasonable[79] or convince the court that enforcing the clause would be unconscionable considering the circumstances that existed when the contract was signed.[80]

For example, delays of three years[81] and 21 months[82] have been considered unreasonable. Also, the cause of the delay may be a factor in determining whether the duration was unreasonable.[83]

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75 See *White Oak Corp. v. Department of Transp.*, 217 Conn. 281, 585 A.2d 1199 (1991), where one contract clause prohibited the contractor from performing highway work in certain areas until a third-party utility company removed gas lines. That very clause indicated that parties to the contract contemplated delays for utility relocation.

76 See *DiGioia Brothers Excavating v. City of Cleveland Dep't of Pub. Utils.,* 734 N.E.2d 438, 135 Ohio App. 3d 436, appeal denied, 727 N.E.2d 134 (2000). The contract also contained a specific clause disallowing damages for delay due to unanticipated utility interferences. As the contractor encountered 26 different unmarked or mislocated utility lines that interfered with its contract work to install three miles of water main and claimed that they resulted in 18 weeks of delay, the contractor filed suit to recover its delay costs. Although the trial court found in favor of the contractor, the appellate court concluded that the contract clearly contemplated this type of delay and the no damages for delay clause was enforceable for this type of delay.

77 See Treacy, "City of New York Proposing Onerous Contract Provisions to Counter Recent Decisions," 22 Pub. Cont. Newsletter 26 (Summer 1987).

78 See "Damages for Owner Caused Delay: The Evolution Back to Fairness," The Construction and Surety Law Update 2 (Summer 1997).

79 See *Dickinson Co. v. Iowa State Dep't of Transp.*, 300 N.W.2d 115 (Iowa 1981).

80 See *State Highway Admin. v. Greiner Eng'g Sciences, Inc.*, 83 Md. App. 621, 577 A.2d 363 (1990).

81 See *People ex rel. Wells & Newton Co. v. Craig*, 232 N.Y. 125, 133 N.E. 419 (1921).

82 See *American Bridge Co. v. State*, 245 A.D. 535, 283 N.Y.S. 577 (1935).

83 See *American Pipe & Constr. Co. v. Westchester Cnty.*, 292 F. 941 (2d Cir. 1923).

For example, where the owner failed to obtain the necessary permits to allow the work to proceed, a four-month delay was held to be unreasonable.[84]

In *McGuire & Hester v. City & County of San Francisco*,[85] the court found that the City was liable for the contractor's delay damages despite the no damages for delay clause, where the City's own unreasonably long delays in fulfilling other obligations under the contract caused the contractor's delay.

3.5 DELAY WAS DUE TO THE OWNER'S (OR OWNER'S AGENT'S) ACTIVE INTERFERENCE OR BAD FAITH

The owner's active interference or bad faith may negate the enforcement of the no damages for delay clause. Situations that have risen to negate this clause include the following:

- The owner's specific directives;
- Administrative mismanagement, excessive owner changes, and denial of site access;
- Subcontractor issues;
- Negligence and gross negligence;
- The owner's failure to perform contractually required tasks;
- Failure to issue a time extension; and
- Failure to act in an "essential manner."

3.5.1 The Owner's Specific Directives

Active interference (or "bad faith") by the owner is one of the exceptions to the enforcement of no damages for delay clauses. Owner interference is often found when the owner or its agents give specific directives or orders, such as an order to fabricate steel despite delays by preceding contractors,[86] orders to use the project prior to completion,[87] and directives to proceed coupled with the owner's failure to have utilities removed,[88] or where the owner issued the notice to proceed to the contractor knowing that the required preliminary work had not been completed.[89]

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84 See *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co., Inc.*, 71 Cal. App. 4th 38, 83 Cal. Rptr. 2d 590 (1999).

85 113 Cal. App. 2d 186, 188–90, 247 P.2d 934 (1952).

86 See *American Bridge Co. v. State*, 245 A.D. 535, 283 N.Y.S. 577 (1935).

87 See *Johnson v. State*, 5 A.D.2d 919, 172 N.Y.S.2d 41 (1958).

88 See *Grant Constr. Co. v. Burns*, 92 Idaho 408, 443 P.2d 1005 (1968). In *XL Specialty Ins. Co. v. Massachusetts Highway Dep't*, 31 Mass. L. Rep. 147, 2012 Mass. Super. LEXIS 383 (Mass. Super. Ct. Jan 3, 2013), the court ruled that the plaintiff ("XL"), as surety and subrogee of the general contractor, Roads Corporation, could recover damages incurred as a result of a two-year delay in a roadway reconstruction and bridge replacement project that resulted from the Highway Department's failure to arrange and accomplish certain utility relocation work that it knew needed to happen before Roads could begin construction.

89 See *U.S. Steel Corp. v. Missouri Pac. R.R. Co.*, 668 F.2d 435 (8th Cir. 1982), where the Court held that "clear and unambiguous" no damages for delay clauses were valid and enforceable as long as the party attempting to use the clause to shield itself from liability did not actively interfere with the contractor. U.S. Steel was under

Active owner interference may be found where the owner changes the acceptance criteria for equipment after the contractor has begun testing procedures.[90]

3.5.2 Administrative Mismanagement, Excessive Owner Changes, and Denial of Site Access

Owner interference may often be found in three other situations: administrative mismanagement, excessive owner changes, and denial of site access. For example, late arrival of numerous drawings and several unsigned important directives demonstrated owner mismanagement.[91] In *J.R. Stevenson Corp. v. City of Westchester,*[92] more than 1,000 changes demonstrated owner interference through excessive changes. The number of changes may not have to be "excessive" to constitute active owner interference; it may be the manner in which the changes occur and how the owner manages them.[93] Although design errors may be the reason for many change orders, an owner's mere knowledge of design flaws and the failure to apprise the contractor of the problems may not be sufficient to constitute active owner interference or even *"willful concealment of foreseeable circumstances."*[94] Owner interference has been found when the owner denies site access by giving another contractor priority access in a limited work area.[95]

In *Newberry Square Development Corp. v. Southern Landmark, Inc*.,[96] there was evidence that the owner delayed the contractor in providing approved plans and specifications and updating plans and specifications to incorporate desired changes, delayed executing change orders, and required

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contract with the Missouri Pacific Railroad Company (MOPAC) to install a bridge over the Arkansas River. The contract required U.S. Steel to commence on-site work within ten calendar days after the date of the issuance of a notice to proceed. MOPAC issued U.S. Steel a notice to proceed knowing that delay-causing circumstances caused by incomplete precent work existed, which would likely prevent U.S. Steel from timely proceeding with its work. The court found that MOPAC knew the prior contractor was behind schedule and that U.S. Steel could not commence work until the prior contractor completed the substructure work. The court held that even though the clause was "clear and unambiguous," MOPAC's issuance of the notice to proceed combined with its knowledge of the delay caused by the preceding contractor amounted to willful, "active interference," and this "active interference" precluded enforcement of the no damages for delay clause.

90 See *G&T Conveyor Co. v. Allegheny Cnty. Airport Auth.*, 2011 U.S. Dist. LEXIS 123156 (W.D. Pa. Oct. 25, 2011).

91 See *Newberry Square Dev. Corp. v. Southern Landmark, Inc.*, 578 So. 2d 750 (Fla. Dist. Ct. App. 1991).

92 113 A.D.2d 918, 493 N.Y.S.2d 819 (1985).

93 See *John Spearly Constr. v. Penns Valley Area Sch. Dist.*, 121 A.3d 593 (Pa. Commw. 2015).

94 See *Triple R Paving, Inc. v. Broward Cnty.*, 774 So. 2d 50 (Fla. Dist. Ct. App. 2000).

95 See *Phoenix Contractors, Inc. v. General Motors Corp.*, 135 Mich. App. 787, 355 N.W.2d 673 (1984). Also see *Howard Contracting, Inc. v. G.A. MacDonald Construction Co.*, 71 Cal. App. 4th 38, 49, 83 Cal. Rptr. 2d 590 (1998), where the California Court of Appeals applied Section 7102 of the California Public Contract Code to hold that *"damages are recoverable in spite of a 'no damages for delay' provision contained in a public agency contract."* In this case, the City contractee withheld information regarding regulatory restrictions and site access during the bidding process, which it was aware would impact the timely completion of the project. The court found that the resulting delays were unreasonable and could not have been contemplated by the parties and hence fell within the statutory exception. The Court of Appeals noted that *"[e]ven before the adoption of section 7102, California courts generally held that 'no damages for delay' clauses in public contracts did not apply to delays arising from a breach of contract caused by the other party to the contract."*

96 578 So. 2d 750, 752 (Fla. Dist. Ct. App. 1991), cause dismissed, 584 So. 2d 999 (Fla. 1991).

that construction not proceed without such orders. The owner further repeatedly failed to make timely payments as the contract required. The no damages for delay clause was not enforced.

3.5.3 Subcontractor Issues

Active interference or bad faith[97] by the prime contractor may be viewed as an exception to the enforcement of a no damages for delay clause in a subcontract. Actions that may constitute active interference by a general contractor to a subcontractor's work include: (1) failure to coordinate the work of other subcontractors;[98] (2) ordering a mechanical subcontractor to perform its work in areas that are not ready for plumbing and mechanical work;[99] and (3) ordering extra work without granting a time extension. These actions may constitute tortious, wrongful, or willful misconduct by a prime contractor, which would allow a subcontractor to recover its impact costs despite the presence of a no damages for delay clause in the subcontract.[100]

A general contractor's willful and knowing interference in a subcontractor's work may also include circumstances where the general contractor has an "unresponsive attitude" to the project schedule, where the general contractor's schedules were "fatally flawed" and could not be used as "accurate and reliable tools" because they contained "erroneous logic ties, inaccurate scope of work, and unrealistic activity durations," where the general contractor had "poor schedule management" that was a "major detriment to the project," and where the general contractor manipulated "the schedule logic and durations to minimize and eliminate the known contractor-caused delays," in addition to testimony from a subcontractor's general manager that the subcontractor was prevented from performing its contractual obligations.[101]

In *Tricon Kent v. Lafarge North America, Inc.*,[102] a general contractor for a highway construction project subcontracted with Tricon Kent to perform earthwork. The subcontract contained a common no damages for delay clause. Tricon's suit for breach of express and implied covenants

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97 See *Evergreen Pipeline Constr. Co., Inc. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153 (2d Cir. 1996), where the subcontractor was able to prove bad faith by the general contractor, who did not provide surveyors as required in the subcontract, misled the subcontractor as to when the surveyors would be available, and ultimately required the subcontractor to hire its own surveyors.

98 In *Allied Fire & Safety Equip. Co. v. Dick Enters., Inc.*, 886 F. Supp. 491 (E.D. Pa. 1995), the fire protection subcontractor alleged that the agreement was that it was only to install the fire protection system in areas completed by other subcontractors and released by the general contractor for the fire protection subcontractor to begin work. In this context, the court upheld the fire protection subcontractor's claim for delay despite a no damages for delay clause where there was active interference by the prime contractor.

99 See *Dennis Stubbs Plumbing, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 67 Fed. Appx. 789, 2003 U.S. App. LEXIS 11231 (2003). Not every jurisdiction recognizes active interference by a party as one of the exceptions to no damages for delay clauses. *See Asset Recovery Contracting, LLC v. Walsh Constr. Co.*, 980 N.E.2d 708, 366 Ill. Dec. 615 (App. Div. 2012), *appeal denied*, 982 N.E.2d 767, 367 Ill. Dec. 617 (Ill. 2013).

100 See *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 642 N.E.2d 1215 (1994).

101 See *United States ex rel. Kingston Envtl. Servs. v. David Boland, Inc.*, 2019 U.S. Dist. LEXIS 202443, 2019 WL 6178676 (D. Haw. Nov. 20, 2019).

102 See *Tricon Kent Co. v. Lafarge N. Am., Inc . et al.*, 186 P.3d 155, 159 (Colo. App. 2008).

alleged that Lafarge failed to properly schedule and sequence the project, which led to "significant obstacles and costly delays" that amounted to interference with Tricon's performance of the subcontract. The court found that Lafarge's failure to properly schedule and coordinate Tricon's activities constituted "active interference" with Tricon's performance. The court recognized "active interference" as an exception to the enforceability of no damages for delay clauses and held that Tricon need not show that Lafarge acted in bad faith in order to benefit from the "active interference" exception.

In *Blake Construction Co. v. C.J. Coakley Co.*,[103] a court considered the enforceability of a no damages for delay provision in a construction subcontract. The subcontractor sought delay damages from the contractor, arguing that the contractor's improper sequencing of the work amounted to intentional interference with the subcontract, which rendered the no damages for delay provision unenforceable. The court agreed, quoting a Texas case, which states that the clause *"did not give [the contractor] a license to cause delays 'willfully' by "unreasoning action," "without due consideration,"* and in *"disregard of the rights of the other parties, nor did the provision grant [the contractor] immunity from damages if delays were caused by (it) under such circumstances."*[104] The court concluded that the contractor's failure *"to take effective steps to prevent further installation of piers, ducts, and electrical conduits contrary to the subcontract's terms"* constituted active interference, thereby precluding enforcement of the no damages for delay provision.[105]

3.5.4 Negligence and Gross Negligence

Courts apply the active interference exception with different degrees of strength. Some jurisdictions appear to allow "simple negligence" by the owner to be adequate to overcome a failure to coordinate the work of other subcontractors[106] and ordering the mechanical subcontractor to perform its work in areas that were not ready for the plumbing and mechanical work, even though they do not explicitly apply the negligence standard.[107] Such "simple negligence" actions include improper sequencing of work,[108] tendering defective plans and specifications,[109] failure to

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103 431 A.2d 569 (D.C. 1981).

104 *Id.* at 578.

105 *Id.* at 579.

106 In *Allied Fire & Safety Equip. Co. v. Dick Enters., Inc.,* 886 F. Supp. 491 (E.D. Pa. 1995), the fire protection subcontractor alleged that the agreement was that it was only to install the fire protection system in areas completed by other subcontractors and released by the general contractor for the fire protection subcontractor to begin work. In this context, the court refused to dismiss the fire protection subcontractor's claim for delay despite a no damages for delay clause in the subcontract where the subcontractor alleged active interference by the prime contractor.

107 Lesser & Wallach, "Risky Business in the Active Interference Exception to the No damages for Delay Clause," 23 Constr. Law. 26, 28 (Winter 2003).

108 *Id.* citing *Blake Constr. Co., Inc. v. C.J. Coakley, Inc.*, 431 A.2d 569 (D.C. Ct. App. 1981).

109 *Id.* citing *Felhaber Corp. v. State of New York*, 410 N.Y.S. 290 (3d Dep't 1978).

coordinate the work of other contractors,[110] failure to provide access to the work site,[111] and failure to grant time extensions in a timely manner.[112] Also the following actions/inactions have been held not to rise to the requisite level of negligence: inaccurate, inappropriate, unworkable, and/or defective plans, specifications, and surveys; a "plethora" of increased scope of work and/or design changes; failing to obtain necessary permits required to commence the work; failing to issue appropriate change orders when extra work was encountered; failing to coordinate the various contractors; interrupting and suspending the trade contractor's work; causing the contractor to perform its work out of sequence; and requiring the contractor to work out of sequence, due to errors, omissions, and changes by the owner and its architectural consultant. These allegations may constitute merely inept administration or poor planning, which do not negate application of the no damages for delay provisions, even for a one-year delay of the contractor's work.[113] The refusal or failure to grant time extensions for required extra work may also constitute the appropriate degree of wrongful action to allow the recovery of delay costs despite the presence of a no damages for delay clause.[114]

Some jurisdictions examining the issue of active owner interference require more than negligent conduct by the owner. For example, in *P.T.& L. Construction Co., Inc. v. State of New Jersey Department of Transportation*,[115] the court refused to find active owner interference in the Department's failure to coordinate the work of the utilities subcontractor, stating that active interference involves more than negligence and *"contemplates reprehensible behavior beyond a 'simple mistake, error in judgment, lack of total effort or lack of complete diligence.'"*[116] Also, poor management of the project may not constitute intentional interference, and the no damages for delay clause may be enforced.[117]

In many cases, courts have applied a higher qualitative level of misconduct, requiring intentional wrongdoing, that is, willful, fraudulent, or grossly negligent conduct,[118] "inexcusable

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110 *Id*. citing *Housing Auth. of Dallas v. Hubbell*, 325 S.W.2d 880 (Tex. App. 1959).

111 *Id*. citing *Commonwealth of Pennsylvania, State Highway & Bridge Auth. v. General Asphalt Paving Co.*, 405 A.2d 1138 (Pa. 1979).

112 *Id.* citing *Mississippi Transp. Comm'n v. S.C.I., Inc.*, 717 So. 2d 332 (Miss. 1998).

113 See *Omni Contracting Co., Inc. v. City of New York*, 35 Misc. 3d 1243(A), 953 N.Y.S.2d 551 (N.Y. Sup. Ct. 2012).

114 See *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc*., 162 Ill. 2d 265, 642 N.E.2d 1215 (1994); *Watson Elec. Constr. Co. v. City of Winston-Salem*, 109 N.C. App. 194, 426 S.E.2d 420, *cert. denied*, 334 N.C. 167, 432 S.E.2d 369 (1993).

115 531 A.2d 1330 (N.J. 1987).

116 531 A.2d 1330, 1343 (N.J. 1987). Also in *C&C Plumbing & Heating, LLP v. Williams Cnty.*, 2014 ND 128, 848 N.W.2d 709 (2014), the North Dakota Supreme Court ruled that a contractor claiming active interference on the part of an owner needs only to show that the defendant committed an affirmative, willful act that unreasonably interfered with the contractor's performance of the contract, regardless of whether it was undertaken in bad faith; however, active interference required more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence.

117 See *Martin Mech. Corp. v. P.J. Carlin Constr. Co.*, 132 A.D.2d 688, 518 N.Y.S.2d 166 (1987).

118 See *Corinno-Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986); *Blau Mech. Corp. v. City of New York*, 158 A.D.2d 373, 551 N.Y.S.2d 228 (1990); *Spearin, Preston &*

incompetence,"[119] "intentional or gross fault,"[120] or "arbitrary and capricious conduct, active interference, bad faith and/or fraud."[121] In such cases, the actions of the party contracting with the contractor need to be more than negligent; they may need to reach the level of gross negligence or intentional misconduct.[122] This often requires affirmative, willful action, in bad faith, which unreasonably interferes with a contractor's compliance with contract terms.[123] Stop work orders, retesting, withholding of payments, threatened loss of an early completion bonus, and other actions geared to coerce a contractor to comply with an owner's scheduling and rescheduling directives may demonstrate bad faith interference.[124] Under New York law, conclusory allegations in a

Borrows, Inc. v. City of N.Y., 160 A.D.2d 263, 553 N.Y.S.2d 372 (1990); *Novak & Co. v. Dormitory Auth.*, 172 A.D.2d 653, 568 N.Y.S.2d 453 (1991); *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 198 A.D.2d 259, 603 N.Y.S.2d 526 (1993); *St. Louis Hous. Auth. ex rel. Jamison Elec., LLC v. Hankins Constr. Co.*, 2014 U.S. Dist. LEXIS 178652 (E.D. Mo. Dec. 31, 2014); *C & H Elec., Inc. v. Town of Bethel*, 312 Conn. 843, 96 A.3d 477 (2014).

119 See *John E. Gregory & Sons, Inc. v. A. Guenther & Sons, Inc.*, 432 N.W.2d 584 (Wis. 1998).

120 See *Pellerin Constr., Inc. v. Witco Corp.*, 169 F. Supp. 2d 568 (E.D. La. 2001).

121 See *Port of Houston Auth. v. Zachry Constr. Corp.*, 2014 Tex. LEXIS 768 (Aug. 29, 2014).

122 See *Landis & Gyr Powers, Inc. v. Berley Indus., Inc.*, 750 N.Y.S.2d 82 (App. Div. 2d Dep't 2002). In the case of *Commercial Elec. Contractors, Inc. v. Pavarini Constr. Co., Inc.*, 50 A.D.3d 316, 856 N.Y.S.2d 46 (App. Div. 1st Dep't 2008), the court determined that the following actions of the prime contractor did not constitute gross negligence or willful misconduct that would allow the subcontractor to recover its delay costs as exceptions to the enforcement of the no damages for delay clause: failure to provide temporary heat to the subcontractor; allowing high-pressure water blasting of concrete when the subcontractor was scheduled to perform its electrical work; and failure to schedule and coordinate the work of other trades in an orderly manner. The court noted that *"the conduct amounted to nothing more than inept administration or poor planning, which falls within the contract's exculpatory clause."* See also *Primiano Elec. Co. v. HTS-NY, LLC*, 2018 NY slip op. 31859(U) (Sup. Ct.), where a general contractor's mismanagement was insufficient to establish gross negligence and void a no damages for delay provision. In *Mafco Elec. Contractors, Inc. v. Turner Constr. Co.*, 2009 U.S. Dist. LEXIS 24499 (D. Conn. Mar. 26, 2009), a finding of gross negligence for purposes of obviating a no damages for delay clause in the subcontract requires a showing that the owner acted recklessly, wantonly, and with a complete lack of regard for the risk to others. The no damages for delay clause also provided that the subcontractor was not entitled to any cost reimbursement or compensation for any delay except to the extent that the general contractor had actually recovered corresponding cost reimbursement or compensation from the owner. Further, the subcontractor expressly waived and released all claims or rights to recover lost profits or any other consequential damages. The subcontractor alleged that it was damaged by the general contractor's "abandonment of the subcontract schedule," requirement of out-of-sequence work, failure to provide reasonable access, failure to complete antecedent work, failure to properly coordinate the work schedules, and failure to process and issue necessary information in a timely fashion, and a continual requirement that the subcontractor perform extra work. The general contractor argued that the no damages for delay clause barred the subcontractor from recovering damages for delay claims. The subcontractor argued that the general contractor had acted in a grossly negligent manner, which equitably precluded enforcement of the no damages for delay clause. For the general contractor's conduct to constitute gross negligence, it had to engage in conduct that was reckless or wanton, without regard to the fact that its actions created a high degree of risk of harm to another, and deliberately disregard the risk. The court found that the subcontractor's allegations that the delays were a result of incompetent administration, poor planning and scheduling, and failure to supervise fell within the exculpatory clause and were subject to the no damages for delay clause. The court found that the no damages for delay clause was enforceable, and the general contractor was entitled to summary judgment.

123 See *Edward J. Dobson, Jr., Inc. v. State*, 218 N.J. Super. 123, 526 A.2d 1150 (1987).

124 See *Jensen Constr. Co. v. Dallas Cnty.*, 920 S.W.2d 761 (Tex. App. 1996).

complaint and affidavit may be insufficient to support a claim that a public owner's alleged conduct was the result of gross negligence or willful misconduct. A court may determine that conclusory allegations that work was performed out of sequence, was poorly coordinated, and was plagued by design changes amount only to "inept administration or poor planning," may not negate the application of the no damages for delay provisions, and may not evince bad faith or gross negligence by a public owner.[125] However, a showing of bad faith is not required in all jurisdictions to invoke the active interference exception to a no damages for delay clause.[126]

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[125] In *Arnell Constr. Corp. v. New York City Sch. Constr. Auth.*, 2018 N.Y. Misc. LEXIS 3345 (N.Y. Sup.Ct, July 31, 2018), the plaintiff contractor Arnell was the successful bidder on a school project for the defendant School Construction Authority ("SCA"). The $30,624,000 contract was awarded on December 29, 2014, and required that Arnell substantially complete the project by August 6, 2016. SCA issued a certificate of substantial completion dated September 16, 2016, stating that Arnell had achieved substantial completion of the work on September 2, 2016. The contractor filed suit alleging a single cause of action for breach of contract-delay damages, and that it encountered delays and impacts throughout construction, which prevented it from achieving substantial completion by August 2, 2016, due to design changes, stop work orders, unforeseen or latent field conditions, and 74 change orders. SCA filed a pre-answer motion to dismiss, asserted that Arnell's single claim for breach of contract and delay damages was barred as a matter of law, as the general conditions of the contract contained a no damages for delay clause, and asserted that Arnell failed to give SCA timely notice of the condition causing the delays alleged in the complaint, as required by the contract's general conditions. Arnell's witness asserted that: (1) the contract's exculpatory clause did not bar the damages that Arnell alleged because Arnell did not contemplate SCA's conduct; (2) SCA's conduct amounted to a material breach of SCA's fundamental obligations under the parties' contract; (3) SCA willful, reckless, and/or grossly negligent conduct wrongfully interfered with and disrupted Arnell's work; (4) SCA wrongfully interfered with and disrupted Arnell's performance under the subject contract by, among other things, issuing 74 change orders, which significantly increased and altered the scope, composition, and nature of the work; (5) SCA did not grant a single extension of time in which to perform such drastically changed and/or added work; (6) Arnell was still unable to complete the project as SCA had not obtained the necessary approvals from the Department of Buildings for the Builders Pavement Plan; and (7) as a result, Arnell had been prevented from applying for a Certificate of Occupancy and planting trees on the street, forcing it to incur substantial costs and expenses for each day it remained idle on the site.

