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CONTRACTUAL DEVICES TO LIMIT, WAIVE AND LIQUIDATE SCHEDULE-RELATED DAMAGES

The quantification of schedule-related damages is a subject so difficult and so fraught with the potential for aberrational results that parties often try to limit them in their contracts, or at least limit the other party’s entitlement to them. These efforts usually consist of attempts to limit contractors’ damages for delay or to waive either or both the owners’ and contractors’ consequential damages—which often [but not necessarily] are schedule-related—or by attempting to quantify them in advance through the use of liquidated-damages clauses.

As is common with many other popular construction clauses, they are often misunderstood and, perhaps more dangerously, subject to popular misconceptions about their enforceability. These problems often are aggravated when the clauses are used together, or are intended to be mutually exclusive. This paper is an attempt to clarify some of the issues that arise in the more common schedule-related limitation of liability and liquidated damages clauses, particularly as they relate to owner-contractor agreements.

I. Owners’ First Line of Defense: No Damages for Delay Clauses

Generally, a contractor is entitled to recover damages for losses due to delay in hindrance of work if the contractor proves: (1) its work was delayed or hindered; (2) it suffered damages because of the delay or hindrance; and (3) the owner of the project was responsible for the act or omission which caused the delay or hindrance.3

Under this rule, contractor-caused delays do not entitle a contractor to damages, but owner-caused delays or force majeure events might. Since the cause of the delays usually is shared and always debated, owners often attempt to exclude all damages for delay, including those caused by themselves. A long-standing contractual device to do so is the use of the no-damage-for-delay clause, the “purpose [of which] is to shift the risk for construction delays from the buyer of construction services to the seller of the services.”4

An early example of such a clause was discussed in O’Connor v. Smith,5 where a contractor sought damages for an owner-caused delay. The clause, which apparently was written in 1886:

In case the company shall be delayed in acquiring title to the lands required by the [railroad], or for any other reason, the contractor shall not be entitled to any

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5 84 Tex. 232, 19 S.W. 168 (1892).
damages…but shall have such extension of time for the completion…as the engineer may deem proper.\textsuperscript{5}

After determining that the clause was unambiguous, the court held:

We do not think that the clause of the contract…can be held to have application to the matters in controversy in this suit. The delay therein provided for is one that the railway company might suffer, and not one that it should cause.\textsuperscript{7}

The next important Texas case interpreting no-damages-for-delay clauses is \textit{Housing Authority of City of Dallas v. Hubbell}.\textsuperscript{8} There, the contractor contended that it was delayed because the owner’s architect imposed “arbitrary and capricious requirements” on him during construction. He sought delay damages in the face of the following clause:

No payment or compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable.\textsuperscript{9}

The contractor obtained a judgment based on a jury finding that the owner’s architect was indeed guilty of arbitrary and capricious conduct,\textsuperscript{10} which the contractor said took the delay damages outside the scope of the no-damages-for-delay clause. The appellate court agreed, holding that the “arbitrary and capricious” finding implied bad faith on the part of the owner. The court went on to hold:

The ‘no-damage-for-delays’ provision was intended to protect Owner from damages for delays caused by others than Owner, and was intended also to protect Owner from damages for delays caused by Owner itself even if such delays were due to Owner’s negligence and mistakes in judgment. But the ‘no-damage-for-delay’ provision did not give Owner a license to cause delays ‘willfully’ by ‘unreasoning action’, ‘without due consideration’ and in ‘disregard of the rights of

\textsuperscript{6} Id.

\textsuperscript{7} Id. at 171. The ruling was dicta, however, since the court nevertheless affirmed judgment for the railroad because it found that the contractor had given up its claim as a “quid pro quo” for the payment of its retainage as part of the project closeout. In this respect, the case appears to have some similarities to the issues presently pending before the court in \textit{TA Operating Systems v. Solar Applications Eng’g, Inc.}, 191 S.W.3d 173 (Tex.App.—San Antonio 2006, writ pending).

\textsuperscript{8} 325 S.W.2d 880 (Tex.Civ.App. 1959, writ ref’d n.r.e.).

