

# Exceptions to No-Damages-For-Delay Clauses

Two recent decisions demonstrate how courts are willing to recognize exceptions to no-damages-for-delay clauses. One of these decisions, however, illustrates the practical difficulty of proving the circumstances that trigger the exceptions.

## Traditional Statement of Exceptions

The first case, *United States ex rel. Gurtz Electric Co. v. Gilbane Building Co.*, No. 07?CV?4430 (N.D. Ill. October 10, 2008), arose out of a federal government project in Chicago and involved the application of exceptions to a No-Damages-for-Delay clause under Illinois law. This case is notable because the clause in question was not a classic no-damages-for-delay clause. Instead, the clause, labeled a "Limitations Clause" allowed delay damages under limited circumstances. The Limitations Clause excluded the owner, the architect, and the construction manager from liability to trade contractors for damages caused by delay, hindrance or interference with the performance of the work with two exceptions. First, the trade contractor could recover damages for active interference of the owner or one of its representatives. Second, delays resulting from defective plans and specifications could result in the trade contractor's recovery of delay damages.

The trade contractor sued the construction manager and its Miller Act payment bond surety. The complaint alleged that the construction manager caused delay by furnishing defective plans and specifications; by demanding that the trade contractor perform work different from, or in addition to, the work required under the subcontract; by interfering with the trade contractor's access to the project; and by failing to cooperate with the trade contractor and to properly schedule and coordinate other subcontractors or suppliers in a manner that would allow the trade contractor to complete its work timely. These allegations were contained within three legal theories: (1) a bond claim under the Miller Act; (2) a breach of contract claim against the construction manager; and (3) a claim for *quantum meruit*.

The construction manager and surety moved to dismiss and to have the court strike the allegations that sought to hold the construction manager and the surety liable for delay claims beyond the scope of the Limitations Clause. The trade contractor countered that Illinois law recognized exceptions to no-damages-for-delay clauses and that its allegations were within these exceptions.

The Illinois exceptions are: (1) delays not within the contemplation of the parties; (2) delay of an unreasonable duration; and (3) delay attributable to inexcusable ignorance or incompetence of the party attempting to enforce. The construction manager and its surety argued that these exceptions did not apply because the clause was not a true no-damages-for-delay clause. Rather, it was a limitation of liability clause. The court rejected the construction manager's and surety's arguments because, under Illinois law, the recognized exceptions to no-damages-for-delay clauses may be extended to other exculpatory clauses that limit but do not completely prohibit recovery of damages. Thus the court expanded the trade contractor's ability to recover for delay damages in addition to those listed in the Limitations Clause. The court allowed the trade contractor to proceed with its claims for delays due to the construction manager's failure to cooperate with the trade contractor and failure to coordinate the other subcontractors, presumably an allegation consistent with the third Illinois exception. In the end the trade contractor in Illinois had an opportunity to seek delay damages beyond the contractual limitations, if there are facts to support an application of the recognized exceptions to no-damages-for-delay clauses in Illinois.

## Proving the Exceptions

The second case illustrates the difficulties of establishing an exception to the enforcement of a no-damages-for-delay clause. In *Mafco Elec. Contractors, Inc. v. Turner Constr. Co.*, 2009 WL 807469 (W.D. Conn. March 26, 2009), an electrical subcontractor brought a breach of contract case against the general contractor seeking damages for its unpaid contract balance and an equitable adjustment to its contract of nearly \$900,000 because of delays experienced on the project. The general contractor moved for partial summary judgment on the equitable adjustment claim, arguing that the no-damages-for-delay clause prevented recovery. The no-damages-for-

delay clause prohibited the subcontractor from recovering damages for delay, obstruction, hindrances, or interferences with its work unless the general contractor actually recovered corresponding costs from the owner. The subcontract also gave the general contractor the right, in its sole discretion, to refuse to pursue a subcontractor claim with the owner, if the general contractor deemed the claim to lack merit in whole or in part.