SCA, in its reply, asserted that Arnell essentially conceded that it violated Section 8.02 of the contract by failing to give SCA timely written notice of a condition causing or threatening to cause a delay, requiring dismissal of the complaint. The court ruled that the "conclusory allegations" in Arnell's complaint and its witness's affidavit were insufficient to support Arnell's claim that SCA's alleged conduct was the result of gross negligence or willful misconduct, that the work was performed out of sequence, poorly coordinated, and plagued by design changes. The court said that the conclusory allegations could amount only to "inept administration or poor planning" and did not negate the application of the no damages for delay provisions, and did not evince bad faith or gross negligence by a public owner. The court granted SCA's pre-answer motion to dismiss the complaint.

[126] In *Tricon Kent Co. v. Lafarge North Am., Inc.*, 186 P.3d 155, 2008 Colo. App. LEXIS 673 (2008), a subcontractor sued a general contractor on a highway construction project for breaching the subcontract's express and implied covenants and claimed that the contractor's interference with the subcontractor's performance caused it to experience costly delays as the scope of its work was changed due to the contractor's failure to schedule and sequence the project in accordance with the prime contract's requirements and with industry custom and practice. The subcontractor argued that the subcontract's no damages for delay clause was inapplicable and that the contractor's actions constituted active interference with the subcontract. The contractor argued that the subcontractor was required to show bad faith to invoke the active interference exception to the clause. In

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3.5.5 Owner's Failure to Perform Contractually Required Tasks

If a contract requires an owner to perform a specific and affirmative task, and the owner does not do so, a court may find active interference. For example, active owner interference was found where: (1) there was an express provision in a contract that a site be drained and that the owner would maintain the site in a "drawdown" condition; (2) the site was drained at the time of pre-bid inspection; and (3) the owner had not properly dewatered the site at the time of notice to proceed or throughout most of the performance period. The owner's failure to maintain the site in a dewatered condition was held to be affirmative interference, invalidating the application of the no damages for delay clause to the contractor's claim.[127]

3.5.6 Failure to Issue a Time Extension

The owner's failure to issue a time extension has been argued to be active owner interference. Certain time extension clauses state that the time for completion "shall be extended" if certain events occur. For example, time extension clauses may require a time extension if the contract-required schedule update indicates that the project is behind schedule because of the owner's actions. Other contracts require a time extension in the event of material alterations or additions to the work. When time extension clauses mandate an extension upon the occurrence of certain events, the argument is that the owner or engineer generally may not refuse to issue a time extension. If the contractor can prove that the event has delayed the project and makes a proper request, a time extension must be granted. Failure to issue the required extension may be a breach of contract that will permit the contractor to collect its delay damages despite a no damages for delay clause. For example, in *Marriott Corp. v. Dasta Construction Co.*,[128] the court determined that refusal to grant a time extension according to the contract, after the contractor's proper request, could constitute sufficient fraud, concealment, or active interference under Florida law to overcome a contract's no damages for delay clause.

In *Pertun Construction Co. v. Harvesters Group*,[129] the contract's time extension clause did not condition grant of a time extension upon the submission of a written request but rather stated that the *"time for completion ... shall be extended in the event of delay."* In Pertun, the court found

considering the matter, the appellate court ruled that the subcontractor did not have to show bad faith to invoke the active interference exception. The subcontractor only had to show that the contractor committed an affirmative, willful act that unreasonably interfered with the subcontractor's performance of the contract. The contractor ordered the subcontractor to proceed with its work knowing that another subcontractor had not completed a retaining wall. The contractor threatened the subcontractor with liquidated damages if it did not perform the work out of sequence. The contractor failed to provide open traffic lanes to the subcontractor to provide access to the job site. The contractor failed to properly schedule, sequence, and coordinate the subcontractor's activities. The no damages for delay clause did not preclude the subcontractor from delay damages due to the active interference exception.

127 See *Coatesville Contractors & Eng'rs, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A.2d 862 (1986).

128 26 F.3d 1057 (11th Cir. 1994).

129 918 F.2d 915 (11th Cir. 1990).

that either failure to grant a time extension permitted under the contract or failure to grant the extension in such a manner as to render it meaningless breached the contract and excused application of the no damages for delay clause. Also relevant was the fact that the contractor terminated Pertun's contract and prevented Pertun's completion of the project. Similarly, in *Findlen v. Winchendon Housing Authority*,[130] the court found that the owner's refusal to extend the time of performance for delay that the owner had caused was arbitrary and capricious conduct. This allowed the court to apply an exception to the application of the no damages for delay clause.

In *United States ex rel. Pertun Construction Co. v. Harvesters Group, Inc.*,[131] the no damages for delay was not enforced to preclude the contractor's claim for delay costs. The court's reasoning was that the no damages for delay clause was conditioned upon the owner's granting the contractor a time extension for excusable delays. Because the owner failed to grant the contractor a time extension, it could not enforce the no damages for delay clause.

3.5.7 Failure to Act in an "Essential Manner"

Related to the concept of active interference are other exceptions to the enforcement of the no damages for delay clause: fundamental breach[132] and the failure to act in an "essential manner."[133] Two cases illustrate examples of owner failure to act in an essential manner. In *A. G. Cullen Construction, Inc. v. State System of Higher Education*,[134] a contract required that the renovation of an historic structure include the replacement of the plumbing and heating system, installation of ventilation and air conditioning systems, and removal and replacement of 550 wood-framed windows. Unknown to the contractor (but known by the owner) and undisclosed in the project specifications was the fact that lead-based paint was on the window frames to be replaced. The owner issued a pre-bid notice to the bidders that indicated the owner would address all *"lead containing materials affected by the project."* When lead paint abatement and other problems occurred, the owner terminated the contract and assessed liquidated damages. The court ruled that the owner failed to act in an essential manner because it had been aware of the existence of lead-

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130 28 Mass. App. Ct. 977, 553 N.E.2d 554 (1990). Also, the court in *Mississippi Transp. Comm'n v. SCI*, 717 So. 2d 332 (Miss. 1998), held that the owner's refusal to grant time extensions on a timely basis could be interpreted as active interference or bad faith preventing the application of the no damages for delay clause from barring the contractor's recovery of delay damages. *See also Watson Elec. Constr. Co. v. City of Winston-Salem*, 109 N.C. App. 194, 426 S.E.2d 420, *cert. denied*, 334 N.C. 167, 432 S.E.2d 369 (1993).

131 918 F.2d 915 (11th Cir. 1990).

132 See *Corinno-Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986); *Forward Indus., Inc. v. Rolm of New York Corp.*, 123 A.D.2d 374, 506 N.Y.S.2d 453 (1986).

133 The Pennsylvania Supreme Court explained this concept in *Coatesville Contractors & Eng'rs, Inc. v. Borough or Ridley Park*, 509 Pa. 553, 506 A.2d 862 (1986): *"the rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential manner." Coatesville Contractors* at 509 Pa. 560, 506 A.2d 856.

134 898 A.2d 1145 (Pa. Commw. Ct. 2006).

based paint and failed to provide specifications for lead paint abatement and otherwise to address the subject of lead paint despite its promise to do so in the pre-bid notice to the contractors.

In the other case, *James Corp. v. North Allegheny School District,*[135] it was determined that various actions of the owner constituted a failure to act in an essential manner and bad faith. These failures included the owner's responsibility for various delays; the owner's failure to enforce another prime contractor's duty to submit proposed sequencing schedules and to adhere to time allocations for work; the owner's recognition of its responsibility for delay yet the refusal to do anything about it other than to threaten the contractor with dismissal; the owner's refusal to pay for extras that had been agreed to in executed change orders; and the owner's wrongful default termination of the prime contractor. However, in *C&H Electrical, Inc. v. Town of Bethel,*[136] the owner's actions were held not to rise to the level of willful misconduct, gross negligence, breach of a fundamental obligation in the contract, or active interference. In *C&H Electrical*, an electrical contractor for a high school renovation project filed suit and sought damages for loss of productivity due to the impact of required asbestos removal at the school. The contractor claimed the loss of productivity resulted from the contractor's forces having to move around to accommodate disruptions, return to work areas multiple times, and constantly move its equipment around the building. Additionally, new crews had to learn the work that had become familiar to other crews. The loss of productivity was caused by such matters as a building official requiring additional spray fireproofing, the state department of health shutting down the job because of an asbestos release, and a significant amount of additional abatement work. The contractor's expert used a "measured mile" analysis to demonstrate and quantify the additional labor and overhead caused by the owner's disruptions. However, the court ruled that neither the removal of the additional asbestos, the requirement of spray fireproofing, or the job shutdown because of an asbestos release could be construed as acts of interference, a breach of a fundamental obligation of the contract, or other exceptions to the application of the no damages for delay clause. Therefore, the court held that the no damages delay clause precluded the contractor's lost productivity claim.

3.6 THE CONTRACTOR FAILED TO ADHERE TO THE REQUIREMENTS OF OTHER CONTRACT CLAUSES TO PROVIDE NOTICE OF DELAY

Contracts often require the contractor to provide notice of delay as a precedent to prevail on a delay claim and alleged damages. In a 2019 New York case,[137] the subcontract required that:

> *Subcontractor shall give the Construction Manager, Owner and Architect written notice of the nature and amount of such claim within (15) days … of the occurrence*

[135] 938 A.2d 474, 2007 Pa. Commw. LEXIS 636, 47 A.L.R.6th 657 (2007).
[136] 2012 Conn. Super. LEXIS 1565 (Super. Ct. D. Hartford June 15, 2012).
[137] See *Multi-Phase Elec. Servs. Inc. v. Barr & Barr Inc.*, 2019 N.Y. Misc. LEXIS 2248, 2019 NY slip op. 31264(U) (Sup. Ct. N.Y. Cty. May 6, 2019).

> *of the event or document upon which such claim is based. In default of such written notice the claim is waived.*

The subcontract also contained a "no damages for delay" clause that provided:

> *In the event that Subcontractor is obstructed, re-sequenced or delayed in its performance of its Work by reason of the fault of the Construction Manager or Owner or Architect, 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 any obstruction or delay. In no event shall Subcontractor be entitled to any monetary damages on account of any obstruction or delay.*

The court noted that there was no dispute that the plaintiff subcontractor was required, as a condition precedent to its right to assert claims arising out of the subcontract, to serve the owner and architect with notice. The court said that the plaintiff did not present any evidence of notice given the owner and architect, although the subcontractor did send notice to the general contractor. Therefore, the court granted the motion for partial summary judgment in favor of the owner based on failure of timely notice to the owner and architect.

3.7 THE DELAY CLAUSE WAIVED EXPRESSLY OR BY THE OWNER'S ACTIONS

A party to the contract may waive the no damages for delay clause expressly or by its actions.[138] For example, an owner waived the protection of the no damages for delay clause by approving payment of delay damages to one subcontractor while not denying another subcontractor's delay claim. The court found that the second subcontractor's claim was not barred by the no damages for delay clause.[139] Also, another court found that the failure of the construction manager to obtain permits constituted a waiver of the no damages for delay clause.[140] Waiver of the right to enforce the no damages for delay clause has also been found where the owner repeatedly promised the contractor that the owner would personally be liable to the contractor for the delays and where the owner stated that the no damages for delay clause did not apply to the extraordinarily long delays incurred on the project.[141]

Actions and writings between the owner and a third party may prove waiver of the no damages for delay clause. In *Findlen v. Winchendon Housing Authority*,[142] the contractor on a housing authority project introduced letters between the owner housing authority project and the state funding agency to prove that the housing authority had waived the no damages for delay clause.

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138 See *Chicago Coll. of Osteopathic Med. v. Geo. A. Fuller Co.*, 776 F.2d 198 (7th Cir. 1985).
139 See *Findlen v. Winchendon Hous. Auth.*, 28 Mass. App. Ct. 977, 553 N.E.2d 554 (1990).
140 See *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wash. App. 661, 828 P.2d 565 (1992).
141 See *Chicago Coll. of Osteopathic Med. v. George A. Fuller*, 776 F.2d 198 (7th Cir. 1985).
142 28 Mass. App. Ct. 977, 553 N.E.2d 554 (1990).

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For example, one letter to the funding agency from the housing authority requested acquiescence in paying the contractor for delay. Another letter acknowledged the state agency's approval of payment for delay. The court found that this was evidence of the housing authority's intention to waive the no damages for delay clause and allowed the contractor to recover its delay costs.

An owner may waive its no damages for delay provision if it approves change orders that directly affect the project's schedule and admit fault in the project's delays.[143] The project faced numerous delays during the course of construction and was completed 546 days after the contracted completion date. The owner approved two change orders, which granted the contractor compensation for 115 days of delay. However, the contractor commenced an action against the owner to recover over $15 million in damages due to added expenses of the delayed project. The owner counterclaimed for liquidated damages of $1,000 per day for 411 days. After a non-jury trial, the court determined the owner could not rely on the no damages for delay clause in the contract because it had waived that clause. The court found that the owner breached the contract by failing to fulfill its duty of scheduling and coordination of the work, failing to have an HVAC contractor in place at the beginning of the project, and delaying full access to the site. The owner argued the no damages for delay clause was applicable in this case because it had not violated its obligation of fair dealing. The contractor asserted that the owner, through its construction manager, acted in bad faith in a grossly negligent manner, breached the contract, and caused delays that the contractor had not contemplated when it entered into the contract. In this case, the no damages for delay clause was not applicable because the two change orders granted by the owner to the contractor constituted a waiver of the provision.

Another argument that some claimants use to avoid enforcement of the no damages for delay clause is that the parties to the agreement orally modified their agreement to set aside the no damages for delay clause and allow recovery for certain delays. A related argument is that the course of conduct and dealings between the parties demonstrated waiver of the no damages for delay clause.[144]

A Texas Appeals Court decision, *Alamo Community College District (ACCD) v. Browning Construction Co.*,[145] upheld the prior ruling by the lower court that a no damages for delay clause did not bar the contractor's right to recovery for approximately $3 million in delay damages. The lower court, through questions submitted to the jury, answered yes to the contractor recovery in spite of the no damages for delay clause.

The key issue in the suit was whether Browning could collect damages for delay when the contract had a no damages for delay clause. The jury answered yes because 1) ACCD had waived its right to rely on that clause; 2) ACCD is estopped from relying on that clause; 3) ACCD and Browning

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143 See *Plato General Construction Corp./EMCO Tech Construction Corp., JV, LLC v. Dormitory Authority of State of New York*, 89 A.D.3d 819, 932 N.Y.S.2d 504, 2011 NY slip op. at 8134 (2d Dep't 2011).

144 See *The Law Co., Inc. v. Mohawk Constr. & Supply Co., Inc.*, 523 F. Supp. 1276 (D. Kan. 2007).

145 2004 Tex. App. LEXIS 318 (4th Dist. San Antonio 2004).

had agreed to modify the clause; 4) active interference of ACCD caused the delays that Browning encountered; 5) ACCD committed unreasonable delay such that Browning would have been justified in abandoning the contract; and 6) ACCD committed fraud, misrepresentation, or other bad faith.

Related to the concept of waiver is the exception to enforcement of the no damages for delay clause due to failure of a condition. For example, in *United States ex rel. Pertun Construction Co. v. Harvesters Group, Inc.*,[146] the no damages for delay was not enforced to preclude the contractor's claim for delay costs. The court's reasoning was that the no damages for delay clause was conditioned upon the owner's granting the contractor a time extension for excusable delays. Because the owner failed to grant the contractor a time extension, it could not enforce the no damages for delay clause.

3.8 CONTRARY TO PUBLIC POLICY AND STATUTES

Courts may also find that contractual provisions exempting a party from tort liability for harm caused intentionally or recklessly are unenforceable on grounds of public policy. In *Port of Houston Authority v. Zachry Construction Corp.*,[147] a Texas appellate court ruled that a contractor may not recover delay damages if a contract provides that an owner is not liable for delay damages regardless of its own negligence, breach, or other fault. Under the contract, the contractor's sole remedy for the delay or hindrance of its work was an extension of time. The trial court had instructed the jury that the clause did not cover delay resulting from the owner's arbitrary and capricious conduct, active interference, bad faith, or fraud. The contract specifically mentioned negligence, breach of contract, or other fault in capital letters. The entirety of the award for breach of contract was awarded for delay or hindrance damages. The appellate court held that such an award was impermissible under the contract. The contract was not illusory merely because common-law exceptions did not apply to the contract. The parties were free to negotiate and agree on the conditions under which the contract would have recovered damages for delay. The appellate court reversed the trial court judgment.

However, on appeal to the Supreme Court of Texas, the appellate court decision was reversed, and the jury awarded Zachry its delay costs in finding that the owner's delay actions were the result of *"arbitrary and capricious conduct, active interference, bad faith and/or fraud."* In reaching this decision, the Texas Supreme Court stated:

> *The common law permits a contractor to recover damages for construction delays caused by the owner, but the parties are free to contract differently. A contractor may agree to excuse the owner from liability for delay damages, even when the owner is at fault. The contractor thereby assumes the risk of delay from, say, an*

[146] 918 F.2d 915 (11th Cir. 1990).
[147] 377 S.W.3d 841 (Tex. App. Houston 14th Dist. 2012).

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> *owner's change of plans, even if the owner is negligent. But can a no damages for delay provision shield the owner from liability for deliberately and wrongfully interfering with the contractor's work? Before this case, a majority of American jurisdictions—including Texas courts of appeals, courts in all but one jurisdiction to consider the issue, and five state legislatures—had answered no. We agree with this overwhelming view…*[148]

The court noted that waivers of future liability for gross negligence were void as against public policy and that, in general, contractual provisions exempting a party from tort liability for harm caused intentionally or recklessly was unenforceable on grounds of public policy. The same rationale should apply to contract liability.

Also, statutes have been passed that make no damages for delay clauses unenforceable,[149] including in public contracts[150] and private, nonpublic construction contracts.[151] There may be subtle ways to maneuver around a no damages for delay clause in minor ways without running afoul of statutory prohibitions against them.[152]

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148 See *Port of Houston Auth. v. Zachry Constr. Corp.*, 2014 Tex. LEXIS 768, 773 (Aug. 29, 2014).

149 See Walker, Statutory Responses to "No Damages for Delay" Clauses, 6 Constr. Law. (Apr. 1986).

150 See Ariz. Rev. Stat. ¶33-221 (C) (1990); Cal. Pub. Cont. Code § 7102; Wash. Rev. Code §§ 4.24.360-4.24.370 (1988). Cal. Pub. Cont. Code § 7102 (1985 & Supp. 1990); Colo. Rev. Stat. §§ 24-91-103.5, 24-91-102, 24-91-110 (1988 & Supp. 1990); La. Rev. Stat. Ann. § 38.2216h (Supp. 1991); Mo. Rev. Stat. § 34.058 (Supp. 1991); Wash. Rev. Code § 4.24.380 (1988). Also N.J.S.A. § 2A:58B-3 provides that a public contract clause *"purporting to limit a contractor's remedy for delayed performance caused by the public entity's negligence, bad faith, active interference, or other tortious conduct to an extension of time for performance under the contract, is against public policy and is void and unenforceable*." In *Barber Bros. Contr. Co., LLC v. State*, 110 So. 3d 1085 (La. App. 1st Cir. 2012), applying La. R.S. § 38:2216(H), which prohibited any contractual waiver of claims for damages caused by delay on public works projects, the court found that the statute was applicable and precluded the waiver of damages the owner asserted.

151 See Wash. Rev. Code §§ 4.24.360-4.24.370 (1988); *Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 587 S.E.2d 711 (2003) (Contract provisions barring a contractor's claim for unreasonable delay damages, except upon an authority's bad faith, malice, gross negligence, or abandonment, are void and unenforceable as against Virginia's public policy.); *J & H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 2012-Ohio-5308, 2012 Ohio Misc. LEXIS 172 (Ohio Ct. Cl. June 6, 2012), aff'd, 2013-Ohio-3827, 2013 Ohio App. LEXIS 3990 (10th Dist. Sept. 5, 2013) (Pursuant to Ohio Rev.Code § 4113.62(C)(1), the owner could not cause a delay and then avoid the natural consequences for causing the delay by relying upon a no damages for delay clause that was deemed to be "boilerplate contract language.").

152 For example, see *Construction Enters. & Contractors, Inc. v. Ortling Sch. Dist. No. 344*, 121 Wash. App. 1012 (Wash. Ct. App. 2004), petition for review denied, 152 Wash. 2d 1034, 103 P. 3d 201 (2004). In this case, the contract provided that the owner *"owned all float time."* The trial court granted the civil engineer's motion for summary judgment, arguing that the "ownership of float" clause barred the contractor's disruption claim. But the Court of Appeals of Washington reversed and remanded, finding that there were genuine issues of fact as to the meaning of "float time" (float is not a "commonly understood term") and there was a factual issue as to whether the "ownership of float" clause barred the contractor's claim (was it a delay claim or a disruption claim?). The court did note that in its opinion, contract provisions such as the "ownership of float" clause did not violate the statute but *"simply defines the parties' rights and procedures for handling contractors' claims."*

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4. THE NO DAMAGES FOR DELAY CLAUSE AND ACCELERATION

A no damages for delay provision may not prevent the recovery of acceleration claims.[153] Contractors argue that an owner should not be able to avoid paying for any acceleration costs that result from the owner's directed acceleration, despite the presence of a no damages for delay clause. Similarly, in the case of constructive acceleration, if the owner refuses to grant legitimate time extensions and insists on project completion as scheduled, but refuses to direct acceleration, it may not be equitable to enforce a no damages for delay clause. Thus, the no damages for delay clause does not bar acceleration claims because the owner refused to provide the time extension that the no damages for delay clause itself says is the sole remedy for delay.[154]

However, if a contractor accelerates to complete on time, when the no damages for delay clause identifies time but not money as the remedy (even when the owner incorrectly denies the time remedy), it may be argued that the contractor acts as a volunteer and should not be able to recover its acceleration costs. Similarly, if a contractor accelerates to avoid any additional time costs as a result of delay that will not be reimbursed because of the presence of a no damages for delay clause, it may be argued that the contractor should not be able to recover its acceleration costs as a way to substitute for the no damages for delay clause.

Another argument is that "acceleration" is the opposite of "delay." Thus, contractors have argued that because the no damages for delay clause only bars delay damages, it does not bar acceleration damages.

The few court decisions that have considered whether a no damages for delay clause will prohibit acceleration damages have reached conflicting results.[155] In *B.J. Harland Electrical Co., Inc. v. Granger Brothers, Inc.*,[156] the court determined that a no damages for delay clause did not permit recovery of lost productivity costs caused by out-of-sequence work and reduced work areas. Even though the claim was limited to those additional performance costs incurred during the original

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153 See *St. Louis Hous. Auth., ex rel. Jamison Elec., LLC v. Hankins Constr. Co.*, 2013 U.S. Dist. LEXIS 101642 (E.D. Mo. July 22, 2013); *Kiewit Constr. Co. v. Capital Elec. Constr. Co., Inc.*, 2005 U.S. Dist. LEXIS 23621 (D. Neb. Oct. 12, 2005).