\textsuperscript{9} Id. at 890.

\textsuperscript{10} Which the trial court defined as “willful and unreasoning action, without due consideration, and in disregard of the rights of other involved parties.” \textit{Id.} at 884-85. The owner’s requested instruction on “arbitrary and capricious” was to define it as meaning “fractious, whimsical, changeable, not rational, depending on the will alone, tyrannical, despotic, done in bad faith, or a failure to exercise honest judgment.” \textit{Id.} at 885.
the parties’, nor did the provision grant Owner immunity from damages if delays were caused by Owner under such circumstances.11

City of Houston v. R.F. Ball Constr. Co.12 was the first attempt by a Texas court to articulate widely adopted exceptions from other jurisdictions. The owner argued, successfully, that the contractor’s delay damages were precluded by a no-damages-for-delay provision, despite the contractor’s argument that the damages were “not intended or contemplated by the parties to be within the purview of the provision.”13 In a heavily-cited footnote, the court identified three other “generally recognized exceptions,” including delays: 1) caused by fraud or bad faith; 2) extending such an unreasonable amount of time such that the delayed party was justified in abandoning the project; or 3) not within the specifically enumerated delays under the clause.14 The court enforced the no-damages-for-delay clause, reasoning that although the contractor had proven the delay damages were unforeseen, the clause applied to unforeseen damages and thus was within the contemplation of the parties at the time of contracting.

Twenty years later, in Green Intern., Inc. v. Solis,15 the Texas Supreme Court mentioned, but did not explicitly endorse as Texas law, all of these exceptions and an additional one cited by the court of appeals, “active interference or other wrongful conduct” of the party seeking to enforce the no-damages-for-delay clause.16 The Court nevertheless reversed the judgment for the subcontractor because “Assuming that these five exceptions preclude the enforcement of no-damages-for-delay clauses, these exceptions have not been established in this case”17 because the jury was never asked whether the delays were unreasonably long, were contemplated or intended by the parties under the no-damages-for-delay-clause, or whether the contractor caused delays by its active interference and wrongful conduct.18

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11 Hubbell, 325 S.W.2d at 891. The court cited City of Dallas v. Shortall, 87 S.W.2d 844 (Tex.App.—Dallas 1935) reversed on other grounds 114 S.W.2d 536 (Tex. 1938), which held that a no-damages-for-delay clause was unenforceable because the delay was “wholly unanticipated,” but it was reversed on other grounds—the differing site conditions, the claim upon which it was premised, could not survive a Longergran challenge—and it passed into obscurity.

12 570 S.W.2d 75 (Tex.Civ.App.—Houston [14th Dist.] 1978, writ ref’d n.r.e.).

13 Id. at 77.

14 Id n.1. The Fifth Circuit Court of Appeals adopted the R.F. Ball exceptions in United States ex rel. Marshall D. Wallace v. Flintco, Inc., 143 F.3d 955, 964 (5th Cir. 1998).

15 951 S.W.2d 384 (Tex. 1997).

16 Id. at 388.

17 Id. (emphasis added).

18 Id. Although the Texas Supreme Court did not expressly hold that the [now] five exceptions were recognized under Texas law, prudent lawyers seeking to invalidate a no-damages-for-delay clause should obtain jury findings specifically tracking each of the exceptions sought, since, under Solis, jury questions on the cause of delay may not suffice to establish one of the exceptions.

For additional examples of Texas courts interpreting exceptions to no-damages-for-delay clauses, see Alamo Community College Dist. v. Browning Constr. Co., 131 S.W.3d 146 (Tex.App.—San Antonio 2004, pet. dism’d by
The subcontractor also challenged the enforceability of the clause on the grounds that it did not meet the fair notice requirements of conspicuousness set forth in *Dresser Indus. v. Page Petroleum, Inc.*\(^9\) The Court disagreed and held that conspicuousness, though required for indemnification clauses, is not required for no-damages-for-delay clauses because they are not extraordinary risk-shifting devices.\(^{20}\)

