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UPDATE

Has the "No-Damage-For-Delay" Clause Just Become Even Stronger?

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In construction contracts "no-damage-for-delay" clauses have been enforced by the courts for more than three decades. Although four exceptions to this clause have been carved out, a recent decision by the Appellate Division, 1st Department may just have doomed the most promising of the exceptions.

Since 1983, the New York courts have enforced "no-damage-for-delay" ("NDFD") clauses in construction contracts. As the name indicates, these clauses typically provide that one party to a contract (usually the owner) will not be responsible to the other (usually the contractor) for any damages, costs or expenses whatsoever resulting from delays to the work, no matter how caused. The clauses are routinely inserted into subcontracts as well. If you are on the wrong end of one of these clauses, it can be extremely difficult to recover any damages for delay — even when caused by the acts of the other party.

In 1986, the Court of Appeals listed four exceptions to NDFD clauses. Basically, the exceptions apply where (1) the party seeking to be shielded was willfully, maliciously or grossly negligent or evinced "bad faith"; (2) the delays were so unreasonable as to constitute an intentional "abandonment" of the contract; (3) there was a breach of a "fundamental obligation" of the contract; or (4) the cause of the delay was "uncontemplated."

Exceptions 1, 2 and 3 have been almost impossible to establish in the typical case. Contractors, therefore, attempt to shoehorn delay claims into the "uncontemplated" exception. The basis for this exception is that although contracting parties are free to allocate risks any way they might agree, they cannot be said to have allocated a risk that neither party could have contemplated. Fitting within this exception, however, was already a challenge. Courts have held that anything even obliquely mentioned in the contract such as change orders, sub-surface conditions, and other contractor delays could be deemed to be "contemplated."

On May 3, 2016, the Appellate Division, 1st Department dismissed a contractor's delay claim due to a NDFD clause. By itself, that would not be noteworthy. However, the court stated: "in any event, under the contract, plaintiff assumed the risk for all delays, whether contemplated or uncontemplated."

This new language implies that notwithstanding the exception carved out by the Court of Appeals, one may exculpate oneself from even uncontemplated delays by allocating that risk in the contract. In other words, one may be able to turn uncontemplated delays into contemplated delays simply by saying so in the contract. Query whether one could similarly shift the risk of the other 3 exceptions?

It didn't seem possible, but NDFD clauses may just have become even tougher to overcome.

Gallet Dreyer & Berkey, LLP has earned a national Tier 1 ranking by *U.S. News & World Report* for its construction law and litigation practice.

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