154 Robert E. Heideck & Kenneth A. Cushing, "Do No-Damage-for-Delay Clauses Bar Acceleration Claims?*,"* Smith Currie & Hancock, LLP, ConsensusDocs Construction Law Newsletter Vol 2, Issue 2 (Apr. 2016).

155 See *Contracting & Material Co. v. City of Chicago*, 20 Ill. App. 3d 684, 314 N.E.2d 598 (1974), *rev'd on other grounds*, 64 Ill. 2d 21, 349 N.E.2d 389 (1976) (a contractor was not entitled to time extension because of failure to satisfy condition precedent but could have recovered acceleration cost if it had satisfied elements of constructive acceleration); *Siefford v. Housing Auth.*, 192 Neb. 643, 223 N.W.2d 816, 74 A.L.R. 3d 172 (1974) (a contractor continuously and substantially behind schedule due to its own fault could not recover acceleration costs because of a no damages for delay clause); *United States Steel Corp. v. Missouri Pac. R.R. Co*, 668 F.2d 435 (8th Cir. 1982) (a no damages for delay clause did not protect an owner that issued a notice to proceed knowing that the contractor could not complete as scheduled because of delay to preceding work; the contractor claimed delay damages rather than acceleration damages).

156 24 Mass. App. Ct. 506, 510 N.E.2d 765 (1987).

contract period and ignored overruns in the delayed performance period, the court concluded that language prohibiting damages for "hindrances or delays" in the no damages for delay clause also prohibited recovery of any lost productivity damages caused by delay. Similarly, a subcontractor's failure to provide its supplier with timely information fell within the ordinary meaning of the word "delay," as used in the contract to limit remedies for delay to time extensions.[157]

In *Watson Electrical Construction Co. v. City of Winston-Salem*,[158] the court said that the refusal to grant a time extension may constitute a breach of contract allowing the contractor to recover acceleration costs despite a no damages for delay clause.

While some courts may be inclined to apply the no damages for delay clause to exclude acceleration and loss of productivity claims, one approach for a claimant to avoid the application of the no damages for delay clause to its acceleration claim is to argue that the clause is unenforceable.[159]

Another way to avoid the application of the clause to acceleration, loss of productivity, and labor disruption claims is to state the claim and resulting damages in terms of hindrance, acceleration, and effect other than delay.[160]

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157 See *United States ex rel. Tennessee Valley Marble Holding Co. v. Grunley Constr.*, 433 F. Supp. 2d 104, 2006 U.S. Dist. LEXIS 29625 (D.D.C. 2006).

158 109 N.C. App.194, 426 S.E.2d 420 (1993), *cert. denied*, 334 N.C. 167, 432 S.E.2d 369 (1993).

159 See *Cleveland Constr., Inc. v. Ohio Pub. Emps. Ret. Sys.*, 2008 Ohio 1630, 2008 Ohio App. LEXIS 1403 (2008).

160 See *John E. Green Plumbing & Heating Co. v. Turner Constr. Co.*, 742 F.2d 965 (6th Cir. 1984). See also § 6.06; but see *Corinno-Civetta Constr. Co. v. City of New York*, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986). In *Alonso v. Westcoast Corp.*, 920 F.3d 878 (5th Cir. 2019), Westcoast Corp., a subcontractor on an Army Corps of Engineers' sewer force main relocation project in Baton Rouge, Louisiana (the project), in turn subcontracted with RCS Contractors, Inc. (RCS) to provide *"all labor, material, special equipment and supervision required to install and complete"* the project within 120 days. RCS began work in September 2010. Several interruptions slowed completion and increased the cost of the project. Several change orders documented increases in the subcontract price, which were primarily based on unanticipated costs. Work was put on hold in March 2011 pending a full redesign. Even after completion of the redesign, work could not be resumed until September 2011, when the flood stage of the Mississippi River fell to a safe level. A second period of interruption began in December 2011 and continued until January 2012 while a solution was developed to correct the leaking pipes. RCS stopped its work on the project in July 2012 without completing its final "punch list" work. In August 2013, RCS filed suit against Westcoast in the Middle District of Louisiana, claiming that Westcoast failed to submit change orders promptly, which prevented RCS from being compensated for the additional work it had performed on the project, and that Westcoast also failed to make prompt payments to RCS under the change orders it did submit. After a jury trial and post-hearing motions, the district court entered an amended final judgment against Westcoast. It awarded RCS $304,189 on the claim of a bad faith breach of contract, $66,450 under the state Prompt Payment Act, $130,517.60 in attorney fees, and $400 in costs. Westcoast appealed, making several arguments to support its claim that the district court erred in entering judgment on RCS's claim of a bad faith breach of contract because the language of the subcontract specifically prohibited the assessment of delay damages; and contended that the subcontract prohibited any claims associated with delay damages, citing this provision:

If the Subcontractor is delayed in the prosecution of its Work due to the acts of the Owner and/or its agents and the Subcontractor suffers delay damages there from, the Contractor agrees to transmit to the Owner any claims

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In one case, the court allowed a subcontractor to recover for hindrance and interference, despite the presence of a no damages for delay clause in the subcontract, because the clause referred simply to the cost of an idle work.[161]

In another case, where the subcontractor was seeking to recover for damages for loss of productivity, the general contractor sought to preclude its recovery based upon the no damages for delay clause in the subcontract, which provided that the subcontractor *"shall have no claim for money damages or additional compensation for delay no matter how caused, but for any delay or increase in the time required for performance of this Subcontract not due to the fault of the Subcontractor, the Subcontractor shall be entitled only to an extension of time for performance of its Work."* The trial court strictly construed this language, finding that the claimant subcontractor was not seeking damages because it had been delayed but, rather, because the compression of the schedule occasioned by the general contractor's breaches of contract had forced it to increase its workforce. The appellate court ruled that this was a proper interpretation of the subcontract's no damages for delay clause.[162]

However, courts may examine the facts of the case as they relate to the allegations to determine whether the claim is really for disruption or hindrance rather than for delay.[163]

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submitted to it by the Subcontractor….It is agreed that in no event will the Contractor be liable for Subcontractor's claims for delay.

Westcoast contended that there was "uncontroverted evidence" at trial that it promptly transmitted any claims from RCS to the contractor Garner, and that Garner transmitted those claims to the Corps. Thus, both contractually and factually, it argued the jury award of $304,189 for bad faith breach of contract must have included "delay damages," and such damages were impermissible. RCS responded that the subcontract provision barring delay damages was not enforceable under Louisiana law because the jury found that Westcoast breached in bad faith. In considering the matter, the appellate court noted that the standard on appellate review in this case was that the jury's *"verdict should be affirmed 'unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.'"* The appellate court determined that there was sufficient evidence from which the jury could have reasonably concluded that Westcoast breached the contract in bad faith. Therefore, the provision of the subcontract barring delay damages was unenforceable under Louisiana law.

161 See *John E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co.*, 742 F.2d 965, 966 (6th Cir. 1984). But see *C&H Elec., Inc. v. Town of Bethel*, 2012 Conn. Super. LEXIS 1565 (Super. Ct. D. Hartford June 15, 2012), where the no damages for delay clause explicitly included barring claims for *"(1) delay in the commencement, prosecution or completion of the work, (2) hindrance or obstruction in the performance of the work, (3) loss of productivity, or (4) other similar claims whether or not such delays are foreseeable, contemplated, or uncontemplated."* The court held that the contractor's claims for loss of productivity due to the impact of required asbestos removal on the project were precluded.

162 See *Cent. Ceilings, Inc. v. Suffolk Constr. Co.*, 91 Mass. App. Ct. 231, 2017 Mass. App. LEXIS 36 (Mass. App. Ct. Mar. 29, 2017).

163 See *Suntech of Conn., Inc. v. Lawrence Brunoli, Inc.*, 173 Conn. App. 321, 164 A.3d 36; 2017 Conn. App. LEXIS 210 (May 23, 2017)

Further, there are other cases that hold that the no damages for delay clause precludes claims for labor inefficiencies.[164]

5. ENFORCEABILITY OF NO DAMAGES FOR DELAY CLAUSES

Despite the aforementioned exceptions, the no damages for delay clause enforcement trends are substantial. The following examples are illustrative of the legal decisions being rendered on the enforceability of the no damages for delay clause:

1. Numerous revisions to plans and an owner's failure to coordinate other prime contractors delayed an HVAC contractor in New York by 28 months. The court ruled that although the owner had actively interfered with the contractor's activities, there was no deliberate intent to delay. Therefore, the clause was enforced.[165]

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[164] See *N. Am. Mech., Inc. v. Walsh Constr. Co. II, LLC*, 2015 U.S. Dist. LEXIS 125136 (E.D. Wis. Sept. 18, 2015), in which the subcontractor North Am. Mech., Inc. (NAMI) sought to recover $1,747,326 for labor inefficiencies, alleging that the general contractor Walsh materially changed the conditions under which NAMI was to perform its work, which resulted in NAMI having to spend thousands of additional man-hours to complete the work due to Walsh's mismanagement of the project. Walsh contended that NAMI's claim was barred by Article 4.4 of the subcontract, which limited NAMI's remedy for delays to an extension of time to perform its work, and Article 5.1, pursuant to which—as long as Walsh acted in good faith—NAMI waived any claim it might have as a result of delay, disruption, interference, obstruction, hindrance, and out-of-sequence work. Walsh argued that what NAMI called "inefficiency" was clearly "delay" within the meaning of these provisions of the subcontract. Further, Walsh disputed that any of the delays were caused by Walsh's alleged mismanagement but rather were caused by unforeseen site conditions, record amounts of snow, and the owner's changing directives as to what spaces could and could not be occupied. NAMI disputed that its claim fell under the no damages for delay language of the subcontract, arguing that Article 4.4 limited only claims arising from a delay in performance and not claims arising from a disruption in NAMI's performance due to Walsh's failure to perform its construction management duties. The court ruled that regardless of what term was used to refer to NAMI's claim, be it delay or inefficiency, it fell within the scope of the "delay, hindrance, interference or other similar event" language used in Article 4.4, and that NAMI had to prove that the delays or inefficiencies were caused by Walsh's intentional wrongdoing or gross negligence. The court, therefore, examined NAMI's contention that Walsh's failure to mitigate the problems NAMI was experiencing on the project, including by failing to allocate adequate staff to supervise the project, rose to the level of inexcusable ignorance or incompetence. Although the court found that there was evidence that Walsh arguably mismanaged the project, its conduct did not rise to the level of fraud, bad faith, or inexcusable ignorance or incompetence. As for the manner in which Walsh staffed the project, NAMI additionally failed to show how an increase in staffing would have prevented any of the problems NAMI encountered. Thus, the court ruled that Article 4.4 foreclosed NAMI's inefficiency claim. This finding obviated the necessity to address NAMI's claim for damages associated with its inefficiency claim. However, the court also ruled that NAMI's failure to adequately prove its damages with respect to this claim presented an independent reason why the labor inefficiency claim failed, and then continued the opinion by examining what it determined to be flawed proofs using three different ways to prove and price NAMI's labor inefficiency losses: (1) the Total Cost Method; (2) a Measure Mile analysis; and (3) resort to MCAA Factors.

[165] See *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983).

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2. A contractor was awarded a contract to build a new high school in Illinois. Due to delayed completion of precedent work, the contractor was not provided timely access to the site. After work began, the contractor was inundated with changes. The court upheld the validity of the clause, saying it was a risk that the contractor agreed to when it accepted the contract.[166]
3. Late completion of precedent work by another contractor delayed a highway contractor in Iowa in starting its work. The court found that a two-year delay was not uncommon in the highway construction business and upheld the clause.[167]
4. Contract provisions that authorized increases in contract time and price for changes in the work superseded the no damages for delay clause. For example, in *PYCA Industries, Inc. v. Harrison County Waste Water Management District*,[168] the claimant argued that the no damages for delay clause was superseded by EPA special conditions that authorized time extensions and price for changes in the work, and for the recovery of time-related costs. The contractor argued that these other provisions act to not preclude its claim for delay damages. In addition, the contractor contended that the EPA special provisions further provided that the special conditions would supersede other conflicting contract provisions such as the no damages for delay clause that was included in the contract documents. The court reasoned that the EPA special conditions were minimum requirements that EPA grantees must include in the contract documents, but the grantees were expressly authorized to impose more stringent terms. The court ruled that the no damages for delay clause was an additional requirement, not a conflicting provision, and the court enforced the no damages for delay clause to preclude the claimant from recovering its delay costs.

These are a few examples of the considerable lengths to which no damages for delay clauses are being enforced. The more the clause orients toward a specific event that could cause delay, the greater chance it has of being upheld. For example, if the owner knows that there is a good chance that certain major equipment for which it is responsible might not be delivered by the contractual date, the owner might insert a specific clause saying that if the equipment is up to 60 days late, the owner would give an equitable time extension if the delivery of that equipment delayed the then current critical path of the project leading to project completion but would not be responsible for the contractor's delay damages. Rulings cited herein suggest that a clause this specific would almost without doubt be enforceable.

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166 See *M. A. Lombard & Son Co. v. Public Building Commission of Chicago*, 101 Ill. App.3d 514, 428 N.E.2d 889 (1981).

167 See *Dickinson Co., Inc. v. Iowa State Dept. of Trans.*, 300 N.W.2d 112 (1981).

168 177 F.3d 351 (5th Cir. 1999).

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6. CHARACTERIZING DELAY DAMAGES

A contractor's delay damages, usually defined as time-related costs, not only include extended general conditions, escalation of labor and material, extended equipment costs, and home office overhead, but also may include costs for expediting delayed deliveries, additional maintenance costs for equipment that have been on the project for a duration that was longer than planned, and cold-weather costs if the work is delayed into winter conditions. Whether such clauses preclude certain costs as delay and lost productivity claims is disputed.[169]

A delay may affect a project in any number of different, if not unique, ways. Consequently, the costs of delay vary widely from case to case. Although delay costs may be quite diverse, they are distinguishable from other costs. Courts have recognized a distinction between additional costs due to changes and variations and costs of delay.[170] This is an important distinction because many contracts may attempt to prohibit the recovery of delay damages in a no damages for delay clause. Attempts to characterize costs of delay as extra work or change order costs to escape the restrictions of a no damages for delay clause may fail if a mischaracterization is discovered and presented to the court. In *Bates & Rogers Construction Corp. v. North Shore Sanitary District*,[171] the contractor claimed $672,550 for itself and $487,000 for its subcontractors for cost overruns in the form of excessive labor costs, supervision, winter protection of the work, and other increased costs, all of which were alleged to be "exclusive of delay damages, none of which are sought hereunder."[172] Despite the contractor's characterization, the court concluded that the no damages for delay clause excluded the claimed damages.

Similarly, courts may not permit recovery of "delay damages" when the no damages for delay clause uses "compensation" to define the damages prohibited. In *Christiansen Brothers v. State*,[173] Christiansen, the general contractor, sued the state of Washington to recover damages arising out of delays in construction of two buildings at Washington State University. Christiansen's contract was for $3,869,800. Although the contract called for a completion date by May 6, 1973, substantial completion occurred on November 18, 1973, and final completion on March 15, 1974.

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169 See *James Constr. Grp., LLC v. Westlake Chem. Corp.*, 2019 Tex. App. LEXIS 10915 (Dec. 17, 2019), where James argued that the damages awarded were consequential and barred by the contract's consequential damages provision. One of James' arguments was that the increased foreman costs constituted "loss of productivity, loss of efficiency, or acceleration" type costs specifically foreclosed by paragraph 26 because they were consequential. In examining this argument, the court noted that the increased foremen costs were specifically referenced in the contract, and therefore they were direct damages because they were contemplated in contract provision. Also, in *Lazzaro v. Deverin*, 2019 Conn. Super. LEXIS 3311, 2019 WL 7498670 (Dec. 6, 2019), the homeowner claimed damages for lost rental income, real estate taxes, bank charges, mortgage interest, and charges because of delays to a new home built by a contractor. The court determined that the homeowner's claimed damages were consequential and denied the claim.

170 See *Osolo Sch. Bldgs. v. Thorleif Larsen & Son of Ind., Inc.*, 473 N.E.2d 643 (Ind. Ct. App. 1985).

171 92 Ill. App. 3d 90, 414 N.E.2d 1274 (1980).

172 92 Ill. App. 3d 90, 414 N.E.2d 1274, 1276 (1980).

173 90 Wash. 2d 872, 586 P.2d 840 (1978).

Architectural design errors, the time other contractors took to perform change order work, acts of Christiansen, weather, and lack of job coordination caused delay.

The general conditions of the contract, article 17, Delays and Extensions of Time, included this language: *"in no event shall any delays or extensions of time be construed as cause or justification for payment of extra compensation to the contractor."*[174] The contractor urged the court to construe the term "compensation" in article 17 to exclude damages for delay. If construed in that manner, the contractor's delay claim of $227,753 would have been recoverable.

However, the court refused the contractor's interpretation of the word "compensation." The court referred to *Black's Law Dictionary,* which defined compensation as, among other things, "payment of damages," while "damages" were defined as "compensation for the loss or injury suffered."[175] The court concluded that the terms "compensation" and "delay damages" were synonymous and held that damages for delay were included within the term "compensation" for purposes of article 17.

Delay damages must also result from delay. Attempts to characterize additional costs not resulting from delay as delay damages meet with similar resistance by the courts. In *Bruce Anderson Co.*,[176] an attempt to collect as extended general conditions for an individual who was never designated as a project supervisor and who performed work during the delay period at an hourly wage was denied.

7. STATE-BY-STATE SURVEY

Courts and legislatures in the United States have addressed the no damages for delay clause differently. Certain state legislatures have enacted statutes that render some or all no damages for delay provisions unenforceable. Certain states distinguish between public and private contracts. In general, for states in which there is no statutory prohibition view, no damages for delay clauses are not against public policy, but they should be strictly construed. Thus, courts have set forth rationales to either strictly construe these clauses or develop exceptions to their enforcement. Because states address this issue differently, a state-by-state survey is provided in Table 7-1.

[174] 586 P.2d at 842.
[175] 586 P.2d at 842.
[176] ASBCA No. 28099, 83-2 B.C.A. (CCH) ¶16,733 (1983).

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8. USE IN INTERNATIONAL CONSTRUCTION CONTRACTS

No damages for delay clauses appear to be relatively uncommon in construction projects outside of the United States. There may be uncertainty as to whether the courts will enforce such clauses, given their exclusionary nature. Information and discussion on cases involving the use of a no damages for delay clause in a limited number of international construction contracts is described below.

8.1 AUSTRALIA[177]

In a 2019 case,[178] the Federal Court of Australia confirmed that it will enforce a no damages for delay clause, including when delay occurs because of a change order/variation under a contract. The contractor claimed damages or "time-related costs" for delay or disruption that resulted from employer-caused delay or disruption as a consequence of variations under the contract.

The contractor contracted with the owner to construct an access road to a remote mine site. The project experienced delay, and the contractor's time-related costs increased beyond its planned costs. The contractor claimed for 1) payment of time-related costs it incurred for the additional work; 2) payment for variations under the contract; and 3) other consequences of the additional time taken and the additional work.

The contract included a no damages for delay clause, which stated:

> *Notwithstanding any other provision of this Contract, the Contractor will not be entitled to claim any Liabilities resulting from any delay or disruption (even if caused by an act, default or omission of the Company or the Company's Personnel (not being employed by the Contractor)) and a claim for the extension of time under Clause 18.3 will be the Contractor's sole remedy in respect of any delay or disruption and the Contractor will not be entitled to make any other claim.*

The court was to determine if this clause should be enforced when the delay occurred as a result of a variation under the contract. The owner argued that the no damages for delay clause overrode any other provision in the contract, including any inconsistent provision, and should prevent the contractor from recovering any losses resulting from delay or disruption, even if the owner caused the delay or disruption. In the event of a "Qualifying Cause of Delay," the owner argued that the contractor would only be entitled to an extension of time for Practical Completion. A variation under the contract constituted a Qualifying Cause of Delay.

The contractor submitted that the no damages for delay clause did not apply to time-related costs for variation work, nor to a claim for remuneration for work performed. It sought to characterize

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[177] See "Construction contracts: 'No damage for delay' clause enforced," Julian Bailey, Caitlin Lloyd, White & Case, August 2019.

[178] See *Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited* [2019] FCA 1049.

its claims as being for those matters, as opposed to a claim for losses, costs, or expenses resulting from delay or disruption.

The court held that the no damages for delay clause prevented the contractor from making a distinct claim for prolongation costs, including time-related costs due to a variation under the contract. In its findings, the court determined that the applicable rates in the contract for variation work included time-related costs. Therefore, by using these rates in valuing variations, the contractor would receive its time-related costs for the prolongation of its works. In addition, the court concluded that if there were no applicable rates in the contract for variation work, the valuation of the variation could include a reasonable amount for time-related costs. However, the contractor could not recover its prolongation costs because the plain wording of the no damages for delay clause precluded any such recovery.

8.2 CANADA[179]

Construction contracts in Canada frequently contain clauses that attempt to limit or exclude a party's liability if certain events occur. If an owner seeks to exclude its liability for delay that it has caused, it may do so, but the disclaimer must expressly provide that it includes the owner's own breach of contract. Canadian courts have found that language such as *"the owner shall in no circumstances be responsible to the contractor for damages resulting from the delay of the contractor's work operations"* is insufficient because it fails to expressly state the situation where the owner has breached its contractual obligations.[180]

By contrast, in *Perini Pacific Ltd. v. Greater Vancouver Sewerage & Drainage District (No. 2)*, the Supreme Court of Canada found that the more specific phrase *"whether or not such delay may have resulted from anything done or not done by the Corporation under the contract"* was an effective exclusion clause because it identified the kind of loss that precluded the claim.[181]

In 2010, the Supreme Court of Canada, in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*,[182] established a structure for the interpretation of all exclusion clauses, which is more onerous for the contractor seeking to exclude the effect of such a clause. The Tercon test considers the parties' obligations to each other,[183] and a broadly worded no damages for delay clause may not shield the owner for delay liability. The Supreme Court of

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179 See "TIME IS MONEY The Condominium Developer's Guide to Delay Claims," Construction Law Report, Irving Marks and Barbara Green, Robins Appleby & Taub, July 2007.

180 *Westcounty Construction Ltd. v. Nova Scotia* [1985] CarswellNS 124 (N.S.T.D.) *D.J. Lowe (1980) Ltd. v. Nova Scotia* (Attorney General) [1993] CarswellNS 152 Mueller, Warren H.O. "Contractual Exclusion and Limitation of Delay Claims" 47 C.L.R. (3d) 5 (2005) at 4 and 22 (note: page references are to ecarswell).

181 [1967] CarswellBC 187 (S.C.C.)

182 [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69.

183 These obligations include the prevention principle and the duty of honesty that forms part of every contract under the organizing principle of good faith, according to *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, 2014 SCC 71.

The "No Damages for Delay" Clause

Canada conclusively rejected the defense of "fundamental breach" and set out a framework for interpreting exclusion clauses:

1. As a matter of interpretation, does the exclusion clause apply to the circumstances established in evidence?
2. If so, was the exclusion clause unconscionable at the time the contract was made (for example, due unequal bargaining power) and therefore invalid?
3. If not, has the party seeking to avoid the exclusion clause established an overriding public policy entitling the Court to refuse to enforce the clause (outweighing the very strong public interest in the enforcement of contracts)?