No-damages-for-delay clauses substantially shift the schedule-related risk from owners to contractors and from contractors to subcontractors. As a result, these clauses “will have a price tag attached.”\(^{21}\) Moreover, parties negotiating no-damages-for-delay clauses should remember that the enforcement of the clause may be subject to somewhat murky defenses of bad faith, “active interference,” “unreasonable delay” or simply that the parties did not intend the delay to be within the purview of the clause. Even broadly-worded clauses may be subject to litigation and interpretation by an arbitrator or judge.\(^{22}\)

Therefore, a belt-and-suspenders approach to no-damages-for-delay clauses will attempt to enumerate the delay-causing events covered by the clause, as well as the damages the owner is attempting to exclude, e.g. lost profits, extended general conditions, and possibly require the contractor to include no-damages-for-delay clauses in its subcontracts as well.\(^{23}\) Indeed, many of the interpretation issues involving consequential damages waivers—discussed below—can be better addressed in a no-damages-for-delay clause. Rather than leave to the courts the issue of whether particular damages, such as lost profits, productivity losses, or impact damages are covered by a blanket no-damages-for-delay waiver, one text suggests that owners include the following language in the AIA General Conditions:

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agr.) (holding that delays caused by owner’s agent’s active interference with the project precluded owner from relying on no-damages-for-delay clause); *Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761 (Tex.App.—Dallas 1996, writ denied) (holding that contractor’s allegation that delay resulted from owner’s unreasonable interference with project, among other things, precluded summary judgment in owner’s favor as fact issue remained on enforceability of the no-damages-for delay clause).

\(^{19}\) 853 S.W.2d 505, 508 (Tex. 1993).

\(^{20}\) *Green Intern, Inc. v. Solis*, 951 S.W.2d at 387.

\(^{21}\) *Alternative Clauses To Standard Construction Contracts* 324 (S. Gregory Joy & Eugene J. Heady eds., 3rd ed. 2009) (this assumes, of course, that both parties have bargaining leverage, which often is not the case. Perhaps for this reason, the AIA does not include no-damages-for-delay clauses in their family of contracts.).

\(^{22}\) *See, e.g., City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 130-31 (Tex.App.—Beaumont 1993, writ denied) (Contractor argued unsuccessfully that no-damages-for-delays clause applied only to underground work. The court disagreed, holding that the clause “stated… the owner will not be liable for damages on account of delays due to changes made by the owner…. This clause applied to underground construction, but not exclusively to underground construction.”).

8.3.3 Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under Section 8.3.1, shall be the sole remedy of the Contractor for any (i) delay in the commencement, prosecution, or completion of the Work, (ii) hindrance, interference, suspension or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims (items i through iv herein collectively referred to in this Section 8.3.3 as “Delays”) whether or not such Delays are foreseeable, unless a Delay is caused by the acts of the Owner constituting intentional interference with the Contractor’s performance of the Work, and only to the extent such acts continue after the Contractor furnishes the Owner with notice of such interference. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Owner’s exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling, or correction of the Work), regardless of the extent or frequency of the Owner’s exercise of such rights or remedies, shall not be construed as intentional interference with the Contractor’s performance of the Work.24

Not every contractor will agree to such a dramatic limitation of its rights and, indeed, the American Institute of Architects does not attempt to impose no-damages-for-delay clauses in its family of documents.

II. Consequential Damage Waivers: Second Line of Defense

The specter of liability for consequential damages for a delayed project haunts both owners and contractors. Often viewed by both as a mechanism for uncertain and potentially ruinous liability, many in the industry have attempted to limit the recovery of these damages through the use of waivers.25 The current AIA clause—which is somewhat typical of industry forms—states:

15.1.6 Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

24 Alternative Clauses, supra, at 323. The clause is intended as a replacement for ¶ 8.33 of the General Conditions for the Contract of Construction, AIA Document A201 (2007), which otherwise specifically disclaims a position on no-damages-for-delay.