The subcontractor admitted the applicability of the no-damages-for-delay clause, but contended that one of the several exceptions to enforcement, under Connecticut or New York law, should apply. The court held that the law of Connecticut and New York recognized four exceptions to enforcement of no-damages-for-delay clauses: (1) delays caused by the enforcing party's bad faith or willful, malicious, or grossly negligent conduct; (2) unanticipated delays; (3) delays so unreasonable that they constitute an intentional abandonment of the contract; and (4) delays resulting from the enforcing party's breach of a fundamental obligation of the contract.

The electrical subcontractor argued that the general contractor's conduct fell into the first, second, and fourth exceptions. The court disagreed and held that, as a matter of law, the no-damages-for-delay clause was enforceable under the facts of this case.

The electrical subcontractor attempted to prove that the general contractor was grossly negligent in causing its delays. The general contractor responded that these allegations, even if true, amounted to ordinary negligence so that the no-damages-for-delay clause applied. The court agreed with the general contractor. The court found the electrical subcontractor's allegations of gross negligence to be conclusory and vague. The only persuasive fact cited by the electrical subcontractor to support its gross negligence claim was an owner's representative's statement that the general contractor's supervision was the "worst ever seen" in his twenty years in the construction industry. Upon closer examination, however, that statement was made with respect to the general contractor's supervision of other trades, not the electrical work at issue in this case. To sum it up, vague and conclusory assertions of delay, mismanagement, and failure of coordination do not constitute gross negligence or willful or malicious conduct.

The court also agreed that there was no evidence for a jury to consider on the exception of unanticipated delays. The legal standard here is whether the delays experienced are reasonably foreseeable. In this case, the electrical subcontractor received an extension to its substantial completion date. At the end of the contract, even by the electrical subcontractor's own expert's opinion, the delay to substantial completion was at most seven months. Such a delay, the court ruled as a matter of law, could not be a delay that was not contemplated by the parties. The court characterized a delay that could support this exception as one that is, in essence, an abandonment of the contract. That court ruled, as a matter of law, that a seven-month delay is not an abandonment of the contract. This reasoning appears to collapse the second and third exceptions into a single category.

Finally, the electrical subcontractor argued that the delays constituted a breach of a fundamental obligation of the subcontract. The court also rejected this position. The electrical subcontractor based its argument for this exception on the general contractor's failure to provide timely materials and purchasing and delivery information for the installation of certain light fixtures. The court noted that the record was undisputed that the electrical subcontractor did eventually receive the materials and completed its work, except for punchlist items, seven months beyond the substantial completion date at the latest. Such breaches of contract are not a complete failure of a condition precedent to performance. In reaching this conclusion the court relied on a decision where an owner failed to obtain a wetlands permit necessary to begin construction and a second case in which a two-year delay caused by faulty subsurface exploration, plan changes and the invasion of protesters onto the job site prevented a contractor from making progress. As the court noted, "the fundamental breach must completely frustrate the performance of one of the parties, not merely delay it for a time."

The court also rejected the electrical subcontractor's argument that the general contractor's failure to present its delay claim to the owner constituted a fundamental breach of contract. The court relied upon the contractual provision noted above that gave the general contractor discretion to refrain from presenting such a claim if it deemed it without merit.

### **Practical Points**

The exceptions to no-damages-for-delay clauses vary from jurisdiction to jurisdiction. Some

jurisdictions may provide exceptions that are more easily proven than others. Nevertheless, all parties to construction contracts should be reminded that court-made exceptions to no-damages-for-delay clauses and other liability limitations clauses require proof that is beyond the “garden variety” delay. It is also significant that the Illinois and Connecticut cases were in very different stages of litigation. The construction manager’s and surety’s motion in the Illinois case was directed at the complaint’s allegations, while the Connecticut case was a partial summary judgment hearing on a more fully-developed record after discovery. At the summary judgment stage, a party seeking to apply one of the exceptions to the application of a no-damages-for-delay clause must be able to show particular facts for a jury to consider that support those exceptions. Conclusory allegations simply will not do.