Tercon has not overruled the test set out in *Canada Steamship Lines Ltd. v. R.*,[184] which provides that an exclusion clause cannot exclude liability for negligence, in the absence of an express reference to "negligence," unless negligence is the only cause of action that the parties could have intended to exclude. Many no damages for delay clauses contain no references to negligence (or breach of contract) and are obviously capable of encompassing other causes of action, most notably breach of contract.

In *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*,[185] the Alberta Court of Queen's Bench interpreted a contract excluding damages for "negligence … or any other theory of legal liability" as excluding a claim for gross negligence, rejecting arguments that this would be contrary to public policy. A clause excluding liability for damages arising out of termination was applied to exclude damages for wrongful termination.

There is no rule that necessarily invalidates an exclusion clause in the event of a fundamental breach or other type of breach of contract. In deciding whether to enforce an exclusion clause in the face of a fundamental breach of contract, the court will decide whether doing so would be "unconscionable" or so unreasonable that the parties could not have intended this result. "Unconscionability" usually arises in situations where there is a vast disparity of contractual bargaining power between two parties to the contract so that the imposition of the disclaimer was essentially forced upon a party (usually the contractor) with no real commercial choice but to accept the term. Where there is equality of bargaining power, the courts will usually give effect to the bargain.[186]

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184 [1952] J.C.J. No. 3, [1952] 2 D.L.R. 786 (P.C.).

185 2017 ABCA 378.

186 *Syncrude Canada Ltd. v. Hunter Engineering Co.* [1989] CarswellBC 37 (S.C.C.) W.J. Kenny, Cook Duke Cox (Edmonton-Calgary), Delay Claims at 32 (source unknown). Some other cases that have considered the effect of exclusion clauses in the context of construction delay claims are: *Alden Contracting Ltd. v. Newman Bros. Ltd.* [1997] CarswellOnt 3734 (Gen. Div.) and *Summitville Consolidated Mining Co. v. Klohn Leonoff* [1989] CarswellBC 697 (B.C.S.C.). For further reading on the topic of exclusion clauses, please see: Mueller, Warren H.O. "Contractual Exclusion and Limitation of Delay Claims," 47 C.L.R. (3d) 5 (2005).

The "No Damages for Delay" Clause

8.3 FRANCE[187]

In France, an owner can include a clause in the contract limiting or excluding its liability to the contractor. However, there are exceptions to this general principle of validity, and these clauses will not be enforceable if:

1. A party is guilty of gross negligence *(faute lourde)* or willful misconduct *(faute dolosive)*. Under French law, the defaulting party is only liable for the damages that were contemplated or were foreseeable when the parties entered into the contract, unless gross negligence or willful misconduct caused the non-performance *(Article 1231-3, Civil Code)*.
2. The limitation or exclusion clause is drafted in an overly broad manner and has the effect of rendering the contractual obligation of a given party derisory or insignificant. Article 1170 of the Civil Code provides that any contract term that deprives an obligor's essential obligation of its substance must be deemed not written.
3. A party is liable by reason of public policy *(ordre public)*. The French legal guarantee regime is one example of a matter of public policy, which cannot be contractually excluded. It includes the:
   - one-year perfect completion warranty *(garantie de parfait achèvement):* the contractor is required to remedy defects notified by the employer at the time of acceptance or within one year of taking over the works *(Article 1792-6, Civil Code);*
   - biennial warranty *(garantie de bon fonctionnement):* the contractor is liable for all defects affecting equipment that can be detached from the civil works without damaging the works or the equipment itself within two years following taking over the works *(Article 1792-3, Civil Code);* and
   - decennial warranty *(garantie décennale):* contractors are strictly liable for ten years to owners and purchasers of the works in respect of defects (including defects of the soil) that compromise the strength of the works or render them unfit for purpose *(Article 1792, Civil Code)*. Parties can limit their decennial liability when performing a public works contract (that is, a contract with the state or a local authority), and the administrative courts have ruled that a provision that reduces the warranty period from ten to five years is valid.

[187] See Frederic Gillion, Eran Chvika, Toshima Issur and Dominique Nkoyok, Pinsent Masons, Thomson Reuters Practical Law, "Construction and Projects in France: Overview." Also see Fabrice Fages and Myria Saarinen, Latham & Watkins, "Complex Commercial Litigation Law Review, 2018," Chapter XX, France.

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8.4 INDIA[188]

In India, the enforceability of the no damages for delay clauses is guided by their impact on public policy. Such clauses attempt to extinguish or waive contractor rights to damages or an equitable adjustment arising out of unreasonable delay by the owner in performing the contract; thus, such clauses are argued to be against the public policy. Section 23 of the Indian Contract Act provides that the consideration or object of an agreement is unlawful if it is opposed to public policy.

The Supreme Court has scrutinized the term "public policy" in a number of cases. In *Indian Financial Association of Seventh Day Adventists vs. M.A. Unneerikutty and Another*,[189] the Supreme Court discussed the meaning of public policy in Section 23 of the Indian Contract Act. The court cited a passage from Maxwell,[190] interpretation of the statute, which read as follows:

> *Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with or without infringing any public right or public policy. Where there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only or whether it is an Act which is intended as a matter of public policy...*

The court pointed out that the concept of public policy is not static and changes with time. A private person can waive a law made for the benefit of an individual; however, when such a law includes public policy elements, the law cannot be waived because then it becomes a matter of public policy or interest.

In the case of *Rawal Construction Company v. Union of India*,[191] the Delhi High Court stated that when the employer's breach of contract causes the delay, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of clearest possible language, deprive the contractor of his right to damages for the breach.[192] A provision that is used as an attempt to deprive the contractor of the right to claim damages will be strictly construed against the employer.[193]

The Supreme Court, in the case of *Ramnath International Construction (P) Ltd. vs Union Of India*,[194] also held no damage clause to be valid; however, the clause imposed a clear bar on any

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188 See Virtika Singhania, "No Damage for Delay Clause in Arbitration Contract," Legal Service India E-Journal.
189 (2006) 6 SCC 351.
190 I.N. Duncan Wallace. *Hudson's Building and Engineering Contracts*, 11th ed, pp. 1098–9, London: Sweet & Maxwell.
191 1981 SCC OnLine Del 315: ILR (1982) 1 Del 44.
192 Hudson & Alfred Arthur, *Hudson's Building and Engineering Contracts* (9th Edn., Sweet & Maxwell, London, 1965) p. 492.
193 *Id*., p. 493.
194 (2007) 2 SCC 453.

claim for compensation of delays in which extension had been sought and obtained. Thus, it can be argued that the party had the option of not agreeing to the extension and suing for damage after ending the contract. The arbitrator proceeded to award damages on ground of delay on the reasoning that the contractor is entitled to compensation unless the employer establishes that the contractor has consented to accept the extension of time alone in satisfaction of his claim for delay.

The Supreme Court, in one of its judgments in *Asian Techs Ltd. v. Union of India*,[195] held that the exclusionary clause prohibits the department from entering any claim for damages but does not prohibit the arbitrator from entering it. After going to the factual analysis, the court concluded that the department was solely responsible for the delay in contract execution; therefore, the department cannot absolve its responsibility by taking advantage of no liability clause. The Supreme Court relied on the judgment of the court's earlier decision in *Port of Calcutta v. Engineers-De-Space-Age.*[196] The Supreme Court also supported this view in *Bharat Drilling & Foundation Treatment (P) Ltd. v. State of Jharkhand*.[197]

In the case of *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd*,[198] the court pointed out that an agreement under no circumstance can violate public policy. In *Simplex Concrete piles (India) Ltd. vs. Union of India*,[199] the Delhi High Court pointed out that Sections 73 and 55 of the Contract Act deal with effect of breach of contract in case of delay. The court held that both sections form the heart and foundation of the Contract Act. The court was of the view that the contract clauses that disentitled parties from the benefit of Sections 73 and 55 would violate Section 23 of the Contracts Act. Thus, it was held that the no damage for delay clauses were against public policy. The Delhi High Court, in *Public Works Department vs M/S Navayuga Engineering Co Ltd*[200] (*PWD* case), distinguished the *Simplex* case. The court pointed out that in *Simplex*, the contractor had no option to sue for damages in case of a breach; however, in the *PWD* case, once the contractual period was over, the petitioner could have opted not to agree to the extension of the time period and thus could have sued for damages.

195 (2009) 10 SCC 354.
196 (1996) 1 SCC 516.
197 (2009) 16 SCC 705.
198 (2006) 11 SCC 245.
199 (2010) 115 DRJ 616.
200 2014 SCC OnLine Del 1343.

Table 7-1: State-by-State Enforcement of the No Damages for Delay Clause

Derived with permission from the Wolters Kluwer website, VitalLaw.com, and its online publication *State-by-State Guide to Design and Construction Contracts and Claims*, Third Edition, by Michael David Dodd and J. Duncan Findlay, December 2021, CCH Incorporated 2022.

State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Alabama	Enforceable with four exceptions.	None	The Supreme Court of Alabama upheld the enforcement of a no damages for delay clause in *RaCON, Inc. v. Tuscaloosa County*.[201] An exception for uncontemplated delays was not available because the parties explicitly considered the delay at issue in the contract.	(1) delays not contemplated by the parties under the provision, (2) delays amounting to an abandonment of the contract, (3) delays caused by bad faith, and (4) delays amounting to active interference.
Alaska	No statutes or case law.	None	No case law.	No case law.
Arizona	Most public contracts must include a provision requiring negotiation for the recovery of owner-caused delay damages where the delay is unreasonable and outside the parties' contemplation. The only reported Arizona case addressing the enforceability of a no damages for delay clause in private contracts held that the clause would not preclude damages for lost profits allegedly resulting from a delay where the party seeking the benefit of the clause had performed in bad faith.[202]	In 1987, the Arizona legislature enacted A.R.S. Section 41-2617 requiring construction contracts with state governmental units to include a provision requiring "negotiations" for the recovery of damages in favor of the contractor where the delay is unreasonable and "not within the contemplation of the parties." Section 41-2617 provides in relevant part: *A contract for the procurement of construction shall include a provision which provides for negotiations between the state governmental unit and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the state governmental unit is responsible, which is unreasonable under the circumstances and which was not within the contemplation of the parties to the contract. This section shall not be construed to void any provision in the contract which requires notice of delays, provides for arbitration or other procedure for settlement or provides for liquidated damages.* Other Arizona statutes relating to public construction contracts use nearly identical language.[203] However, there are no Arizona cases applying these statutes in making or denying an award of delay damages.	In *Airfreight Express Ltd. v. Evergreen Air Center, Inc.*, the contract at issue was not a construction contract, but was an aircraft maintenance contract containing a no damages for delay clause.[204] Although *Airfreight Express* did not involve a construction contract, the Court of Appeals' analysis of the no damages for delay clause is significant. The maintenance company allegedly delayed repairing certain aircraft of the plaintiff cargo company as part of a scheme to enter the air cargo market and "steal … business" away from the plaintiff.[205] The Court of Appeals held that the no damages for delay clause would not exclude delay damages where the delaying party acted in bad faith.[206] The court recognized that several other jurisdictions had adopted a rule that limitation of liability clauses are not enforceable where the party seeking their benefit has acted in bad faith.[207] The court also emphasized that its holding was in harmony with general contract principles, specifically the Restatement (Second) of Contracts, which "prohibits contracts exempting parties from intentional or reckless tort liability," and Arizona contract law, which requires parties to a contract to act in good faith.[208] The court further supported its holding with the policy consideration that "a party should not benefit from a bargain it performed in bad faith."[209] The Airfreight Express case thus indicates that Arizona courts may	Regarding public construction contracts, Arizona statutes appear to codify an exception where the delay is "unreasonable under the circumstances and … not within the contemplation of the parties to the contract." Although the statutory language seems to require only "negotiation" of damages in such a case, based on *Airfreight Express*, Arizona courts are likely to invalidate a no damages for delay clause in a public construction contract where the contractee's delay was unreasonable or unanticipated. Although *Airfreight Express* does not address construction contracts, the court's analysis of general Arizona principles of contract law would apply equally to construction contracts and would indicate that Arizona will carve out an exception for delay damages resulting from bad faith conduct of the other contracting party.

201 953 So. 2d 321 (Ala. 2006).
202 *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 158 P.3d 232 (Ariz. Ct. App. 2007) (reversing trial court summary judgment enforcing no damages for delay clause to bar damages claim and holding that a jury issue was presented on whether party had acted in bad faith).
203 See A.R.S. § 15-213(D) (construction contracts involving public school districts); A.R.S. § 34-221(F) (construction contracts with county, city, and town entities); A.R.S. § 34-607(E) (public construction service contracts).
204 Id. at 110.
205 *Id.* at 111.
206 *Id.* at 110–13.
207 *Id.*
208 *Id.* at 111.
209 *Id.*

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			enforce no damages for delay clauses, but subject to an exception for bad faith.[210]	
Arkansas	The Eighth Circuit Court of Appeals, applying Arkansas law, held that "clear and unambiguous" no damages for delay waivers are generally enforceable, although they are not enforceable against the contractor when the delay is caused by the "active interference" of the contractee.[211]	None	In *U.S. Steel Corp. v. Missouri Pacific Railroad Co.*, the Court held that "clear and unambiguous" no damages for delay clauses are valid and enforceable as long as the party attempting to use the clause to shield itself from liability did not actively interfere with the contractor.	The *U.S. Steel* court recognized that a no damages for delay provision is normally enforceable unless the delay is one "(1) not contemplated by the parties under the [no damages for delay] provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference."
California	No damages for delay clauses are valid in California[212] but limited by well-recognized exceptions.[213]	California Public Contract Code § 7102 codifies certain exceptions to no damages for delay clauses for construction contracts and subcontracts involving public agencies. Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee's liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor. No public agency may require the waiver, alteration, or limitation of the applicability of this section. Any such waiver, alteration, or limitation is void. This section shall not be construed to void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages.	California enforces no damages for delay clauses, but only to the extent the parties contemplated the type of delay and intended the clause to foreclose the damages suffered.[214] Because a no damages for delay clause results in the forfeiture of one party's damages (usually the contractor's), and because forfeiture is not favored, California courts construe such clauses against the party for whose benefit the clause was intended (usually the owner/contractee). In this sense, California construes no damages for delay clauses "strictly."[215] The few recently reported California cases directly addressing no damages for delay clauses (including unpublished decisions) indicate that no damages for delay clauses remain valid but subject to recognized exceptions.[216] In most cases, California courts have found that the application of the clause to particular categories of damages or types of delay raises issues of fact that cannot be resolved as a matter of law.[217]	Consistent with Section 7102 for public agency contracts, California courts have refused to enforce no damages for delay clauses to bar delay damages where the delay was outside the contemplation of the parties at the time the contract was entered.[218] For example, in *Hawley v. Orange County Flood Control District*, the court held that a no damages for delay clause did not, as a matter of law, bar the contractor from recovering delay damages where the contractee changed specifications and at times refused to allow work to progress.[219] Similarly, in *McGuire & Hester v. City & County of San Francisco*,[220] the court found that the City contractee was liable for the contractor's delay damages despite the no damages for delay clause, where the City's own unreasonably long delays in fulfilling other obligations under the contract caused the contractor's delay.

210 See also 4.2 *Richard A. Friedlander et al.*, Arizona Construction Law Practice Manual § 4.2.1.3.10(2), at 4.2-13-14 (Robert O. Dyer & David C. Tierney eds., 2003) (discussion providing that no damages for delay clauses are generally enforceable with exceptions).

211 See *U.S. Steel Corp. v. Missouri Pacific Railroad Co.*, 668 F.2d 435, 438 (8th Cir. 1982) (noting that non-performance by a third party is not an exception to the waiver of damages created by a valid no damages for delay clause). See also *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 311, 902 S.W.2d 760 (1995) ("Courts give only a restrained approval to 'no damage' clauses because of their harsh effect. While such clauses are not void as against public policy and will be enforced so long as the basic requirements for a valid contract are met, the courts accord such clauses a strict construction.").

212 See *Frank T. Hickey, Inc. v. L.A. Jewish Cmty. Council*, 128 Cal. App. 2d 676, 685–86, 276 P.2d 52 (1954).

213 See *Hawley v. Orange Cnty. Flood Control Dist*., 211 Cal. App. 2d 708, 27 Cal. Rptr. 478 (1963) (collecting cases).

214 *Hawley*, 211 Cal. App. 2d at 717.

215 *Id*. at 713 (citing *Milovich v. City of L.A.*, 42 Cal. App. 2d 364, 108 P.2d 960 (1941)); see also California Civil Code Sections 1442 ("A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created") and California Civil Code Section 3275 (providing conditions under which forfeitures may be relieved).

216 See *Superior Gunite v. Mitzel*, 117 Cal. App. 4th 301, 12 Cal. Rptr. 3d 423 (2004) (applying a no damages for delay clause where the validity of the clause was not at issue).

217 See, *e.g*., *Hawley*, 211 Cal. App. 2d at 717 ("The question of whether or not the delay damage clause was intended by the parties to prevent recovery under the peculiar circumstances here involved resolves itself into a factual question…").

218 See *Hawley*, 211 Cal. App. 2d at 713–17 (collecting cases).

219 *Id*. at 717.

220 113 Cal. App. 2d 186, 188–90, 247 P.2d 934 (1952).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Colorado	The Colorado Court of Appeals has held that "no damages for delay" clauses are valid and enforceable in Colorado so long as they are strictly construed against the owner or contractee; however, the clause is not enforceable against the contractor when the delay is caused by the "active interference" of the owner or contractee. Furthermore, Colorado statutes have made most no damages for delay clauses unenforceable in public works contracts.	In 1989, the Colorado legislature enacted § 24-91-103.5 of the Colorado Revised Statutes (CRS) to nullify no damages for delay clauses in public construction contracts. CRS § 24-91-103.5(1)(a) states: *Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.* Subsection (2) of the statute adds that: *Subsection (1) of this section is not intended to render void any contract provision of a public works contract that:* *(a) Precludes a contractor from recovering that portion of delay costs caused by the acts or omissions of the contractor or its agents;* *(b) Requires notice of any delay by the party responsible for such delay;* *(c) Provides for reasonable liquidated damages;* *(d) Provides for arbitration or any other procedure designed to settle contract disputes.* CRS § 24-91-103.5 thus applies only to "public works contract" provisions that "waive, release, or extinguish" a contractor's right to damages for a delay caused "in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof."	In the first known state court decision in Colorado addressing a no damages for delay clause, the Colorado Court of Appeals held that "'no damages for delay' clauses are valid and enforceable in Colorado, but they are to be strictly construed against the owner or contractee."[221] In *Tricon Kent v. Lafarge North America, Inc.*, a general contractor for a highway construction project subcontracted with Tricon Kent to perform earthwork. The subcontract contained a common no damages for delay clause. Tricon's suit for breach of express and implied covenants alleged that Lafarge failed to properly schedule and sequence the project, which led to "significant obstacles and costly delays" that amounted to interference with Tricon's performance of the subcontract. The court found that Lafarge's failure to properly schedule and coordinate Tricon's activities constituted "active interference" with Tricon's performance. The court recognized "active interference" as an exception to the enforceability of no damages for delay clauses and held that Tricon need not show that Lafarge acted in bad faith in order to benefit from the "active interference" exception.	CRS § 24-91-110 provides that the statute: *shall not apply in the case of a contract made or awarded by any public entity if a part of the contract price is to be paid with funds from the federal government or from some other source and if the federal government or such other source has requirements concerning retention or payment of funds which are applicable to the contract and which are inconsistent with this article.* No case law interprets this provision of this statute, which is applicable to certain public contracts. The *Tricon Kent* court recognized that no damages for delay provisions are enforceable under Colorado law, but observed that an owner's active interference with a contractor is a recognized exception to the enforcement of such clauses.[222]
Connecticut	No damages for delay provisions generally are valid and enforceable, absent four specific circumstances that render enforcement unconscionable or inequitable.	None	Although no damages for delay provisions generally are enforceable, Connecticut courts will look to the facts of the case prior to barring a contractor's claim for delay damages. In *White Oak Corp. v. Department of Transportation*,[223] the contractor sought delay damages from a public agency for a six-month delay to the project caused by the gas company's failure to timely relocate gas lines. The *White Oak* court concluded that the public agency's failure to effectuate timely relocation of gas lines was neither a breach of its contractual duties nor grossly negligent; thus, delay did	There are four limited circumstances where delay damages may be recovered even when the parties' contract contains a no damages for delay clause: (1) the delays are caused by the owner's bad faith or its willful, malicious, or grossly negligent conduct; (2) the delays are not reasonably foreseeable; (3) the delays are so unreasonable that they constitute an intentional abandonment of the contract by the owner; and (4) the delays result from the owner's breach of a fundamental obligation of the contract.[224]

[221] *Tricon Kent Co. v. Lafarge N. Am., Inc. et al.*, 186 P.3d 155, 159 (Colo. App. 2008).
[222] *Id.* at 160–161.
[223] 217 Conn. 281,585 A.2d 1199 (1991).
[224] *Id.* (citing *Corinno*, 493 N.E.2d at 915).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			not come within the specific exceptions to enforceability of the no damages for delay clause of the contract. Accordingly, the court enforced the provision, thereby barring the contractor's claim for delay damages.	
Delaware	No damages for delay provisions generally are valid and enforceable, although there are certain exceptions to the general rule.	None	No damages for delay provisions are generally enforceable in Delaware, subject to certain exceptions. In *Anthony P. Miller, Inc. v. Wilmington Housing Authority*,[225] a contractor sought to recover delay damages from a public agency when the agency's separate contractor went on strike, which delayed the project beyond the plaintiff contractor's control. The parties' contract contained a no damages for delay clause, which the court enforced, thereby barring the contractor's breach of contract claim for delay damages. In doing so, however, the court acknowledged that there are certain exceptions to enforcement of such provisions, which were not present in that case. In *F.D. Rich Co. v. Wilmington Housing Authority*,[226] a contractor sought to recover delay damages from a public agency when bad soil conditions delayed the project. The court rejected the contractor's argument that this delay was not reasonably foreseeable and, as such, the no damages for delay clause barred the contractor's claim for delay damages.	Certain exceptions to the general rule of enforcement are recognized in Delaware. No damages for delay provisions may not be enforced where the delay was of a kind that the parties did not contemplate, where the delay amounted to an abandonment of the contract, or where the delay was caused by bad faith.[227] Such clauses may also not be enforced if the delay was not reasonably foreseeable.[228]
District of Columbia	No damages for delay clauses are generally enforceable, subject to certain exceptions that render enforcement of such clauses inequitable.	None	Courts generally enforce no damages for delay provisions but have recognized certain exceptions to the rule. In *Blake Construction Co. v. C.J. Coakley Co.*,[229] a court considered the enforceability of a no damages for delay provision in a construction subcontract. The subcontractor sought delay damages from the contractor, arguing that the contractor's improper sequencing of the work amounted to intentional interference with the subcontract, which rendered the no damages for delay provision unenforceable. The court agreed, quoting a Texas case, which states that the clause "'did not give [the contractor] a license to cause delays "willfully" by "unreasoning action," "without due consideration," and in "disregard of the rights of the other parties," nor did the provision grant [the contractor] immunity from damages if delays were caused by (it) under such circumstances.'"[230] The court concluded that the contractor's failure	Courts generally enforce such provisions unless the delay is one "(1) not contemplated by the parties under the [applicable no damages for delay] provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference."[232]

225 165 F. Supp. 275 (D. Del. 1958) (applying Delaware law).
226 392 F.2d 841 (3d Cir. 1968) (applying Delaware law).
227 *Miller*, 165 F. Supp. at 281.
228 *F.D. Rich Co*., 392 F.2d. at 843 (finding that bad soil conditions should have been reasonably foreseeable and enforcing no damages for delay provision).
229 431 A.2d 569 (D.C. 1981).
230 *Id.* at 578.
232 *Id*. at 578–79 (quoting *E.C. Ernst, Inc. v. Manhattan Constr. Co*., 551 F.2d 1026, 1029 (5th Cir. 1977)).