25 The movement toward these clauses picked up speed after the notorious decision in Perini Corp. v. Great Bay Hotel & Casino, Inc., 129 N.J. 479 (1992), where the New Jersey Supreme Court upheld an arbitration award to the Great Bay Hotel & Casino for nearly $15 million, more than 24 times the general contractor’s entire fee on the project.
1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.\(^{26}\)

Before addressing the enforceability of this waiver of consequential damages, however, we must first attempt to determine what damages are “consequential”—and therefore waived—and which are “direct” and therefore outside the purview of the clause.

The distinction between direct and consequential damages is one of the most “baffling” and “criticized” common-law principles,\(^{27}\) which had its genesis in the famous 1854 case of Hadley v. Baxendale.\(^{28}\) Hadley contracted with Baxendale for the delivery of a broken crankshaft, but as a result of Baxendale’s late delivery, Hadley’s business was closed longer than anticipated. The court, taking into consideration his business losses, awarded judgment for Hadley. The Court of Exchequer remanded for a new trial and announced the rule that has confused lawyers ever since:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.\(^{29}\)

Little has happened over the last 150 years to refine Judge Alderson’s formulation. In Texas, direct damages “are the necessary and usual result of the defendant’s wrongful act; they flow naturally and necessarily from the wrong.”\(^{30}\) Consequential damages “result naturally, but

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\(^{26}\) General Conditions for the Contract for Construction, ¶ 15.1.6, AIA Document A201 (2007).

\(^{27}\) Philip L. Bruner & Patrick J. O’Connor, Jr., 6 BRUNER & O’CONNER CONSTRUCTION LAW 19:16 (2009).


\(^{29}\) Id. at 151.

\(^{30}\) Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997).
not necessarily, from the defendant’s wrongful acts… [and] need not be the usual result of the wrong, but must be foreseeable… and must be directly traceable to the wrongful act and result from it.”

Courts have struggled to precisely define into which of these categories damages fall, in large part because classification depends on the whole language of a construction contract, frequently entered into hastily and without the benefit of counsel, by parties unaware of the legal controversies involved. It is under these circumstances that lost profits, for example, may be either direct or consequential, depending on how, whose and which profits are lost.

Despite the uncertainty of the characterization of the damages, courts have not hesitated to enforce their waiver, albeit with inconsistent applications. Consequential damages waivers are enforceable unless “they meet the extremely high standard of unconscionability.” In Texas, the unconscionability of a contract or clause is measured by examining: 1) the atmosphere in which an agreement is formed; 2) alternatives available to the parties at the time of contracting; 3) the non-bargaining ability of a party; 4) whether the contract is contrary to public policy, or illegal; and 5) whether the contract is oppressive or unreasonable. Indeed, the authors could find no Texas construction case in which a consequential damages clause was deemed unconscionable, possibly because the construction industry involves “parties generally… considered to be sophisticated and capable of fully understanding the terms of the contracts they enter,” it seems unlikely that consequential damages waivers will frequently be declared unconscionable in construction disputes.

While the clauses generally are enforceable, courts nevertheless have ample opportunity to equivocate, even on seemingly identical damages. A typical example is Wade and Sons, Inc. v. Am. Standard, Inc., a case involving an HEB grocery store remodeling project. A supplier and a mechanical subcontractor entered into a purchase agreement with a consequential damages waiver. The contract called for the supplier to deliver air conditioning units with factory installed “piping packages.” The delivered units did not have the requisite piping packages, and the mechanical subcontractor ultimately had to install the pipe himself, delaying his work by six months and costing, by the subcontractor’s estimation, nearly $75,000. The court stated that the

31 Id.


34 Douglas M. Poulin, Recovering Consequential Damages, 23 CON. LAW. 29, at 30 (No. 4, Fall 2003).


36 Poulin, supra, at 30. Advocates for homeowners, subcontractors and suppliers might be expected to disagree about levels of bargaining power and sophistication throughout the industry.

subcontractor’s damages arose “out of having to fabricate and install the piping packages for the units and the resulting delay on the project.”\^{38} The court concluded—without providing any statement of facts upon which it relied—that the subcontractor’s damages were consequential and therefore barred by the contract because the cost of “fabricating and installing the piping packages in a finished space…could not have been conclusively presumed to have been foreseen or contemplated by the parties.”\^{39}