Table 7-1: State-by-State Enforcement of the No Damages for Delay Clause

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			"to take effective steps to prevent further installation of piers, ducts, and electrical conduits contrary to the subcontract's terms" constituted active interference, thereby precluding enforcement of the no damages for delay provision.[231]	
Florida	Florida courts enforce no damages for delay clauses, except in the case of fraud, bad faith, or active interference by the owner.	None	Clauses providing for no damages for delay are legal and enforceable in Florida, except in case of fraud, bad faith, or active interference.[233] A strict construction of a no damages for delay clause was applied in *United States ex rel. Pertun Construction Co. v. Harvesters Group, Inc.*[234] The court found that there was a "condition precedent" to the application of the no damages for delay clause. The clause read as follows: "Subcontractor agrees that such extension of time for completing the work precludes, satisfies and cancels any and all other claims on account of such delay." During the project, the subcontractor was terminated, and no extension of the contract time was made. The court strictly construed the clause and found that an extension of time was a condition precedent to the waiver of the damages remedy. Since there was no time extension, the condition precedent to the waiver of damages had not occurred.	Damages may be awarded for delay, despite the no damages for delay clause, upon a "knowing delay" that is sufficiently egregious[235] or upon the willful concealment of foreseeable events that impact timely performance.[236] These exceptions to the no damages for delay clause are generally predicated upon an implied promise and obligation not to hinder or impede performance.[237] In *Newberry Square Development Corp. v. Southern Landmark, Inc.*,[238] there was evidence that the owner delayed the contractor in providing approved plans and specifications and updating plans and specifications to incorporate desired changes. There was also evidence that the owner delayed executing change orders and required that construction not proceed without such orders. The owner further repeatedly failed to make timely payments as the contract required. This conduct was established not only for the project at issue, but also for two other construction projects involving the parties. Further, the contractor's president testified that the owner's representative had threatened "that he would break me before he'd pay." The no damages for delay clause was not enforced. Florida law also recognizes fraud, bad faith, and active interference by the owner as exceptions to the enforcement of no damages for delay clauses.[239] *Triple R. Paving* helps to measure the scope of the willful concealment exception. A road contractor sought damages for inefficiency due to extended performance. The willful concealment prong was satisfied for one delay event where the owner's architect was aware of a design flaw but subsequently failed to advise the contractor of the flaw even while the architect undertook to review the design's compliance with an industry standard during a value engineering redesign process. Although the court recognized that the conduct was not as "egregious" as the

231 *Id.* at 579.
233 See generally *Triple R Paving, Inc. v. Broward Cnty.*, 774 So. 2d 50, 54 (Fla. Dist. Ct. App. 2000) (citing cases).
234 918 F.2d 915 (11th Cir. 1990).
235 See *S. Gulf Utils. Inc., v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458, 459 (Fla. Dist. Ct. App. 1970).
236 *McIntire v. Green-Tree Cmtys., Inc.*, 318 So. 2d 197 (Fla. Dist. Ct. App. 1975).
237 *United States ex rel. Seminole Sheet Metal Co. v. SCI, Inc.*, 828 F.2d 671, 675 (11th Cir. 1987).
238 578 So. 2d 750, 752 (Fla. Dist. Ct. App. 1991), cause dismissed, 584 So. 2d 999 (Fla. 1991).
239 *Triple R. Paving*, 774 So. 2d at 54. See also *Marriott Corp. v. Dasta Constr. Co.*, 26 F.3d 1057, 1067–68 (11th Cir. 1994) (citing *Seminole*, 828 F.2d at 675); *S. Gulf*, 238 So. 2d at 459 (no damages for delay clause ineffective where delay is knowingly and sufficiently egregious); *McIntire*, 318 So. 2d at 199–200 (clause ineffective where "circumstances which caused the delay were brought about by [owner] and were even foreseen but concealed by [owner] when the contract was made").

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
				conduct of the contractor in *Newberry*, the failure to advise Triple R. of the flaw was a failure to cooperate and an example of bad faith. Note that the enforceability of the no damages for delay clause in *Triple R. Paving* is addressed separately for the contractor's discrete delay claims. Although vitiated due to the willful concealment of one design flaw, the clause was enforced to preclude damages for separate delays involving the owner's relocation of utility lines and a design flaw in the relocation of a pond. Florida law also recognizes that no damages for delay provisions can be narrow and only provide protection to an owner and not its architectural firm.[240]
Georgia	Georgia courts have held that no damages for delay clauses are valid and enforceable for the delays that they address.	None	No damages for delay clauses are valid and enforceable for the delays that they address.[241] Georgia courts, however, have noted that any ambiguity must be construed against the drafter because these clauses act as exculpatory clauses.[242] Also, as exculpatory clauses, no damages for delay clauses must be specific in what they purport to cover, including exceptions to the provision.[243] The Georgia Court of Appeals has strictly construed such clauses, including exceptions in those clauses.[244] A subcontractor's claim for money damages for delay was barred where there was a no damages for delay clause in the prime contract between the contractor and owner and a flow-down clause in the subcontractor agreement, despite the fact that the subcontract itself did not contain a no damages for delay clause.[245] Even if the subcontract contains a flow-down clause, however, a no damages for delay provision may not be enforceable if it conflicts with other clauses in the subcontract.[246]	Georgia has not articulated discrete exceptions to the enforcement of no damages for delay clauses. However, exculpatory clauses in construction contracts under Georgia law must be "clear and unambiguous, they must be specific in what they purport to cover, and any ambiguity will be construed against the drafter," and such clauses "will not be applied to delays or their causes not contemplated by the parties."[247]

240 *Perez-Gurri Corp. v. McLeod*, 238 So. 3d 347 (Fla. Dist. Ct. App. 2017).

241 *Dep't of Transp. v. Fru-Con Constr. Corp.*, 206 Ga. App. 821, 823, 426 S.E.2d 905 (1992) (enforcing clause relieving DOT of liability for contractor's delay damages caused by other contractors on project); see also *APAC-Ga., Inc. v. Dep't of Transp.*, 221 Ga. App. 604, 472 S.E.2d 97 (1996) (enforcing no damages for delay provision where delay not caused by violation of any express contractual duty).

242 *Atlanta Econ. Dev. Corp. v. Ruby-Collins, Inc.*, 206 Ga. App. 434, 436, 425 S.E.2d 673 (1992) (affirming denial of partial summary judgment based on ambiguity of parties' intent to incorporate no damages for delay clause).

243 *Ragan Enters., Inc. v. L & B Constr. Co.*, 228 Ga. App. 852, 492 S.E.2d 671 (1997).

244 *Id.* (barring claim where contract prohibited delay damages except those due *solely* to fraud or bad faith and evidence did not support finding that willful and wanton acts, malicious intent, or interest or sinister motive was *sole* cause of delay).

245 *Id.*

246 *Atlantic Coast Mech. v. R.W. Allen Beers Constr.*, 264 Ga. App. 680, 592 S.E.2d 115 (2003) (holding that no damages for delay provision did not flow down and was unenforceable against subcontractor where subcontract contained inconsistent provisions allowing the subcontractor to recover for delays).

247 See *Dep't of Transp. v. APAC-Ga., Inc.*, 217 Ga. App. 103, 106, 456 S.E.2d 668 (1995) (quoting *Dep't of Transp. v. Arapaho Constr., Inc.*, 180 Ga. App. 341, 349 S.E.2d 196 (1986), aff'd, 257 Ga. 269, 357 S.E.2d 593 (1987), and quoting 357 S.E.2d at 594).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Hawaii	There is no case law on no damages for delay clauses appearing in construction contracts in Hawaii. However, an exclusion in a performance bond on a surety's liability for the owner's delay damages has been upheld.	None	A provision in a performance bond excluding the surety's liability for the owner's delay damages was upheld in *Mayer v. Alexander & Baldwin, Inc*.[248] In *Mayer*, the court noted that a surety's liability on its bond was limited to the terms of its contract and not subject to the strict construction of exculpatory clauses that might affect other contracts.	No case law.
Idaho	No damages for delay provisions are generally enforceable but will be strictly construed to limit the harshness of their application.	None	Under Idaho law, a party to a contract may absolve itself from certain duties and liabilities.[249] However, courts look with disfavor on attempts to avoid liability through no damages for delay clauses and strictly construe such provisions against the person relying upon them, especially when that person drafted the document.[250] In *Grant Construction Co. v. Burns*,[251] the court decided the construction and validity of a no damages for delay clause in a state highway construction contract. The particular provision under consideration attempted to strictly limit the delay damages that the contractor could collect in the event a utility failed to relocate its facilities in advance of construction. The court strictly construed the contract against the state highway department that had drafted it and held that the limitation on delay damages only applied where the utility had failed to take timely action to remove its facilities to permit the construction. The court held the provision did not apply where the state highway department had failed to notify the utility to move its facilities. In a subsequent case, *Idaho State University v. Mitchell*,[252] the court noted that, in the absence of any ambiguity, a contract clause that limited the recovery of damages would be enforceable. The Idaho State University Minidome had been flooded because of a break in a main water supply pipe installed by the defendant construction company. The trial court granted summary judgment to the University based on a warranty clause contained in the construction contract. However, the Idaho Supreme Court reversed, holding that under the warranty clause the damages claim was limited to repair of the defective work and could not include the consequential damages to the artificial turf resulting from the flooding. The artificial turf had not been part of the contracted work under the construction contract.	Courts will narrowly construe no damages for delay clauses and refuse to enforce them if they are ambiguous, are unconscionable, or violate public policy.

[248] 56 Haw. 195, 532 P.2d 1007 (1975).
[249] *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 178, 595 P.2d 709 (1979).
[250] *Id.*
[251] 92 Idaho 408, 443 P.2d 1005 (1968).
[252] 97 Idaho 724, 552 P.2d 776 (1976).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			Initially we note the rule to be that if parties to a contract have provided the measure of damages to be recoverable for breach of the duties imposed by the contract, they are bound by such provision and liability thereunder is restricted to the terms of the contract. Barring questions of unconscionability or public policy, such provisions are upheld even where the effect is to limit a party's common law liability for breach of contract.[253] Thus, no damages for delay clauses are viable in Idaho, but their application is quite restricted.	
Illinois	Under Illinois law, no damages for delay clauses are enforceable but are construed strictly against those who seek their benefit.	None	No damages for delay clauses are enforceable but are strictly construed against those who seek their benefit. *Bates & Rogers Construction Corp. v. Greeley & Hansen*[254] illustrates the Illinois Supreme Court's rather strict stance on the enforceability of no damages for delay clauses. The court rejected the contractor's attempt to avoid the no damages for delay clause by characterizing the damages sustained from the defendants' "negligence" as not constituting "delay damages": *Plaintiffs' own characterization of the damages incurred as the result of delays compels the conclusion that such damages are covered by the no damages for delay clause. [Plaintiffs] agreed to the exculpatory clause, and undoubtedly the price bid for the project reflected the possibility that delays could occur. We therefore hold [plaintiffs] to the plain words of the bargain it made.* The court noted that the case involved no argument for the application of any exception but that its holding was not inconsistent with decisions in other jurisdictions, one of which recognized an exception for bad faith or gross negligence. Illinois appellate courts, however, have recognized several exceptions that avoid the harshness of such clauses.[255] In *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*,[256] the Illinois Supreme	The Illinois Supreme Court specifically recognized two exceptions to the general rule that no damages for delay clauses are enforceable: (1) where there is "bad faith, fraud, concealment, or misrepresentation on the part of the party asserting the clause's operation"[257] and (2) delays that were beyond the parties' contemplation.[258] "Reasonable foreseeability is the touchstone of the exception… Only unforeseeable delays and obstructions or those not naturally arising from performance of the work itself or the subject of the contract come within the exception."[259] Importantly, although the *J & B Steel* court acknowledged that previous Illinois appellate court decisions had also carved out exceptions for "delay of 'unreasonable duration' and delay attributable to 'inexcusable ignorance or incompetence of engineer,'" it specifically declined to address whether a party can recover for those types of delays in the face of a no damages for delay clause.[260] Thus, there is some question whether Illinois courts will enforce a no damages for delay clause where the delay was of unreasonable duration or attributable to engineer incompetence. In *Mellon Stuart Construction, Inc. v. Metropolitan Water Reclamation District of Greater Chicago*,[261] a federal court applying Illinois law considered whether the exceptions to no damages for delay clauses apply to clauses that permit a limited recovery of delay damages as opposed to none. Noting that the Illinois Supreme Court

253 Id. at 727.
254 109 Ill. 2d 225, 229–30, 486 N.E.2d 902 (1985).
255 See, *e.g.*, *John Burns Constr. Co. v. City of Chicago*, 234 Ill. App. 3d 1027, 1033, 601 N.E.2d 1024 (1992) (stating that exceptions exist for delay caused by "bad faith," delay "not within contemplation of parties," delay of "unreasonable duration," and delay "attributable to inexcusable ignorance or incompetence of engineer") (citing sum total of appellate decisions to date on issue).
256 162 Ill. 2d 265, 276, 642 N.E.2d 1215 (1994).
257 *Id*. at 278.
258 *Id.*
259 *Id*. at 278–79.
260 *Id*. at 277 (quoting *John Burns Constr.*, 234 Ill. App. 3d at 1033).
261 1995 WL 239371 (N. D. Ill. Apr. 21, 1995).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			Court finally addressed the scope of certain of these exceptions and determined those that should be operative in Illinois. In *J & B Steel*, a subcontractor brought suit against a contractor alleging that it was precluded from completing its work on time because of the contractor's failure to properly supervise and coordinate the construction. The court held that despite the presence of a no damages for delay clause in the contract, the contractor's motion to dismiss should not have been granted because the subcontractor's allegations of the contractor's improper supervision and coordination of the project were sufficient to state a claim under the "bad faith, fraud, concealment, or misrepresentation" exception to the general rule that no damages for delay clauses are enforceable. The court explained that: *[a]lthough bad faith or other wrongful conduct covered by the exception is not specifically alleged, it may be inferred from the allegations of [contractor's] conduct. Not only is it alleged that [contractor] intended its schedule change to preclude [subcontractor] from timely completing its performance, but [contractor] denied [subcontractor] the means necessary to obtain fair compensation for the attendant costs. We conclude … that [subcontractor's] allegations are sufficient to withstand [contractor's] motion [to dismiss].*	had not yet addressed the issue, the court concluded that they should apply on a case-by-case basis. The court stated: *[a]mong the factors the court should consider in making this determination include the extent of damages recoverable under the restrictive provision (i.e., the more limited the damages, the greater the likelihood that the exceptions will apply), the harshness of the result, who determines the amount of the recoverable damages, and whether the reason for the cause of the delay falls within the parameters of an exception.*
Indiana	Indiana courts recognize exculpatory clauses in contracts and presume that the contracts represent the freely bargained agreement of the parties.	Construction contracts that the Indiana Department of Transportation and a contractor enter into after June 30, 2005, are governed by IN ST 8-23-9-58(b), which states in part: *The department [of transportation] may not include in a contract, or in any specifications or other documents that are a part of or incorporated in a contract, a provision that prohibits a contractor from receiving, or restricts the contractor in receiving, reasonable compensation or reasonable expenses directly related to unforeseen conditions encountered during the construction project as a result of:* *a conflict with the facilities of a utility (as defined in IC 8-1-9-2(a)); or* *(1) delays due to the relocation of utility facilities; that differ materially from the affected utilities or utility relocations specified in the contract documents.*	In *Indiana Department of Transportation v. Shelly & Sands, Inc.*,[262] a contractor filed suit after utility relocation delays on a construction project caused the project to run 165 days past the original completion date, creating over a million dollars in extra costs for the contractor and its subcontractors. The appellate court overturned the trial court's denial of the defendant's summary judgment motion and held that the no damages for delay clause barred the plaintiff's recovery. The court enforced the no damages clause after determining that it was not an "open-ended" exculpatory clause. The court explained that "[t]he cause of the delays was the utility relocation, and the contract precluded compensation for delays based on utility relocation. The contract identified this possibility for delay with sufficient specificity to absolve the Department of liability when this eventuality occurred." The court went on to note that the clause in question was not against public policy because it did not violate any Indiana statute. Finally, the court held that the "superior knowledge" doctrine did not negate the effectiveness of	The *Shelly & Sands* court noted generally with respect to exculpatory clauses that: *some exceptions do exist [to the enforceability of exculpatory clauses] where the parties have unequal bargaining power, the contract is unconscionable, or the transaction affects the public interest such as utilities, carriers, and other types of businesses generally thought to be suitable for regulation or which are thought of as a practical necessity for some members of the public.*[265]

[262] 756 N.E.2d 1063, 1068 (Ind. Ct. App. 2001).
[265] *Id*. at 1072.

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			the exculpatory clause because in this situation the government had not failed to provide material information to the contractor.[263] In *Shelly & Sands*, the contractor argued, among other things, that the no damages for delay clause was unenforceable because it eviscerated an Indiana statute that authorizes the Department of Transportation to order utility relocation.[264] The court disagreed "[b]ecause Indiana values the freedom to contract so highly." This decision, however, predates the implementation of IN ST 8-23-9-58, which invalidates exculpatory clauses in construction contracts with the Department of Transportation relating to compensation for certain unforeseen conditions regarding utilities or utility relocations.	
Iowa	The general rule is that no damages for delay provisions are valid but will be strictly construed.	None	According to the Iowa Supreme Court, the general rule with respect to no damages for delay clauses is that "'a "No Damage" clause in a contract is valid, but, due to the harsh results induced thereby, will be strictly construed.'"[266] In *Cunningham Bros., Inc. v. City of Waterloo*, the contractor sought to recover for additional expenses incurred due to the owner's delay in providing access to the construction site. In ruling on the enforceability of the no damages for delay clause, the Iowa Supreme Court stated that such clauses are generally recognized as valid but must be strictly construed to avoid harsh results.[267] The court further stated, "[h]owever, where it clearly appears that the contracting parties have so contracted, the same is recognized, allowing the chips to fall where they may." The court noted that no damages for delay clauses will "not be enforced where the delay is the result of fraud or active interference upon the part of the one who seeks the benefits thereof; or the delay is of such a duration as to justify the contractor in abandoning the contract," but concluded that the parties contemplated the failure to have the site available on the commencement date, in that the contract provided that "any delay" caused by the owner would entitle the contractor to an extension of time.[268] In *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co.*,[269] the court upheld a no damages for delay clause where a general contractor ran up hundreds of thousands of dollars of extra costs as a result of	No damages for delay clauses are not enforceable in the following situations: "where the delay (1) was of a kind not contemplated by the parties, (2) amounted to an abandonment of the contract, (3) was caused by bad faith on the part of the contracting authority, or (4) was caused by active interference by such party."[270]

263 Id. at 1072–76. See also *Stelko Elec., Inc. v. Taylor Cmty. Sch. Bldg. Corp.*, 826 N.E.2d 152, 157 (Ind. Ct. App. 2005) (rejecting plaintiff's claim that a no damages for delay clause did not preclude claims "that arise from the acceleration or compression of the time to complete the Project," where plaintiff failed to provide defendant written notice of requested time modifications as the contract required).

264 756 N.E.2d at 1073.

266 *Owen Constr. Co. v. Iowa State Dep't of Transp.*, 274 N.W.2d 304, 306 (Iowa 1979) (quoting *Cunningham Bros., Inc. v. City of Waterloo*, 254 Iowa 659, 664, 117 N.W.2d 46 (1962)).

267 254 Iowa at 664.

268 *Id.*; see also *Owen*, 274 N.W.2d at 306–07 (holding that a contract clause allowing recovery for delay caused by the contracting authority's negligence was enforceable under Cunningham because the clause was "not as restrictive as the traditional no damage clause").

269 355 F. Supp. 376 (S.D. Iowa 1973).

270 *Owen*, 274 N.W.2d at 307 (citing *Kiewit*, 355 F. Supp. 376).

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			construction delays caused primarily by the steel and engineering contractors with which the owner had separately contracted. The court construed the use of the term "active" to modify "interference" by the court in Cunningham to mean that "more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence is needed for plaintiff to prove the 'active interference' necessary to render unenforceable an otherwise clear and unambiguous 'no damage' clause." Although the court found that there was evidence of some neglect and delay on the part of the steel contractor, it enforced the no damages for delay clause because the defendants committed no "active interference."	
Kansas	Kansas courts strictly interpret no damages for delay clauses in construction contracts in favor of the contractor and against the owner when the delay at issue resulted from a contractee's breach of contract.	None	Kansas courts have strictly scrutinized no damages for delay provisions in construction contracts.[271] In *Peter Kiewit & Sons' Co. v. State Highway Commission*, the Supreme Court of Kansas strictly construed a utility-specific no damages for delay clause in favor of the contractor and against the Kansas State Highway Commission. The contract provided that the Commission was responsible for the removal of existing public utility lines on the project site. After construction began, the contractor concluded that the Commission had not moved certain water lines that had to be moved for construction to continue. As a result, the contractor had to stop work on the project. Due to this delay, the contractor sustained economic damages for which it brought suit. The Commission sought to avoid liability based on a contractual clause that provided that "no additional compensation [would] be allowed for any delays, inconveniences, or damages sustained by [the contractor] due to any interference from [temporary] utility appurtenances."[272] The court strictly interpreted the clause, holding that the clause was an enforceable waiver of damages suffered due to delay caused by relocated utility appurtenances but that the clause did not waive delay-related damages resulting from the Commission's failure to fulfill its contractual obligation to relocate utility appurtenances.	No cases describe exceptions to enforcement, but no damages for delay clauses are strictly construed.

[271] See, *e.g.*, *Peter Kiewit & Sons' Co. v. State Highway Comm'n*, 184 Kan. 737, 339 P.2d 267 (1959); see also *Law Co. v. Mohawk Constr. & Supply Co.*, 523 F. Supp. 2d 1276 (D. Kan. 2007), reversed and remanded on other grounds, 577 F.3d 1164, 10th Cir. (Kan. 2009); *Howard Mgmt. Grp. v. City of Kansas City*, 794 P.2d 1177 (Kan. Ct. App. 1990) (trial court strictly enforced the clause against the contractor, but the appellate court remanded on other grounds).

[272] 339 P.2d at 274.