Lost profits, interest, or delay damages may be deemed either direct or consequential in any given case, based on how the contract allocates risks and responsibilities for payments, performance, and the consequences of breach at the time of contracting. Thus, it could be the case that because large construction contracts are customarily financed by third-parties, “interest costs incurred and the interest revenue lost during [a delay in completion]…are predictable results of the delay and are, therefore, compensable direct damages.”\^{40} However, it could also be the case that financing one’s own project precludes recovery of interest as a direct damage.\^{41} One cannot reliably predict how any given judge, jury, or arbitrator might find under many scenarios.

Drafters should recognize that consequential damages waivers are a useful, if inconsistently interpreted, tool for limiting liability. There is little certainty in how judges or arbitrators will interpret the vague distinctions between direct and consequential damages. Even when parties specifically enumerate illustrations of what they deem to be consequential damages, as is the case in the 2007 AIA A201 General Conditions, the court may very well conclude that the waiver does not apply to direct damages for these enumerated items. In Tenn. Gas Pipeline, for example, in spite of the fact that “loss of profits” and “loss of use” were specifically included in the waiver of consequential damages as “consequential loss or damage,” the court still held that the clause did not preclude recovery for loss of use or profits characterized [by the court] as direct damages.\^{42}

Ultimately, although a consequential damages waiver may limit damages generally, parties may find their original goals thwarted when a specific dispute falls into the hands of a third-party decision-maker. If owners want to preclude the contractor from recovering principal office expenses, they should say so in the contract directly, rather than depending on a judge or

38 Id. at 822.
39 Id. at 823-24; see also, 6 Bruner & O’Connor Construction Law 19:16 n.8 (2009). One of the most recent cases attempting to distinguish between direct and consequential damages is the unreported opinion in Tenn. Gas Pipeline Co. v. Technip USA Corp., 2008 WL 3876141 (Houston [1st Dist.] 2008, review denied). It analyzes a myriad of different damages claims unique to a complicated $18 million dollar construction delay case, and characterizes them as either “direct” or “consequential” in a turgid opinion which the Supreme Court refused to review. It is nevertheless a notable example of the difficulty of characterization implicit in a broad waiver of consequential damages.
42 Id. at *21.
arbitrator to conclude that principal office expenses are consequential damages. Likewise, if contractors wish to limit the owner’s recovery for rental expenses, they should do so unambiguously. Parties seeking to limit consequential damages and limit other specifically enumerated damages, possibly could do so using the following mark-up of the AIA General Conditions:

15.1.6 Waiver of Certain Damages

The Contractor and Owner waive all Claims against each other for consequential, incidental, or special damages arising out of or relating to this Contract. In addition, the following damages, whether consequential, direct, or otherwise, are also waived:

.1 damages incurred by the Owner for [specific list of waived damages]; and

.2 damages incurred by the Contractor for [specific list of waived damages].

This clause may remove from judges’ and arbitrators’ hands the daunting task of delineating whether this or that lost profit, for example, is direct or consequential, based on the facts, circumstances, and the subsequent positions of the contracting parties. Another clause, which specifically addresses delay damages, was extensively used in Ohio until the legislature banned its use when the cause of the delay was the owner’s act or failure to act:

To the fullest extent permitted by law, any extension of time granted pursuant to [the contract] shall be the sole remedy which may be provided by [Owner], and [Contractor] shall not be entitled to additional compensation or mitigation of Liquidated Damages for any delay, interference, hindrance or disruption, including, without limitation, costs of acceleration, consequential damages, loss of efficiency, loss of productivity, lost opportunity costs, impact damages, lost profits or other similar remuneration. [Contractor] agrees that the possibility that [Contractor] may accelerate its performance to meet the Construction Schedule is within the contemplation of the parties and that any such acceleration is solely within the discretion of [Contractor].