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Kentucky	The Kentucky Fairness in Construction Act provides that any no damages for delay clause after June 26, 2007, is void and unenforceable unless the provision permits recovery of delay costs caused by acts or omissions of the contracting entity, requires notice of any delay by the party affected by the delay, provides for reasonable liquidated damages, provides for arbitration or any other procedure designed to resolve contract disputes, or specifies the costs recoverable for delay.	In 2007, Kentucky enacted the Kentucky Fairness in Construction Act, KRS § 371.400-425 (2007). KRS § 371.405(2)(c) and (3) state as follows: *(2) The following provisions in a contract for construction shall be against the public policy of this Commonwealth and shall be void and unenforceable:* ... *(c) A provision that purports to waive, release, or extinguish the right of a contractor or subcontractor to recover costs, additional time, or damages, or obtain an equitable adjustment of the contract, for delays in performing the contract that are, in whole or part, within the control of the contracting entity. Unusually bad weather that cannot be reasonably anticipated, fire, or other act of God shall not automatically entitle the contractor to additional compensation under this paragraph.* *(3) Subsection (2)(c) of this section shall not render null, void, and unenforceable a contract provision that:* *(a) Permits a contractor or subcontractor to recover that portion of delay costs caused by acts or omissions of the contracting entity;* *(b) Requires notice of any delay by the party affected by the delay;* *(c) Provides for reasonable liquidated damages;* *(d) Provides for arbitration or any other procedure designed to resolve contract disputes; or* *(e) Specifies which costs are recoverable by a contractor or subcontractor for delay.*	The Kentucky Supreme Court recently enforced Ky. Rev. Stat. Ann. §371.405(2)(c)'s bar voiding no damages for delay clauses but interpreted the statute to clarify that the exceptions and procedural requirements in Ky. Rev. Stat. Ann. §371.405(3) may be valid contractual limitations that are applicable to delay claims.[273] *In Louisville & Jefferson County Metropolitan Sewer District v. T+C Contracting, Inc.*, the contractor sought to recover additional expenses associated with "duplicative testing and the work required as the result of the design deficiency" despite contractual written-notice and formal-claim procedures.[274] In ruling on the contractual dispute resolution clause, the Kentucky Supreme Court recognized that Ky. Rev. Stat. Ann. §371.405(2)(c) "prohibits contractual provisions that completely foreclose a contractor's ability to [recover delay damages] within the control of the contracting entity" but that Ky. Rev. Stat. Ann. §371.405(3) "acts as an exception to (2)(c)." The court further noted that "KRS 371.405(3) tempers the broad preclusive effect of KRS 371.405(2)(c)" because Subsection (3)'s permitted limitations to recovery of delay damages include ubiquitous provisions "in the world of construction law."	KRS § 371.405(3) details the exceptions to the general rule that no damages for delay provisions are enforceable.
Louisiana	No damages for delay clauses are enforceable in Louisiana, with certain exceptions. The Louisiana Supreme Court and federal district court applying Louisiana law have recognized that no damages for delay clauses may be invalid where the party seeking to invoke them has acted in bad faith or	The Louisiana Civil Code nullifies contractual provisions that prospectively exclude or limit the liability of a party for intentional or gross fault that damages the other party.[277] This statutory provision limits the enforcement of no damages for delay clauses in private contracts.[278] Likewise, no damages for delay clauses are no longer valid and enforceable for public contracts under Louisiana Revised Statute § 38:2216(H), which provides as follows:	*Freeman v. Department of Highways* involved a contract for engineering services with the Louisiana Department of Highways. The Supreme Court of Louisiana upheld the validity of a clause precluding delay damages and allowing only time extensions for "delays beyond [the contracting engineer's] control or for those caused by tardy approvals of work in progress by various official agencies," including the Department.[279] It was conceded that the Department had failed to diligently approve work progress, which	Louisiana courts have not expressly recognized any exception to no damages for delay clauses. However, the *Pellerin* and *Freeman* cases indicate that a Louisiana court likely would find such clauses unenforceable in private contracts where there is evidence of bad faith or intentional delay. Moreover, Louisiana statutes now invalidate no damages for delay clauses in public contracts where the contracting public entity has caused the delay in whole or in part.

273 *Louisville & Jefferson Cty. Metro. Sewer Dist. v. T+C Contracting, Inc.*, 570 S.W.3d 551, 555 (Ky. 2018).
274 *Id.* at 556–57.
277 La. Civ. Code Ann. art. 2004.
278 *Pellerin Constr., Inc.*, 169 F. Supp. 2d at 584–85.
279 253 La. at 123–27.

Table 7-1: State-by-State Enforcement of the No Damages for Delay Clause

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
	with "gross fault."[275] Louisiana statutes also bar "no damages for delay" clauses in public contracts if the delay was caused in whole or in part by the contracting public entity.[276]	*Any provision contained in a public contract which purports to waive, release, or extinguish any rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable.*	resulted in delays. The Supreme Court reasoned that since the clause stopped short of vesting the contractee with the ability to frustrate the plaintiff's performance, the clause was valid. In so holding, Freeman expressly called into question an earlier Louisiana Court of Appeal decision, *Sandel & Lastrapes v. City of Shreveport*,[280] that had refused to enforce a no damages for delay clause on public policy grounds.[281] In Sandel, the contractee had intentionally caused delays, leading the Court of Appeal to reject the no damages for delay clause as contrary to public policy because it exempted "negligent acts which cause injury."[282] The Freeman court expressly rejected Sandel's reliance on this policy consideration since no authority had been cited "which supports the view that it is against public policy for contracting parties to agree that, in case one of them fails to perform a certain act timely and thus delays the other … the former will not be held responsible for any damages."[283] The Freeman court stopped short of overturning the holding in Sandel, however, because the case was factually distinguishable. In *Pellerin Construction, Inc. v. Witco Corp.*, the federal district court applied Louisiana law in addressing the validity of a no damages for delay clause that broadly precluded damages for all delay.[284] In considering the clause, the court declined to adopt an exception for "active interference" on the ground that Louisiana courts had not recognized such a rule. It noted, however, that the Louisiana Civil Code nullified contract provisions that "in advance, exclude or limit the liability of one party for intentional or gross fault that causes damage to the other party." It further observed that in Freeman, the Louisiana Supreme Court had held that such clauses were generally enforceable so long as they "could not be read as vesting the defendant with the absolute right to prevent" performance. Applying that rule, the federal court reasoned that the clause before it should be applied to bar the contractor's damage claim absent evidence of "bad faith, gross fault, or intentional fault."	
Maine	No statutes or case law.	None	No case law.	No case law.

275 *Freeman v. Dep't of Highways*, 253 La. 105, 127–30, 217 So. 2d 166 (1968) (upholding clause); *Pellerin Constr., Inc. v. Witco Corp.*, 169 F. Supp. 2d 568, 584–85 (E.D. La. 2001) (no damage for delay clause in private contract enforceable absent evidence of "intentional or gross fault"); see also *James S. Holliday, Jr. & H. Bruce Shreves*, La. Practice Constr. Law § 8:10 (2009) ("'[n]o damages for delay' clause[s] are valid and enforceable in Louisiana").
276 See La. Rev. Stat. Ann. § 38:2216 (2003) (public policy prohibits clauses barring delay damages where delay is caused by the contracting public entity).
280 129 So. 2d 620 (La. Ct. App. 1961).
281 253 La. at 133–36.
282 129 So. 2d at 624.
283 253 La. at 135–36.
284 169 F. Supp. 2d at 584–85.

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Maryland	No damages for delay provisions are not unconscionable and will be enforced absent very limited circumstances amounting to fraud, bad faith, or gross negligence.	None	Maryland courts will enforce no damages for delay provisions absent circumstances amounting to fraud, bad faith, or gross negligence. In *State Highway Administration v. Greiner Engineering Sciences, Inc.*,[285] a contractor sought delay damages from a public agency despite a no damages for delay provision in the parties' contract. The trial court concluded that, under the "New York rule," the project delay caused by funding cuts was not reasonably foreseeable, and as such, the no damages for delay clause should not be enforced. The appellate court reversed, holding that an unambiguous no damages for delay clause is not unconscionable and should be enforced even if the parties did not contemplate a particular delay. In doing so, the court expressly rejected the "New York rule" in favor of the "literal enforcement" approach, under which exceptions to enforcement exist only when there is intentional wrongdoing, gross negligence, fraud, or misrepresentation on the part of the agency asserting the clause.	A no damages for delay provision may not be enforced when there is intentional wrongdoing, gross negligence, fraud, or misrepresentation on the part of the agency asserting the clause.[286]
Massachusetts	Massachusetts courts generally will enforce no damages for delay clauses, subject to certain exceptions. One such exception is statutory: all public construction contracts must contain a provision stating that, if the public body authorizes suspension of the project for longer than fifteen days due to its failure to act within the time specified in the contract, the public body must compensate the contractor for the delay.	Massachusetts General Laws (MGL) 30 § 39O(a) provides that all public contracts must contain a provision that allows the public agency to, among other things, issue a written notice of delay to the project for its convenience; provided, however, that the public body shall adjust the contract price if such delay exceeds fifteen days: *The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.*	It is well settled in Massachusetts that no damages for delay provisions generally are enforceable and preclude recovery of delay damages. In *B.J. Harland Electrical Co. v. Granger Bros.*,[287] a subcontractor sought delay damages from a contractor on a public project. The subcontractor sought to circumvent the no damages for delay clause by characterizing its requested damages not as "delay" damages but as damages for "increased costs of performing its work piecemeal, out of sequence, and in winter weather" as a result of the general contractor's failure to begin, prosecute, and complete its work in an orderly manner. The court concluded that these damages amounted to claims for "hindrance or delays" within the meaning of the contract, thereby precluding the subcontractor's recovery of such damages. Massachusetts courts also enforce no damages for delay provisions in public contracts despite the presence of language mandated by MGL 30 § 39O(a). In *Sutton Corp. v. Commonwealth*,[288] a contractor sought to recover delay damages as a result of the utility company's failure to timely move its lines. The parties' contract contained a no damages for delay provision, limited by the express requirements of MGL 30 § 39O(a). The court found, however, that the language of MGL 30 § 39O(a) permits a contractor to recover for delay only if (1) the delay was caused by the public body itself, and (2) the public body provided a written order of suspension as	Massachusetts courts appear to follow the "literal enforcement approach," which recognizes few exceptions to the plain language of a no damages for delay provision. As stated in *Granger:* *Contracts are made to be performed, and it must be held that the parties intended to enter into a complete and final arrangement under such terms and conditions as would create and define their obligations and would enable them to accomplish their contemplated aims and objects. With this end in view, every phrase and clause must be presumed to have been designedly employed, and must be given meaning and effect, whenever practicable, when construed with all the other phraseology contained in the instrument, which must be considered as a workable and harmonious means for carrying out and effectuating the intent of the parties.*[290]

[285] 83 Md. App. 621, 577 A.2d 363 (1990).
[286] *Id*. at 639.
[287] 24 Mass. App. Ct. 506, 509, 510 N.E.2d 765 (1987).
[288] 412 Mass. 1003, 1005, 586 N.E.2d 975 (1992).
[290] *Granger*, 24 Mass. App. Ct. at 513–14 (quoting *Charles I. Hosmer, Inc. v. Commonwealth*, 302 Mass. 495, 501, 19 N.E.2d 800 (1939)).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			contemplated in the statute. Because the delay was caused by the utility company and not the public body, and because the public body did not issue a written order of suspension, the court enforced the no damages for delay provision, thereby precluding the contractor's recovery for such delay. Similarly, in *Reynolds Bros. v. Commonwealth*,[289] a contractor sued the state for losses caused by delays and loss of productivity resulting from changes to the contractor's work schedule, restricted access to the job site, and the discovery of unanticipated subsurface conditions. The court found that the statutory exception to enforcement of the no damages for delay clause did not apply because the state never issued a written order authorizing a delay of more than fifteen days. The court also rejected the contractor's argument that the no damages for delay clause did not bar its claims because such claims were based on "hindrances" and "interferences" with its work, resulting in a loss of productivity. The court rejected the contractor's argument and enforced the no damages for delay provision against the contractor.	
Michigan	Under Michigan law, no damages for delay clauses are generally considered enforceable but are strictly construed.	None	No damages for delay clauses are generally considered enforceable.[291] According to the court in *John E. Green Plumbing & Heating Co. v. Turner Construction Co.*, however, "because of their harsh effects, these clauses are to be strictly construed."[292] In *Green*, the plaintiff was the plumbing and fire-sprinkler contractor for the construction of a hospital. The plaintiff worked under the defendant, a construction manager whose duties included coordinating the work schedules for the various contractors. The contractor brought suit for damages suffered from various obstacles that the construction manager created during the project. The trial court granted summary judgment for the construction manager with respect to the contractor's negligence claims on the basis of the no damages for delay clause in the contract between the two parties. On appeal, the contractor argued that the clause, strictly construed, only barred delay damages and not other kinds of damages, such as damages for "hindering work on the project," as were being asserted.[293] The court of appeals agreed and overturned the trial court's ruling "because at least a portion of [the contractor's]	According to the court in *Phoenix Contractors, Inc. v. General Motors Corp.*, a no damages for delay clause will not be enforced in the following situations: "where the delay (1) was of a kind not contemplated by the parties; (2) amounted to an abandonment of the contract; (3) was caused by bad faith on the part of the contracting authority; or (4) was caused by the active interference of the other contracting party."[294]

289 412 Mass. 1, 586 N.E.2d 977 (1992).
291 See *Phoenix Contractors, Inc. v. Gen. Motors Corp.*, 135 Mich. App. 787, 792, 355 N.W.2d 673 (1984) (holding a no damages for delay clause to be "valid"); see also *John E. Green Plumbing & Heating Co. v. Turner Constr. Co.*, 742 F.2d 965, 966 (6th Cir. 1984) ("No-damage-for-delay clauses are commonly used in the construction industry and generally recognized as valid and enforceable.") (internal quotation marks and citation omitted).
292 742 F.2d at 966.
293 *Id.*
294 135 Mich. App. at 792.

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			claimed damages related to extra manpower costs incurred as a result of [the construction manager's] hindrances—failure to properly coordinate work on the project and failure to insure that temporary heat was provided." Thus, the court declined to enforce the otherwise "valid and enforceable" no damages for delay clause because the damages in question resulted from the construction manager's "hindrances" and not from claimed delay.	
Minnesota	No case law.	None	No case law.	No case law.
Mississippi	Mississippi enforces no damages for delay clauses, with four recognized exceptions.	None	In Mississippi, "[c]ontractual no-damage-for-delay clauses are enforceable, though they are construed strictly against those who seek their benefit."[295] Moreover, "[l]ike all contractual provisions, a 'no damage for delay' clause is open to construction only if it is ambiguous."[296] Before its 1998 decision in *Mississippi Transportation Commission v. SCI, Inc.*,[297] the Mississippi Supreme Court had not addressed the validity of a no damages for delay clause in over forty years.[298] In *SCI*, the court upheld a jury verdict awarding delay damages, rejecting the Commission's argument that a no damages for delay clause in the construction contract precluded damages as a matter of law. In upholding the verdict, the court noted that such clauses are generally enforceable, with certain recognized exceptions. The court found sufficient evidence of one of those exceptions ("active interference or bad faith") in the case before it to support the jury's damage award. Since *SCI*, Mississippi courts have consistently enforced unambiguous no damages for delay clauses, with four recognized exceptions.[299]	In *SCI* and later decisions, the Mississippi Supreme Court held that no damages for delay clauses will not be applied where the delay: *(1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies.*[300] In *SCI*, as noted above, the Mississippi Supreme Court upheld an award of damages for delay notwithstanding such a clause, where there was sufficient evidence to support a jury finding of active interference or bad faith.[301] Other cases have upheld the denial of a directed verdict or summary judgment, finding that whether any of the four exceptions should apply presented issues of fact properly submitted to the jury. For example, in *Mississippi Transportation Commission v. Ronald Adams Contractor*, the court upheld the trial court's refusal to grant summary judgment enforcing a no damages for delay clause, finding issues of fact on whether any of the four exceptions should be applied.[302] Similarly, in *Tupelo Redevelopment Agency v. Gray Corp. Inc.*, the court upheld the trial court's denial of a directed verdict, finding issues of fact on whether

295 *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 511–12 (Miss. 2007) (quoting *Miss. Transp. Comm'n v. SCI, Inc.*, 717 So. 2d 332, 338 (Miss. 1998)).
296 *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1087 (Miss. 2000) (citing *Simmons v. Bank of Miss.*, 593 So. 2d 40, 43 (Miss. 1992)).
297 717 So. 2d 332 (Miss. 1998).
298 *Id.* at 338 ("Despite the apparent commonness of them, this Court has only once addressed and upheld the validity of a 'no damages for delay' provision in a construction contract.") (citing *Edward E. Morgan Co. v. State Highway Comm'n*, 212 Miss. 504, 54 So. 2d 742 (1951)).
299 *Tupelo Redevelopment Agency*, 972 So. 2d at 512–13 (upholding validity of clause but finding issue of fact on application of exceptions); *Everman's Elec. Co. v. Evan Johnson & Sons Constr., Inc.*, 955 So. 2d 979, 982 (Miss. Ct. App. 2007) (upholding trial court grant of summary judgment applying such a clause to preclude damages for delay); *Ronald Adams Contractor*, 753 So. 2d at 1087 (upholding validity of clause but finding issue of fact on application of exceptions).
300 *Tupelo Redevelopment Agency*, 972 So. 2d at 512 (quoting *SCI*, 717 So. 2d at 338).
301 *SCI*, 717 So. 2d at 338–39.
302 753 So. 2d at 1087.

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
				(i) the type of delay fell within the scope of the clause at issue; or (ii) any of the other exceptions to enforcement should apply.[303]
Missouri	Pursuant to Missouri statutes, no damages for delay clauses in public works contracts are unenforceable, with some exceptions. No damages for delay clauses in private contracts are also enforceable, with some exceptions.	In 1990, the Missouri legislature enacted § 34.058 of the Missouri Revised Statutes (RSMo) to void no damages for delay clauses in public works contracts. RSMo § 34.058.2 states: *Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.* RSMo § 34.058.3 qualifies the above by stating that: *Subsection 2 of this section is not intended to render void any contract provision of a public works contract that:* *(1) precludes a contractor from recovering that portion of delay costs caused by the acts or omissions of the contractor or its agents;* *(2) requires notice of any delay by the party responsible for such delay;* *(3) provides for reasonable liquidated damages; or* *(4) provides for arbitration or any other procedure designed to settle contract disputes.* For purposes of the statute, a "public works contract" is defined in RSMo § 34.058.1 as: *a contract of the state, county, city and other political subdivisions of the state, except the Missouri transportation department, for the construction, alteration, repair, or maintenance of any building, structure, highway, bridge, viaduct, pipeline, public works, or any other works dealing with construction, which shall include, but need not be limited to, moving, demolition, or excavation performed in conjunction with such work.* In *Roy A. Elam Masonry, Inc. v. Fru-Con Construction Corp.*,[304] the Missouri Court of Appeals held that "[t]his statute applies to public	In the context of private contracts, Missouri courts have held that no damages for delay clauses are enforceable. *In Roy A. Elam Masonry*, the court noted that Missouri courts had addressed a no damages for delay clause in a construction contract, but it recognized two lines of authority from other states regarding the enforcement of such a provision.[305] Accepting the position that such clauses are enforceable, the court upheld the no damages for delay clause, holding that an unambiguous contract provision must be enforced absent fraud, misrepresentation, or procedural or substantive unconscionability.	Pursuant to Missouri statutes, a no damages for delay clause in a public works contract is unenforceable. In addition, as held in *Roy A. Elam Masonry*, a no damages for delay clause in a private contract will not be enforced if fraud, misrepresentation, or procedural or substantive unconscionability is found.[306] In considering these exceptions, the court reasoned that because the contract at issue "was agreed to by two experienced commercial entities, in equal bargaining positions," there was no unconscionability.

303 972 So. 2d at 512–13.
304 922 S.W.2d 783, 791 (Mo. Ct. App. 1996).
305 922 S.W.2d at 789.
306 *Id*. at 790.

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
		works contracts, not to contracts between private parties." RSMo § 34.058 thus applies only to no damages for delay clauses in public works contracts that "waive, release, or extinguish" a contractor's right to damages for a delay caused in whole or in part by the contracting public entity, except where one of the four exceptions of RSMo § 34.058.3 apply.		
Montana	No statutes or case law.	None	No case law.	No case law.
Nebraska	No damages for delay clauses are enforceable.	None	Under Nebraska law, a contractor damaged by a delay in the performance of the work that is caused by a breach of contract by the other party may recover damages occasioned by the delay but only in the absence of a no damages clause or other provision exempting the other party from liability.[307] This rule applies equally to public works contracts and contracts between private parties.[308] In *Siefford v. Housing Authority of Humboldt*, the contractor sought damages from the Housing Authority based upon an acceleration claim and reduction in liquidated damages assessed against it for delays to the project. The contractor claimed the Housing Authority hindered and prevented it from performing its work in a timely manner while also refusing to grant a time extension. The contract provided that "[n]o payment or compensation of any kind shall be made to the Contractor of damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable." Assuming that the Housing Authority caused the delays, the court, after reviewing other jurisdictions that had interpreted similar provisions, held that the no damages for delay provision precluded the contractor from recovering damages for delay caused by the Housing Authority. In *Weitz Co., LLC v. Alberici Constructors, Inc.*, the subcontractor brought a claim against the general contractor, alleging that the general contractor failed to act in several instances, which delayed the subcontractor's work and caused damages to the subcontractor. The general contractor relied on a no damages for delay provision contained in the prime contract with the owner, which was incorporated by reference in the subcontract, to argue that the subcontractor's claim was barred and should be dismissed. The no damages for delay provision in the prime contract provided that the owner would not be liable to the contractor or any subcontractor or supplier for damages arising out of or resulting from delays caused	While Nebraska courts have not articulated any specific exceptions to the rule, *Siefford* relied upon other jurisdictions interpreting similar provisions. One of those jurisdictions stated that a contractor could only recover when faced with a no damages for delay provision when the delay or hindrance was caused by fraud, bad faith, or malicious intent.[310] Thus, it is possible that Nebraska would also recognize those exceptions.

[307] *Siefford v. Hous. Auth. of Humboldt*, 192 Neb. 643, 650, 223 N.W.2d 816 (1974); In re *Appeal of Parsons Constr. Co.*, 180 Neb. 839, 146 N.W.2d 211 (1966); In re *Appeal of Roberts Constr. Co.*, 172 Neb. 819, 111 N.W.2d 767 (1961).
[308] *Siefford*, 192 Neb. at 643.
[310] See *Psaty & Fuhrman v. Hous. Auth. of Providence*, 76 R.I. 87, 68 A.2d 32 (1949).

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			by or within the control of the contractor, or delays beyond the control of both the owner and contractor. The court interpreted this provision to mean that, in reference to the subcontractor's claim, the general contractor would not be liable for delay damages arising out of claims for which the owner and/or another subcontractor may be liable if the delay were within the subcontractor's control or beyond both the general contractor's and subcontractor's control, but the general contractor could be liable for damages caused by delay that was beyond the subcontractor's control and within the general contractor's control. The court ultimately denied the general contractor's Rule 12(b)(6) motion to dismiss, concluding that because the subcontractor's complaint alleged that the general contractor caused the delay, the no damages for delay provision did not bar the subcontractor's claim.[309]	
Nevada	No damages for delay clauses are valid and enforceable in Nevada, with four exceptions. The exceptions stem from the implied covenant of good faith and fair dealing.	None	The Supreme Court of Nevada held that no damages for delay clauses are valid and enforceable in *J.A. Jones Construction Co. v. Lehrer McGovern Bovis, Inc.*[311] In *Jones Construction*, a party appealed the trial court's failure to include detailed jury instructions on the exceptions to the enforceability of no damages for delay clauses. The trial court had provided a general instruction on the implied duty of good faith in all contracts but rejected a specific instruction on the recognized exceptions to the no damages for delay clause. The court held that the subcontractor was entitled to a specific instruction concerning the exceptions to the enforceability of a no damages for delay clause in a construction contract.	Nevada courts recognize four exceptions to the enforcement of no damages for delay clauses: "(1) willful concealment of foreseeable circumstances that impact timely performance, (2) delays so unreasonable in length as to amount to project abandonment, (3) delays caused by the other party's bad faith or fraud, and (4) delays caused by the other party's active interference." These exceptions are intended to reinforce the "implied covenant of good faith and fair dealing [that] exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one party that disadvantage the other."[312] The Nevada Supreme Court rejected a broader version of the willful concealment exception above for any delays "not contemplated by the parties at the time they entered into the contract" because the presence of a no damages for delay clause indicates that the parties realized that not all delays can be contemplated and that the clause is meant to address risks for these unforeseen delays.
New Hampshire	No statutes or case law.	None	No case law.	No case law.
New Jersey	Although no damages for delay provisions generally are enforceable, they are strictly construed against the drafter, and exceptions to enforcement may be applied. One such exception is statutory. Since 1994, any agreement	N.J.S.A. 2A:58B-3(b) provides that any agreement purporting to limit a contractor's damages for delay arising out of the public entity's "negligence, bad faith, active interference, or other tortious conduct" is against public policy and void and unenforceable. N.J.S.A. 2A:58B-3(b) provides:	New Jersey courts generally enforce no damages for delay provisions, subject to certain exceptions. In *Ace Stone, Inc. v. Township of Wayne*,[314] a contractor sought to recover from a public agency damages for delay caused by the agency's failure to timely secure necessary easements. Due to the agency's failure, much of the contractor's work was started and stopped several times, which	Although New Jersey courts generally find that the parties to a construction contract containing a no damages for delay provision contemplate that the contractor will bear the risks of ordinary and usual types of delays, courts will find exceptions where the delay damages

309 2009 WL 115980, at *2–3 (D. Neb. 2009).
311 120 Nev. 277, 89 P.3d 1009 (2004).
312 *Id.* (quoting *Frantz v. Johnson*, 116 Nev. 455, 465 n.4 (2000)).
314 47 N.J. 431, 221 A.2d 515 (1966).