III. Liquidated Damages

Liquidated damages clauses are often the “compromise to an outright waiver of consequential damages,” as liquidated damages “fill the void left by the elimination of

43 See, e.g., Alternative Clauses To Standard Construction Contracts 324 (S. Gregory Joy & Eugene J. Heady eds., 3rd ed. 2009) where owners are advised to abandon the specific illustrations of consequential damages from 15.1.6 of the A201 General Conditions entirely.

44 See, Cleveland Constr., Inc. v. Ohio Pub. Employees Retirement Sys., 2008 WL 885841 (Ohio App. [10th Dist.]).

consequential damages” in a construction contract.46 Such clauses stipulate an amount of recoverable damage resulting from some event, usually a delay on a project’s construction.

The primary impediment to the recovery of liquidated damages is the prohibition against their use as a “penalty.” Volumes have been written on the question of when a stipulated damage provision of a contract should be enforced as liquidated damages and when enforcement should be denied because it is a penalty provision.47 In Texas, a liquidated damages provision is not enforceable unless the court finds that: 1) the harm caused by the breach is incapable or difficult of estimation, and 2) that the amount of liquidated damages called for is a reasonable forecast of just compensation.48 Whether a liquidated damages clause is a penalty is a question of law for the court.49 Penalty is an affirmative defense to the payment of liquidated damages; therefore, the party seeking to invalidate the clause carries the burden of proof.50

There are, however, no hard and fast rules as to whether liquidated damages are penalties, or whether they are an imperfect forecast of difficult-to-determine damages. Obviously, when actual damages mirror liquidated damages, courts will enforce the clause.51 On the other hand, an owner with an enforceable liquidated damages clause may be precluded from introducing evidence of actual damages, even if actual damages suffered are well in excess of the liquidated damages stipulated under the contract.52 Owners who do not accurately predict their damages run the dual risk of being overcompensated—potentially resulting in the clause being invalidated as a penalty—or being undercompensated, in which event the liquidated damages effectively operates as a limitation of liability for the contractor.

The latter is, indeed precisely the effect of one widely-used industry form:

The Contractor understands that if the Date of Substantial Completion established by this Agreement, as may be amended by subsequent Change Order, is not attained, the Owner will suffer damages which are difficult to determine and

46 Poulin, supra, at 31.
47 Stewart v. Basey, 245 S.W.2d 484, 485-86 (Tex. 1952).
48 Rio Grande Valley Sugar Growers, Inc. v. Campesi, 592 S.W.2d 340, 342 n.2 (Tex. 1979) (citing Stewart v. Basey, 245 S.W.2d 484, 486 (Tex. 1952)).
51 Fidelity & Deposit Co. v. Stool, 607 S.W.2d 17, 25-26 (Tex.Civ.App—Tyler 1980, no writ) (where jury found that actual damages suffered was $3,794.96, liquidated damages of $3,000 bore “reasonable relationship” to actual damages, and was therefore recoverable as valid liquidated damages).
52 Beard Family P’ship v. Commercial Indem. Ins. Co., 116 S.W.3d 839, 848-49 (Tex.App.—Austin 2003, no pet.) (the parties stipulated the enforceability of the liquidated damages clause at $500 a day and, as a result, the court of appeals affirmed the trial court’s decision to bar any evidence of actual damages, which were allegedly $1,000 per day).
accurately specify. The Contractor agrees that if the Date of Substantial Completion is not attained the Contractor shall pay the Owner ______ Dollars ($_______) as liquidated damages and not as a penalty for each Day that Substantial Completion extends beyond the Date of Substantial Completion. The liquidated damages provided herein shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages of whatsoever nature incurred by the Owner which are occasioned by any delay in achieving the Date of Substantial Completion.53

This clause memorialized what two prominent commentators suggest is the general rule: except under unusual circumstances, a liquidated damages clause for delay “constitutes the owner’s exclusive remedy for delay caused by events within the scope of the clause and bars the owner from recovering any actual damages attributable to the delay.”54

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53 AGC ConsensusDOCS 200 ¶6.5.1.1 (2007).