Table 7-1: State-by-State Enforcement of the No Damages for Delay Clause

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
	purporting to limit a contractor's remedy for damages for delay on a public project caused by the public entity's negligence, bad faith, active interference, or other tortious conduct is void and unenforceable.	*A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract, agreement or purchase order, to which a public entity is a party, relative to the construction, alteration, repair, maintenance, servicing or security of a building, structure, highway, roadway, railroad, appurtenance and appliance, including moving, demolition, excavating, grading, clearing, site preparation or development of real property connected therewith, purporting to limit a contractor's remedy for delayed performance caused by the public entity's negligence, bad faith, active interference, or other tortious conduct to an extension of time for performance under the contract, is against public policy and is void and unenforceable.* N.J.S.A. 2A:58B-3(a) defines "public entity" and "contractor" as follows: *"Public entity" means this State or any department, public authority, public agency, public commission or any instrumentality of this State authorized by law to make contracts for the making of any public work, but shall not include any county, municipality or instrumentality thereof. "Contractor" means a person, his assignees or legal representatives, with whom a contract with a public entity is made.* Notwithstanding the foregoing, N.J.S.A. 2A:58B-3(c) clarifies that no damages for delay provisions in public contracts are still enforceable when delays are contemplated by the parties or result from another entity's negligence: *Nothing in this section shall be deemed to void any provisions in a contract, agreement or purchase order which limits a contractor's remedy for delayed performance caused by reasons contemplated by the parties nor shall the negligence of others be imputed to the State.*[313]	ultimately led to performing much of the work in winter months. In deciding whether the no damages for delay provision barred the contractor's delay claim, the court noted that active interference or bad faith on the part of the owner often has barred enforcement of a no damages for delay clause in other jurisdictions. However, the court concluded that in this matter, the intent of the parties must govern the enforceability of the clause. The court remanded the case to the trial court to determine whether the parties contemplated that the clause would preclude a claim for damages even where the public agency failed to provide timely access to the site. In *Buckley & Co. v. State*,[315] the court also looked to the intent of the parties to determine whether to enforce a no damages for delay clause. Several clauses in the public contract referenced delays that may be incurred in vacating or removing buildings and in obtaining rights of way in certain areas of the site, and provided that the contractor could make no claims for additional compensation on account of those delays. The contract also represented, however, that certain parcels in other areas of the site had already been acquired, when in fact they had not been acquired. The court held that, although the contractor could not recover for delays referenced in the contract, the parties did not contemplate the latter cause of delay at the time of contracting, and therefore the no damages for delay clause did not bar recovery of delay damages for work that the contractor performed at these latter portions of the construction site. The court in *Edwin J. Dobson, Jr., Inc. v. State*[316] considered whether a public agency had "actively interfered" with a contract, thereby precluding enforcement of a no damages for delay provision against the contractor. In *Dobson*, a contractor intended to use a specific supplier on a public contract it had been awarded. However, the contractor subsequently became involved in a dispute with the supplier on an unrelated project. Consequently, the supplier informed the contractor that it would not timely provide materials unless the contractor met the supplier's long list of demands related to the other project. The contractor refused and requested that the public agency permit the contractor to substitute a different supplier. The public agency declined permission, even after the contractor explained that failure to substitute suppliers would result in significant if not substantial delay to the project. The public agency also refused to grant a time extension. Ultimately, the project was completed 315 days late. The contractor sought relief from the no	are caused by the active interference of the owner or where the owner's conduct indicates bad faith or some other tortious intent.[318]

313 See also N.J.S.A. 40A:11–19 (applicable to contracts with municipal corporations); N.J.S.A. 18A:18A-41.
315 140 N.J. Super. 289, 356 A.2d 56 (1975).
316 218 N.J. Super. 123, 127, 526 A.2d 1150 (1987).
318 *See* N.J.S.A. 2A:58B-3 (statute applies only to public agencies); *Ace Stone, Inc.*, 47 N.J. 431.

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			damages for delay provision on the ground that the public agency had "actively interfered" with the contractor's performance. The court rejected the contractor's argument and stated the following standard for active interference: *"Active interference" connotes more than negligence. While the term is not capable of precise definition, it contemplates reprehensible behavior beyond "a simple mistake, error in judgment, lack of total effort, or lack of complete diligence...." The public agency must commit some affirmative, willful act, in bad faith, which unreasonably interferes with the contractor's compliance with the contract terms before it can be said that there has been active interference which subjects the public agency to delay damages notwithstanding the no damage for delay clause in the contract. The ultimate determination must be based on the intention of the parties as can be discerned from the contractual language in light of the circumstances.*[317] The court concluded that the parties' intent was evidenced by the plain language of the no damages for delay provision, which barred the contractor's claim. Many deemed the *Dobson* decision to be a harsh result, which ultimately led to the passage of N.J.S.A. 2A:58B-3. As of this writing, there are no published court decisions interpreting the new law.	
New Mexico	There are no New Mexico statutes or case law directly addressing no damages for delay clauses.	No New Mexico statute is directly applicable.[319]	No case law.	No case law.
New York	No damages for delay provisions generally are enforced in New York subject to certain judicial exceptions.	None	New York courts generally enforce no damages for delay clauses unless certain facts are present. In *Corinno Civetta Construction Corp. v. City of New York*,[320] New York's highest court rejected a sewer construction company's claim that it was entitled to damages for delay caused, in part, by the defendant city's moratorium on street openings, notwithstanding the presence of a no damages for delay clause contained in the parties' contract. Considering the reach of the clause, the court explored the exceptions to	New York recognizes four exceptions to the enforceability of no damages for delay provisions and allows damages to be recovered for (1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct; (2) uncontemplated delays; (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee; and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract.[322]

317 218 N. J. Super. at 128–29 (citations omitted).

319 While not directly on point, N.M. Stat. Ann. § 13-1-170 (1997) allows state agencies and other public entities to issue regulations requiring "uniform clauses" in public contracts on a variety of subjects, including "adjustments in prices" and "permissible excuses for delay or nonperformance." No case law addresses whether this statutory section would permit a state agency to adopt uniform no damages for delay clauses.

320 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986).

322 *Corinno*, 493 N.E.2d at 912 (discussing that a no damages for delay provision will not be enforced against a contractor where there is bad faith or willful, malicious, or grossly negligent conduct on the part of the owner; provision will also be avoided where the delays are "so great or so unreasonable that they may fairly be deemed equivalent to [its] abandonment of the contract") (internal quotation marks and citation omitted); see also *Kalisch-Jarcho, Inc. v. City of N.Y.*, 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983);

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			enforceability recognized in New York. The court concluded that the provision should be enforced against the contractor because the city was not willful, malicious, or grossly negligent in refusing to authorize additional overtime so that the project could be completed before the moratorium went into effect, and that a contract clause proscribing work during the moratorium demonstrated that the parties had expressly contemplated such a delay.[321]	
North Carolina	North Carolina has, by statute, made most no damages for delay provisions unenforceable in public contracts. These provisions are generally enforceable and will likely be strictly construed in private contracts.[323]	In 1997, the North Carolina legislature enacted § 143-134.3 of the North Carolina General Statutes (NCGS) to nullify no damages for delay clauses in construction contracts by public entities. NCGS § 143-134.3 states: *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 of any institution of State government, or of any county, city, town, or other political subdivision thereof.* The statute adds that: "For purposes of this section, the phrase 'owner or its agent' does not include prime contractors or their subcontractors." NCGS § 143-134.3 prohibits enforcement of no damages for delay provisions, in any construction contract conducted for and authorized by a public entity, that attempts to forbid or limit a contractor's right to compensable damages for a delay caused by the owner or its agents.	Prior to the 1997 passing of NCGS § 143-134.3, North Carolina authority permitted but strictly construed no damages for delay clauses and would not enforce ambiguous provisions.[324] Although the enactment of the statute changed the rule for public contracts, it is likely that the reasoning of *Watson Electrical Construction Co. v. City of Winston-Salem* would apply to private contracts. In that case, a contractor brought suit against the City of Winston-Salem for damages allegedly created by the City's delays. The City asserted that the following no damages for delay clause precluded an award of damages and limited the contractor's sole remedy for delays under the contract to time extensions: "If the Contractor is delayed by the Owner or Architect or any Agent or employee of either, the Contractor's sole and exclusive remedy for the delay shall be the right to a time extension for completion of the Contract and not damages."[325] The City maintained that the no damages for delay provision limited the contractor's remedy for delay to time extensions; therefore, even if the contractor could show breach of contract, it could not recover damages for constructive acceleration. The court noted that the contractor did not seek damages for delay, but instead contended that the unreasonable, unjustified refusal to grant the contractor an extension of time was a breach of the contract in itself. The court held that the refusal to grant an extension of time could be the basis of the contractor's breach of contract claim and also found that the contract did not address the question of what remedy could be had for an unreasonable denial of a time extension. The court further held that since the contract did not address the issue of remedy for	No case law describes additional exceptions to enforcement.

Blau Mech. Corp. v. City of N.Y., 158 A.D.2d 373, 551 N.Y.S.2d 228, 229–30 (1990) (explaining that a delay is "contemplated" when, although the conditions causing the delay themselves may not have been anticipated, the possibility of their arising was contemplated and addressed in the agreement).

321 See also *McNally Wellman Co. v. New York State Elec. & Gas Corp*., 63 F.3d 1188 (2d Cir. 1995) (finding that where a contract for construction equipment is properly characterized as a "sales transaction" rather than a construction contract, the U.C.C. supplants New York common law regarding the enforceability of no damages for delay provisions); *Port Chester Elec. Constr. Corp. v. HBE Corp*., 894 F.2d 47 (2d Cir. 1990) (noting that no damages for delay provisions are strictly construed against the party seeking to avoid liability); *Worth Constr. Co., Inc. v. TRC Engineers, Inc*., 55 A.D.3d 388, 865 N.Y.S.2d 95 (2008); *Peter Scalamandre & Sons, Inc. v. Village Dock, Inc.*, 187 A.D.2d 496, 589 N.Y.S.2d 191 (1992) (stating that no damages for delay provisions will be enforced as appropriate when incorporated by reference into a subcontract).

323 See *APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 110 N.C. App. 664, 431 S.E.2d 508 (1993).

324 *See Watson Elec. Constr. Co. v. City of Winston-Salem*, 109 N.C. App. 194, 426 S.E.2d 420 (1993).

325 109 N. C. App. at 198.

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			such a breach, the question was not one of law but one that must be solved by the finder of fact interpreting the intent of the parties.	
North Dakota	No North Dakota case law or statutes address no damages for delay provisions.	None	No case law.	No case law.
Ohio	In 1998, the Ohio legislature declared no damages for delay clauses in construction contracts void and unenforceable as against public policy. Prior to the enactment of this statute, those clauses were generally accepted as valid under Ohio law but subject to certain exceptions.[326]	Section 4113.62(C) of the Revised Code of Ohio (R.C.) invalidates the provisions of any construction contract entered into after September 30, 1998, that bar recovery of delay damages caused by the owner. With respect to claims of contractors, R.C. § 4113.62(C)(1) states: *Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract 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.* With respect to claims of subcontractors, R.C. § 4113.62(C)(2) states: *Any provision of a construction subcontract, agreement, or understanding, or specification or other documentation that is made part of a construction subcontract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction subcontract when the cause of the delay is a proximate result of the owner's or contractor's act or failure to act, or that waives any other remedy for a construction subcontract when the cause of the delay is a proximate result of the owner's or contractor's act or failure to act, is void and unenforceable as against public policy.*	In *B.I. Chipping Co. v. R.F. Scurlock Co.*,[327] the plaintiff, an underbrush and tree removal subcontractor, brought suit against the defendant highway contractor to recover delay damages occasioned by the presence of aerial utility lines that the Ohio Department of Transportation (ODOT) did not timely relocate. The contract contained a no damages for delay clause that allowed the subcontractor to recover for delays in the amount that the contractor received through the ODOT claims process; however, the subcontractor refused to accept the amount that ODOT determined, urging that the clause was unenforceable under R.C. § 4113.62(C). The trial court found that because the contract allowed the subcontractor to recover for delays in the amount that the contractor received through the ODOT claims process, and thus did not preclude all liability for delays, R.C. § 4113.62(C) did not apply, and the restriction upon the amount of damages for delay was enforceable. The appellate court agreed and upheld the trial court's decision.	In *DiGioia Bros. Excavating, Inc. v. Cleveland Department of Public Utilities*,[328] the court held that the following four types of delay constituted exceptions to the general rule that no damages for delay clauses are enforceable unless it was caused by a: *delay that (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; (4) is not within the specifically enumerated delays to which the clause applies.* Importantly, *DiGioia* involved construction contracts the parties entered into prior to the effective date of R.C. § 4113.62. In *B.I. Chipping*, the appellate court examined the additional question of whether, if the damages-related clause at issue was not rendered unenforceable by virtue of R.C. § 4113.62, the clause nonetheless was unenforceable where conditions arose that were not within the contemplation of the parties at the time the contract was made.[329] The court found the exception inapplicable: "Appellant's recovery of delay damages is limited to that which is actually recovered from ODOT; it is not waived or precluded. Thus, the trial court correctly concluded that it did not need to address the scope of delays contemplated by the parties at the time of contracting." Because contract provisions that wholly preclude damages for delay are unenforceable by virtue of R.C. § 4113.62(C), the previously recognized judicial exceptions to delay-related clauses are unnecessary to avoid harsh results. In light of the court's analysis in *B.I. Chipping*, however, the extent to which these exceptions will be applied to such clauses not rendered unenforceable by virtue of R.C. § 4113.62(C) is unclear.

[326] See *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.*, 113 Ohio St. 3d 226, 232–33, 864 N.E.2d 68, 74–75 (2007).
[327] 2005 WL 3484306 (Ohio Ct. App. Dec. 20, 2005).
[328] 135 Ohio App. 3d 436, 449, 734 N.E.2d 438 (1999).
[329] 2005 WL 3484306, at *5–6.

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Oklahoma	Although no reported Oklahoma court case has addressed the enforceability of no damages for delay clauses, one unreported case,[330] along with secondary authorities, suggest that Oklahoma may recognize such clauses,[331] with exceptions.[332]	None	No reported Oklahoma case directly addresses the enforceability of no damages for delay clauses. In *Sammons-Robertson Co. v. Massman Construction Co.*, however, the Tenth Circuit appeared to apply Oklahoma law to uphold a similar contract provision.[333] In *Sammons*, a contract regarding excavation work in the construction of a dam contained a clause stating that the subcontractor had been advised that the site for the work was not then in possession of the dam authority and that neither the principal contractor nor the dam authority would be liable for delay in obtaining title to and possession of any land. The *Sammons* court held that this clause, coupled with the fact that the dam authority was not negligent in moving to obtain possession of the premises concerned, precluded recovery of damages by the subcontractor for a delay caused by the refusal of the landowner to allow an immediate entry upon the premises. Additionally, Section 4:7 of the current Oklahoma Practice Series provides that "[c]ontracts often have 'no damages for delay' clauses that state that the owner will not be liable for monetary damages resulting from delays. Most of the time, the contractor is limited only to an extension of time. Clauses of this sort are generally enforced." Notably, however, Section 4:7 cites no supporting Oklahoma law.[334] In an unreported decision, the federal district court for the Western District of Oklahoma refused to enforce a no damages for delay clause as a matter of law, holding that issues of fact precluded summary judgment: "To the extent that this circuit recognizes an exception to delay damages clauses where a party has engaged in inequitable conduct, the record before the court shows that there is a factual dispute concerning this issue."	Beyond stating that no damages for delay clauses are generally enforceable, Section 4:7 of the Oklahoma Practice Series identifies exceptions. It asserts that "[c]ourts have held that [no damages for delay] clauses do not apply in cases of wrongful conduct, fraud or active interference."[335] Furthermore, Section 4:7 identifies exceptions to enforcement of such clauses "if the delay: (1) was not contemplated by the parties; (2) amounted to an abandonment of the contract; (3) resulted from fraud, bad faith or arbitrary action; (4) resulted from active interference with the contractor's work; or (5) was unreasonable."[336]

330 *United States ex rel. M.L. Young Constr. Corp. v. The Austin Co.*, NO. CIV-04-0078-T, 2005 WL 2396597, at *5 (W.D. Okla. Sept. 28, 2005) (refusing to grant summary judgment enforcing no damages for delay clause based on evidence of inequitable conduct).

331 *Sammons-Robertson Co. v. Massman Constr. Co.*, 156 F.2d 53, 57 (10th Cir. 1946) (applying Oklahoma law) (construction contract clause that expressly protected a party from liability for delay barred recovery of damages for delay).

332 Randi A. Donaldson, 9 Okla. Prac., Construction Law § 4:7 (2008).

333 See *Sammons-Robertson Co.*, 156 F.2d at 57; *United States ex rel. M.L. Young Constr. Corp.*, 2005 WL 2396597, at *5.

334 Randi A. Donaldson, 9 Okla. Prac., Construction Law § 4:7 (2008).

335 *Id*. (*citing John E. Green Plumbing & Heating Co. v. Turner Constr. Co.*, 500 F. Supp. 910 (E.D. Mich. 1980), aff'd, 742 F.2d 965 (6th Cir. 1984)).

336 *Id*. (citing *Clifford R. Gray Inc. v. City Sch. Dist. of Albany*, 277 A.D.2d 843, 716 N.Y.S.2d 795 (2000); *Am. Pipe & Constr. Co. v. Westchester Cnty.*, 292 F. 941 (2d Cir. 1923); *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt-Meridian Constr. Corp.*, 890 F. Supp. 1213 (S.D.N.Y. 1995), judgment aff'd in part, vacated in part on other grounds, 95 F.3d 153 (2d Cir. 1996); *U.S. Steel Corp. v. Mo. Pac. R.R. Co.*, 668 F.2d 435 (8th Cir. 1982)). See also *United States ex rel. M.L. Young Constr. Corp.*, 2005 WL 2396597, at *5 (recognizing "inequitable conduct" exception).

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Oregon	In Oregon, no damages for delay provisions in public works contracts are deemed against public policy and are void and unenforceable. With respect to private contracts, however, it is uncertain whether Oregon courts will enforce no damages for delay provisions.	In 2005, the Oregon Legislature enacted law that provides that 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 acts or omissions of the contracting agent or persons acting therefor," will be deemed against public policy and considered void and unenforceable.[337]	There are no reported Oregon cases applying the state statute that renders no damages for delay provisions in public works contracts unenforceable. On the other hand, *Northeast Clackamas County Electric Co-Operative v. Continental Casualty Co.*[338] involved application of a no damage clause contained in a private contract for the construction of power transmission lines. Because the case was based on diversity jurisdiction, the Ninth Circuit Court of Appeals looked to Oregon state law when determining whether to apply the no damage provision. The contractor had bid to construct power transmission lines over mountainous terrain. The Co-Op, which had accepted the contractor's bid, agreed to clear the right-of-way by its own operations and left the contractor to construct the lines. When construction was about one-third complete, the contractor requested a 30-day extension based on the Co-Op's delay in delivering poles and clearing the right-of-way. The extension was granted. A month later, the contractor requested a second extension based on the same delays by the Co-Op and damage to the power lines caused by a windstorm. The Co-Op refused to grant the extension or pay the contractor unless it agreed to repair the storm damage at its own expense. The contractor refused, and the Co-Op terminated its contract. The district court found that the delay in construction of the power line and the damage resulting from the windstorm were due exclusively to the Co-Op's failure to properly clear the right-of-way. There was no provision in the contract requiring the contractor to repair at its own expense storm damage caused by the Co-Op's failure to properly perform its duties. The Co-Op attempted to rely upon the no damage provision in the contract to assert that the contractor's only available remedy was an extension of time. The Ninth Circuit rejected the Co-Op's argument, concluding that, because the Co-Op had wrongfully insisted that the contractor pay for the storm damage at its own expense before the Co-Op would grant the contractor an extension, the Co-Op had unjustifiedly repudiated the no damage contract provision and the Co-Op's subsequent wrongful termination of the entire contract made enforcement of the no damage provision "impossible in fact and inapplicable in law." Thus, the Ninth Circuit held that the no damage provision did not apply to bar the contractor's claim and that the contractor could recover on a quantum meruit basis. In light of the foregoing, the validity of no damages for delay clauses in private contracts is uncertain under Oregon law.	No case law.

337 26 Or. Rev. Stat. Ann. § 279C.315 (2009).
338 221 F.2d 329 (9th Cir. 1955).

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Pennsylvania	No damages for delay provisions generally are enforced but are disfavored and strictly construed. Such provisions will not be enforced if enforcement is deemed inequitable due to the owner's interference.	None	Generally, no damages for delay clauses are enforceable, subject to certain exceptions involving interference by the owner. In *Gasparini Excavating Co. v. Pennsylvania Turnpike Commission*,[339] a contractor sought additional compensation from a public agency for delay despite the presence of a no damages for delay provision in the parties' contract. The contractor argued that the owner actively and directly interfered with its work when it notified it to proceed with the work, knowing that the contractor would be unable to perform the work due to the presence of the owner's separate contractors. Relying on New York authority, the Pennsylvania Supreme Court agreed with the contractor and found that the public agency had actively interfered with the contractor's work, thereby precluding enforcement of the no damages for delay provision.[340]	Pennsylvania courts recognize exceptions to enforcement of no damages for delay provisions "where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act on some essential matter necessary to the prosecution of the work."[341]
Rhode Island	No damages for delay provisions generally are enforceable.	None	Rhode Island courts generally enforce no damages for delay provisions.[342] In *Rhode Island Turnpike & Bridge Authority v. Bethlehem Steel Corp.*, the contractor argued that the provision should be avoided because the project delay was "unreasonable." The court rejected the contractor's contention, finding that there was no evidence to suggest that the project delays, caused largely in part by the public agency's separate contractors, were "unreasonable," and it enforced the provision to preclude an award of delay damages.	Although there is little authority on point, language in *Rhode Island Turnpike* suggests that a no damages for delay provision may be avoided if the court determines that the underlying delay was in some way "unreasonable."[343]
South Carolina	No damages for delay clauses are valid and enforceable under South Carolina law, with four exceptions. The exceptions stem from the implied covenant of good faith and fair dealing.	None	The Supreme Court of South Carolina held that no damages for delay clauses are valid and enforceable in *United States ex rel. Williams Electric Co. v. Metric Constructors, Inc*.[344] The court stated that these clauses are enforceable as long as they meet the ordinary rules governing the validity of contracts, and it recognized four exceptions to enforcement.[345]	South Carolina's four exceptions to the enforcement of no damages for delay clauses are those delays caused by (1) fraud, misrepresentation, or other bad faith; (2) active interference; (3) delay that amounts to an abandonment of the contract; and (4) gross negligence.[346] These exceptions stem from the implied covenant of good faith and fair dealing that exists in every contract under South Carolina law. The court has expressly declined an exception for "delays not contemplated by the parties."
South Dakota	No case law.	None	No case law.	No case law.

339 409 Pa. 465, 187 A.2d 157 (1963).
340 409 Pa. at 477–78 (citing *Am. Bridge Co. v. State*, 245 A.D. 535, 283 N.Y.S. 577 (1935)).
341 See *Guy M. Cooper, Inc. v. East Penn Sch. Dist.*, 903 A.2d 608, 613 (Pa. Commw. Ct. 2006) (citing *Henry Shenk Co. v. Erie Cnty.*, 319 Pa. 100, 178 A. 662 (1935)); see also *James Corp. v. N. Allegheny Sch. Dist.*, 938 A.2d 474, 484 (Pa. Commw. Ct. 2007); *Coatesville Contractors & Eng'rs, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A.2d 862 (1986) (preexisting access problem caused by undrained lake known by owner but unknown by contractor); *Gasparini Excavating Co. v. Pa. Tpk. Comm'n*, 409 Pa. 465, 187 A.2d 157 (1963); *Commonwealth, State Highway & Bridge Auth. (Penn-DOT) v. Gen. Asphalt Paving Co.*, 46 Pa. Commw. 114, 405 A.2d 1138 (1979) (owner assumed responsibility for negotiating relocation of water line but failed to do so expeditiously, resulting in denial of access while others relocated water line); *Commonwealth, Dep't of Highways v. S.J. Groves & Sons Co.*, 20 Pa. Commw. 526, 343 A.2d 72 (1975).
342 See *R.I. Tpk. & Bridge Auth. v. Bethlehem Steel Corp.*, 119 R.I. 141, 379 A.2d 344 (1977).
343 379 A.2d at 354.
344 325 S.C. 129, 132–33, 480 S.E.2d 447 (1997).
345 325 S. C. at 132–33.
346 *Id.* at 137.

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Tennessee	Tennessee courts have upheld the enforceability of no damages for delay clauses in construction contracts, with some exceptions.	None	In *Brown Bros. v. Metropolitan Government of Nashville & Davidson County*,[347] the Tennessee Court of Appeals upheld a no damages for delay clause in a road construction contract. The court emphasized that "[p]arties to a contract are free to allocate risks and burdens between themselves as they see fit." Finding the contract at issue unambiguous in its placement of risk of delay with the contractor, and finding that "[t]he delays the appellant suffered were exactly of the type provided for in the contract," the court held that the no damages for delay clause was enforceable. In an unreported case, *Thomas & Associates, Inc. v. Metropolitan Government of Nashville & Davidson County*, the Tennessee Court of Appeals further elaborated on the purpose of no damages for delay clauses, stating that such clauses "are meant to further the protection of the public interest and are aimed generally against the contractor … with a view of limiting the cost of an improvement to the sum agreed upon and such additional sums as are specially provided for."[348] In that case, the court upheld no damages for delay clauses in two road construction contracts, stating that such clauses are "interpret[ed]… according to their plain and ordinary meaning" and "are normally valid and enforceable." The court stated that the delay "was exactly the kind contemplated by the parties and expressly covered in the contract." In another unreported case, *Haren Construction Co. v. Metropolitan Government of Nashville & Davidson County*,[349] the Tennessee Court of Appeals addressed the effect of a suspension-of-performance clause on a no damages for delay clause in the same contract. Reasoning that "all the provisions of a contract should be construed in harmony with each other" and that the two clauses were "neither inconsistent or [sic] irreconcilable," the court held that "the contract differentiates that suspension and delay are different occurrences," and thus, the applicability of one clause does not imply the applicability of the other. Finding the facts of the case to state a claim for delay, not suspension, the court applied the no damages for delay clause.	The court in *Brown Bros.* found the Iowa case of *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co.*[350] to be instructive. It held that notwithstanding a no damages for delay clause, a contractor can recover for unreasonable delay if the delay (1) was of a kind not contemplated by the parties; (2) amounted to an abandonment of the contract; (3) was caused by bad faith; or (4) was caused by active interference.[351] The court further stated, again in reliance on *Peter Kiewit Sons' Co.,* that a showing of "active interference" requires "some kind of reprehensible conduct" that involves "something far more affirmative than lack of total effort or lack of complete diligence."[352] In that case, none of the above exceptions were found to exist, and the court upheld the no damages for delay clause.[353]

347 877 S.W.2d 745, 749 (Tenn. Ct. App. 1993).
348 2003 WL 21302974, at *13 (Tenn. Ct. App. June 6, 2003) (internal quotation marks and citation omitted).
349 2003 WL 21537623 (Tenn. Ct. App. July 9, 2003).
350 355 F. Supp. 376, 397 (S.D. Iowa 1973).
351 *Brown Bros.*, 877 S.W.2d at 749. See also *Thomas & Assocs.*, 2003 WL 21302974, at *14.
352 877 S.W.2d at 750.
353 *Id.* See also *Thomas & Assocs.*, 2003 WL 21302974, at *14 ("[W]e cannot find that the contract has created a triable issue under any of the exceptions to the 'no damages for delay' clauses.").

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Texas	Texas courts uphold no damages for delay clauses; however, such provisions do not give "license to cause delays 'willfully,' by 'unreasoning action,' 'without due consideration,' and in 'disregard for the rights of other parties,' nor [do] the provision[s] grant … immunity from damages if delays were caused … under such circumstances."[354] However, the Texas Supreme Court held that a no-delay-damages provision cannot shield an owner from liability for deliberately and wrongfully interfering with a contractor's work.[355] The court not only reaffirmed five exceptions to the enforceability of no-delay-damages provisions but also held that, as a matter of public policy, such provisions cannot be enforced—regardless of what the contract states—if the delay resulted from the owner's deliberate, intentional, and wrongful conduct, which may include instances where an owner's decision results in the increased delays.	None	Although Texas courts require that certain contractual provisions relieving a party in advance for its own negligence must meet fair notice requirements,[356] no such requirement applies to no damages for delay clauses.[357] Such clauses are strictly construed and enforced unless an exception applies.[358] Pursuant to general principles of contract construction, "when an unambiguous [no damages for delay clause] has been entered into between the parties, the courts will look to the written instrument as the expression of the parties' intention since it is the parties' objective, not subjective, intent which is significant."[359] Applying that rule, Texas courts have enforced no damages for delay clauses to bar recovery of damages where the clause unambiguously provided that an extension of time was the contractor's exclusive remedy.[360] Unless established as a matter of law from the record, parties seeking an exception to enforcement of a no damages for delay provision must present the exceptions to the finder of fact.[361] Thus, in *Green International, Inc. v. Solis*, the Texas Supreme Court found that the appellate court had erred in upholding a damage award for delay where the contract contained a no damages for delay clause and the jury had not been asked to make findings sufficient to establish any of the recognized exceptions to enforcement of such a clause.	Texas courts enforce no damages for delay clauses unless "the delay: (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract;…(4) is not within the specifically enumerated delays to which the clause applies;"[362] or (5) was caused by "active interference or other wrongful conduct."[363] In *United States ex rel. Wallace v. Flintco, Inc.*, the Fifth Circuit Court of Appeals applied Texas no damages for delay law to reaffirm the above-cited exceptions.[364] Moreover, in *Flintco*, the court held that, notwithstanding a no damages for delay clause, a general contractor's multiple disruptions and active interferences with a subcontractor's performance permitted the subcontractor to "treat the contract as rescinded and recover under quantum meruit the full value of the work done."

354 *Carrothers Constr. Co. v. City of Dallas*, 1996 WL 625433, at *3 (5th Cir. Oct. 11, 1996) (applying Texas law) (quoting *Housing Auth. of Dallas v. Hubbell*, 325 S.W.2d 880, 891 (Tex. Civ. App.—Dallas 1959)). See also *United States ex rel. Straus Sys., Inc. v. Associated Indem. Co.*, 969 F.2d 83, 85 (5th Cir. 1992) (applying Texas law to no damages for delay clause); *City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978). See also *West v. Triple B Servs.*, LLP, 264 S.W.3d 440, 449 n.9 (Tex. App.—Houston [14th Dist.] 2008) (distinguishing *R.F. Ball Constr. Co.*).

355 See *Zachry Constr. Corp. v. Port of Houston Auth*., No. 12-0772, 2014 Tex. LEXIS 768, at *43 (Tex. Aug. 29, 2014).

356 *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993) (holding that certain releases and indemnity clauses—in which one party exculpates itself from its own future negligence—must be unambiguous and conspicuous).

357 *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 386–87 (Tex. 1997) (distinguishing *Dresser Indus.*, 853 S.W.2d at 508).

358 *United States ex rel. Wallace v. Flintco, Inc.*, 143 F.3d 955, 964 (5th Cir. 1998) (applying Texas law) (quoting *R. F. Ball Constr. Co.*, 570 S.W.2d at 77 & n.1).

359 *R.F. Ball Constr. Co.*, 570 S.W.2d at 78.

360 *Electro Assocs., Inc. v. Harrop Constr. Co.*, 908 S.W.2d 21, 23–24 (Tex. App.—Houston [1st Dist.] 1995) (award of delay damages was error where subcontract expressly provided that an extension of time was an "exclusive remedy").

361 *Green Int'l*, 951 S.W.2d at 388 (citing *R.F. Ball Constr. Co.*, 570 S.W.2d at 77) (when a party fails to request jury findings on the exceptions to the no damages for delay clause, such exceptions must be established as a matter of law).

362 *Id.* at 387 (citing *R.F. Ball Constr. Co.*, 570 S.W.2d at 77 & n.l).

363 *Id.* at 388. See also *Flintco*, 143 F.3d at 964 (including "actual interference with the performance required under the contract" as an exception).

364 *Flintco*, 143 F.3d at 964–65 (citing *Hubbell*, 325 S.W.2d at 890, for similar evidence held sufficient to uphold damages notwithstanding a no damages for delay clause). See also *Carrothers Constr. Co.*, 1996 WL 625433.

Table 7-1: State-by-State Enforcement of the No Damages for Delay Clause

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Utah	Utah courts have upheld the enforceability of no damages for delay clauses in construction contracts, with some exceptions.	None	In *Allen-Howe Specialties Corp. v. U.S. Construction, Inc.*,[365] the Utah Supreme Court upheld a no damages for delay clause in an agreement between a contractor and subcontractor, holding that "damages cannot be awarded for delays contemplated by the parties and should be controlled by the contractual remedies." In another case, a no damages for delay clause in a road construction contract was upheld in *Western Engineers, Inc. v. State ex rel. Road Commission*.[366]	In *Western Engineers*, the Utah Supreme Court held that notwithstanding a no damages for delay clause, a contractor can recover for unreasonable delays if the delay (1) is the result of fraud or active interference on the part of one seeking the benefit of the provision; (2) has extended performance for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; (3) is not within the specifically enumerated delays to which the no damages for delay clause is to apply; or (4) was not intended or contemplated by the parties to be within the purview of the no damages for delay provision, in light of the relationship of the parties and objectives and attendant circumstances.[367] The Utah Supreme Court further elaborated on the "interference" exception in *Allen-Howe Specialties Corp.* There, the court stated that "[a] 'no damage' clause will not exculpate the contractee for liability for damages for delay with the work of the contractor where such interference is direct, active, or willful."[368] The court further stated that "interference" requires "reprehensible conduct of the contractee which is in collision with or runs at cross purposes to the work of the contractor." "Active interference," the court continued, "requires some affirmative, willful act, in bad faith, to unreasonably interfere with the contractor's compliance with the terms of the construction contract. It clearly requires more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence." No such interference was found to have occurred. The court also addressed the "unreasonableness" exception, stating that no damages for delay clauses are unenforceable where "the delays can be said to be so excessive and unreasonable as to fall outside the scope of the contract and warrant an additional recovery in quantum meruit."
Vermont	Vermont courts have not addressed the validity of no damages for delay clauses. It is recognized, however, that owners "may not obstruct, hinder, or delay a contractor's work and then seek damages for the delay" that results.[369]	None	No case law.	No case law.

365 611 P.2d 705, 709 (Utah 1980).
366 20 Utah 2d 294, 437 P.2d 216 (1968).
367 20 Utah at 296.
368 611 P.2d at 709.
369 *Carter v. Sherburne Corp.*, 132 Vt. 88, 94, 315 A.2d 870 (1974).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
Virginia	A Virginia statute has rendered most no damages for delay provisions in public contracts void and unenforceable if such delay is "unreasonable."[370] No damages for delay provisions in private contracts, however, generally may be enforced absent certain circumstances.	Section 2.2-4335 of the Virginia Code (VCA) invalidates most no damages for delay provisions in public contracts where such delay is "unreasonable." VCA § 2.2-4335(A) provides: *Any provision contained in any public construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.* VCA § 2.2-4335(B) adds that it does not, however, void certain provisions in public contracts: *B. Subsection A shall not be construed to render void any provision of a public construction contract that:* *1. Allows a public body to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;* *2. Requires notice of any delay by the party claiming the delay;* *3. Provides for liquidated damages for delay; or* *4. Provides for arbitration or any other procedure designed to settle contract disputes.*	Virginia courts presumably still enforce no damages for delay provisions in private contracts, subject to certain exceptions.[371]	Virginia has recognized a difference between mere delay and delay caused by active interference.[372] No damages for delay provisions will not be enforced where the owner acts in bad faith.[373] Further, all no damages for delay provisions between contractors and subcontractors may be unenforceable. In dicta, a Maryland federal court interpreting Virginia state law noted that Va. Code Ann. § 11-4.1:1 likely applies and, therefore, a no damages for delay clause in a subcontract executed after July 1, 2015, is unlikely enforceable.[374]
Washington	Since 1979, Washington statutes have made most no damages for delay provisions unenforceable.	In 1979, the Washington legislature enacted § 4.24.360 of the Revised Code of Washington (RCW) to nullify most no damages for delay clauses in Washington. RCW 4.24.360 states: *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*	RCW 4.24.360 was a reaction to two 1978 decisions of the Washington Supreme Court that followed prior Washington authority permitting but strictly construing no damages for delay provisions so long as the owner did not hinder performance and the delay was within the reasonable contemplation of the parties. In *Nelse Mortensen & Co. v. Group Health Cooperative of Puget Sound*,[375] the court's perspective was freedom to contract: if foreclosed by the contract, no recovery was allowed for delay within the contemplation of the contracting parties. If owner-caused delay	Although RCW 4.24.360 essentially overruled *Mortensen* and *Christiansen Bros.*, the term "unreasonable" used in *Mortensen* may explain its use in RCW 4.24.360. The statute applies to "unreasonable" delay, and *Mortensen* describes "unreasonable" delay as delay of a nature not contemplated by the parties with either a specific contractual remedy or a contractual means of compensation for the delay. Under the contract in *Absher Construction Co. v. Kent School District No. 415*,[377] the contractor waived its claim if it failed to

370 See *Blake Constr. Co., Inc./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 571, 587 S.E.2d 711 (2003).
371 *McDevitt & St. Co. v. Marriott Corp.*, 713 F. Supp. 906, 921 (E.D. Va. 1989) (applying Virginia law) (enforcing a no damages for delay clause where there was no evidence that the owner's delay was "unreasonable, intentional or fraudulent"), affirmed in part and reversed in part on other grounds, 911 F.2d 723 (4th Cir. 1990).
372 See *Algernon Blair, Inc. v. Norfolk Redevelopment & Hous. Auth.*, 200 Va. 815, 108 S.E.2d 259, 263 (1959).
373 *Lane Constr. Corp. v. Brown & Root, Inc.*, 29 F. Supp. 2d 707 (E.D. Va. 1998) (applying Virginia law), affirmed in part and reversed in part on other grounds as *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000).
374 *United States, f/u/b Manganaro Midatlantic, LLC v. Grimberg/Amatea JV*, Civil No. PX-16-2816, 2017 WL 6492719 (D. Md. Dec. 19, 2017).
375 90 Wn.2d 843, 845, 586 P.2d 469 (1978).
377 77 Wn. App. 137, 145, 890 P.2d 1071 (1995).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
		or persons acting for the contractee is against public policy and is void and unenforceable. The statute adds that: *This section shall not be construed to void any provision in a construction contract … which (1) requires notice of delays, (2) provides for arbitration or other procedure for settlement, or (3) provides for reasonable liquidated damages.* For the purposes of the statute, a "construction contract" includes both public and private contracts and is defined in RCW 4.24.370 as: *any contract or agreement for the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith.* RCW 4.24.360 thus applies only to provisions that "waive, release, or extinguish" a contractor's right to damages for an "unreasonable" delay caused by the owner or those for which the owner is liable.	was of a nature that the parties contemplated and specific provisions of their contract provide a remedy, or the contract otherwise supplied a means of compensation for such delay, then the delay cannot be deemed "unreasonable" to the extent the contract terms should be abandoned in favor of quantum meruit recovery. In *Christiansen Bros. v. State*, a companion case to *Mortensen*, the court noted that "[a]ctive owner interference may in some circumstances be of such a nature as to be outside the contemplation of the parties and thus to transcend a no-damage-for-delay clause," but concluded that, since there was no owner interference and the parties contemplated the delays, the clause precluded recovery of damages.[376] The court declined to conclude that no damages for delay clauses were void and unenforceable in violation of public policy.	provide a timely notice of the claim or failed timely to comply with a dispute resolution process. These provisions do not violate RCW 4.24.360 because they do not "waive, release, or extinguish" any rights to delay damages.[378] The Washington Supreme Court in *Scoccolo Construction, Inc. ex. rel. Curb One, Inc. v. City of Renton*[379] used RCW 4.24.360 to void a city's contract provision that attempted to shift the cost of delays caused by utility companies to the contractor. RCW 4.24.360 invalidates no damages for delay clauses as against public policy "where the delay is caused by the contractee or 'persons acting for' the contractee."[380] The court concluded that, since the city's franchise contracts with the utility companies gave the city the power to compel the utilities to relocate their facilities, the utilities were "acting for" the city for purposes of RCW 4.24.360.
West Virginia	No statutes or case law.	None	No case law.	No case law.
Wisconsin	According to the Wisconsin Supreme Court, no damages for delay clauses are enforceable, except where the delays in question are caused (1) by fraudulent conduct of the engineer, (2) by reason of orders made in bad faith and to hamper the contractor, and (3) by reason of orders unnecessary in themselves and detrimental to the contractor and which were the result of inexcusable ignorance or incompetence on the part of the engineer. Delay not contemplated by the parties is not an exception to the general rule that no	None	In *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*,[381] the seminal Wisconsin no damages for delay case, the plaintiff entered into a contract with the defendant general contractor, agreeing to provide plastering and drywall work as part of a hospital remodeling project for Milwaukee County. The plaintiff claimed that as a result of the defendant's delay in readying the premises, poor scheduling of its other subcontractors, and management of its own employees, the plaintiff's work was delayed. The plaintiff eventually ceased performance and brought suit to recover its increased costs. Although the plaintiff acknowledged that the contract had a no damages for delay provision, it argued that the delay was not of the kind the parties contemplated, and therefore the provision should not be enforced. The court rejected the plaintiff's argument:	In *Gregory*, the court noted that no damages for delay clauses are not enforceable where the delays in question are "caused (1) by fraudulent conduct of the engineer, (2) by reason of orders made in bad faith and to hamper the contractor, (3) by reason of orders unnecessary in themselves and detrimental to the contractor and which were the result of inexcusable ignorance or incompetence on the part of the engineer."[383]

376 90 Wn.2d 872, 877, 586 P.2d 840 (1978).
378 *Id.* See also *Hensel Phelps Constr. Co. v. King Cnty.*, 57 Wn. App. 170, 179 n.6, 787 P.2d 58 (1990).
379 158 Wn.2d 506, 145 P.3d 371 (2006).
380 *Scoccolo*, 158 Wn.2d at 509.
381 147 Wis. 2d 298, 304, 432 N.W.2d 584 (1988).
383 147 Wis. 2d at 304.

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	damages for delay clauses are enforceable.		*Knowing that unforeseen delays—such as the ones in this case—can occur, parties can bargain accordingly. A subcontractor can protect itself from the risk of unforeseen delay simply by adjusting its bid price in recognition of the potential additional costs or by refusing to accept such a provision in the contract.* In *Northern Clearing, Inc. v. Larson-Juhl, Inc.*,[382] the defendant contracted with a general contractor to build a facility. The general contractor subcontracted with the plaintiff to do the excavation, clearing, and grading on the project. At the beginning of the project, the general contractor erroneously placed grading stakes that caused the project to be delayed. After the subcontractor brought suit, the defendant claimed that the subcontractor should be barred from recovering damages for delay based on the no damages for delay provision in the contract that the subcontractor had entered into with the general contractor. The appellate court rejected the defendant's argument, in part because the court recognized that no damages for delay clauses "would not be enforced when delays were caused by orders detrimental to the contractor and which were the result of inexcusable ignorance or incompetence on the part of the engineer." The court concluded that the general contractor's staking errors fell in this category.	
Wyoming	It is uncertain whether Wyoming courts will enforce no damages for delay provisions.	None	In *Westates Construction Co. v. City of Cheyenne*,[384] the contractor contracted with the City to enlarge a water reservoir. The federal government, which retained broad supervisory authority over the project, suspended the contractor's work. As a result of the suspension of work, the contractor requested a change order that would compensate it for the anticipated delays and extra work the suspension created. The contractor, however, failed to submit the required data in support of its request for a change order. Three years later, the contractor resubmitted its request for a change order, along with its supporting data, seeking additional compensation for the delay and extra work performed. The trial court granted summary judgment in favor of the City, and the appellate court affirmed. The appellate court noted a provision in the parties' construction contract that stated: *"No charge will be made by the Contractor for hindrances or delays from any cause whatsoever in the progress of the work."* The appellate court concluded that, on its face, this provision seemed to preclude any claim by the contractor for delay damages. However, the general	The holding in *City of Gillette* suggests that, unless a no damage provision clearly and unequivocally states that an extension of time, or some other non-monetary remedy, is a contractor's "sole and exclusive" remedy for delay, the contract provision will not be enforced or interpreted to preclude a contractor's claim for delay damages.

[382] 2004 WL 2093311 (Wis. Ct. App. Sept. 21, 2004).
[384] 775 P.2d 502 (Wyo. 1989).

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State	Summary	Applicable Statutes	Construction and Enforcement	Exceptions to Enforcement
			conditions to the contract expressly allowed for the recovery of delay damages by either party. The general conditions also stated that where there was a conflict between contract terms, the terms of the specific agreement between the City and the contractor would control. The appellate court construed these provisions together to conclude that the parties had intended that delay damages would only be available to the City. Such a conclusion was dicta, however, because the appellate court proceeded to conclude that it need not construe what the parties meant by these conflicting contract provisions because the real issue was the fact that the contractor was required under the general conditions to comply with the change order procedures before obtaining an increase in the contract amount or contract time. Because the contractor had failed to comply with the change order procedures in a timely manner, the contractor's claim for delay damages was legally precluded. Some have read *Westates Construction* to mean that Wyoming courts will enforce no damages for delay provisions; however, that case did not make that finding. Several years later, in *City of Gillette v. Hladky Construction, Inc.*,[385] the court had to decide whether the following contract provision amounted to a no damages for delay provision that precluded the contractor's delay damages claim: *If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either … or by changes ordered in the Work … or other causes beyond the Contractor's control … then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.* The City relied on this provision to argue that the contractor's exclusive remedy was an extension of time, not monetary damages. The contractor responded that the parties' contract did allow for recovery of money damages for delay, citing a provision in the contract that provided that the above-quoted contract provision would not preclude recovery of damages for delay by either party under other provisions of the contract documents. The contractor also relied upon another contract provision, which stated that the rights and remedies available under the contract documents *"shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law."* The Supreme Court of Wyoming agreed with the contractor, holding that because delay damages are generally available under common	

[385] 196 P.3d 184 (Wyo. 2008).

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			law, remedies provided in a contract are generally not exclusive, and the contract provision relied upon by the City did not contain express language limiting the contractor's remedies or state that the contractor's remedy provided therein was exclusive, the contract provision at issue did not apply to bar the contractor's claim for delay damages. Citing a leading commentator on construction law, the court also noted that a "typical" no damages for delay clause expressly states that a time extension is the contractor's "sole and exclusive" remedy for delay. Because the contract provision at issue did not contain express, limiting language to this effect, the court concluded that it was not a no damages for delay clause.	

The "No Damages for Delay" Clause

About the Author

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