54 5 BRUNER & O’CONNOR CONSTRUCTION LAW 15:82 (2009). See also George C. Baldwin, The A, B, C’s of Liquidated Damages 7, Construction Law Conference (1999). (“An owner will not be able to collect both liquidated damages and other delay damages, if the [liquidated damages] clause covers delay. Neither will the owner be permitted to choose whether to pursue actual or liquidated damages once the breach has occurred. Its election occurs when the clause is placed in the contract.”).
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CONTRACTUAL DEVICES TO LIMIT, WAIVE AND LIQUIDATE SCHEDULE-RELATED DAMAGES

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OWNERS’ FIRST LINE OF DEFENSE:
NO DAMAGE FOR DELAY CLAUSES

GENERAL RULE-RECOVERY FOR DAMAGES

- Generally, a contractor is entitled to recover damages for losses due to delay in hindrance of work if the contractor proves: (1) its work was delayed or hindered; (2) it suffered damages because of the delay or hindrance; and (3) the owner of the project was responsible for the act or omission which caused the delay or hindrance.
  - * Jensen Constr. Co. v. Dallas County, 920 S.W.2d 765 (Tex. App.—Dallas 1996, appeal after remand).*
AIA A-201 DELAYS AND EXTENSIONS OF TIME

§ 8.3 DELAYS AND EXTENSIONS OF TIME
§ 8.3.1 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 of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.
§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.
§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

AIA A201- DELAY PROVISION DOES NOT LIMIT OR PRECLUDE DAMAGES FOR DELAY

• § 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

EXAMPLE OF AN 1886 NO DAMAGES FOR DELAY CLAUSE

• In case the company shall be delayed in acquiring title to the lands required by the [railroad], or for any other reason, the contractor shall not be entitled to any damages...but shall have such extension of time for the completion...as the engineer may deem proper.

— O'Connor v. Smith, 84 Tex. 232, 19 S.W. 168 (1892)
EARLIEST TEXAS CASE HOLDING “NO DELAY” CLAUSE DOESN’T APPLY

• We do not think that the clause of the contract...can be held to have application to the matters in controversy in this suit. The delay therein provided for is one that the railway company might suffer, and not one that it should cause.

  • O’Connor v. Smith, 84 Tex. 232, 19 S.W. 168 (1892)

TEXAS COURTS CONTINUE TO STRUGGLE WITH APPLYING NO DAMAGES FOR DELAY PROVISIONS

• “The ‘no-damage-for-delays’ provision was intended to protect Owner from damages for delays caused by others than Owner, and was intended also to protect Owner from damages for delays caused by Owner itself even if such delays were due to Owner’s negligence and mistakes in judgment.”

  – Housing Authority of City of Dallas v. Hubbell, 325 S.W.2d 880 (Tex.Civ.App. 1959, writ ref’d n.r.e.).

HUBBELL ANNOUNCES EXCEPTIONS TO ENFORCEMENT

• But the ‘no-damage-for-delay’ provision did not give Owner a license to cause delays ‘willfully’ by ‘unreasoning action’, ‘without due consideration’ and in ‘disregard of the rights of the parties’, nor did the provision grant Owner immunity from damages if delays were caused by Owner under such circumstances.

  • Housing Authority of City of Dallas v. Hubbell, 325 S.W.2d 890 (Tex.Civ.App. 1959, writ ref’d n.r.e.).
Green v. Solis
Exceptions To Enforcement of No Delay Clauses

• DELAY WAS NOT INTENDED OR CONTEMPLATED BY THE PARTIES;
• DELAY RESULTED FROM FRAUD, MISREPRESENTATION, OR OTHER BAD FAITH ON PARTY SEEKING BENEFIT;
• LENGTH OF DELAY WAS UNREASONABLE OR WOULD JUSTIFY ABANDONING CONTRACT
• DELAY WAS NOT SPECIFIC TYPE OF DELAY DESCRIBED IN CONTRACT
• ACTED ARBITRARILY AND CAPRICIOUSLY (TRACKING LANGUAGE OF HUBBELL)

Green Intern., Inc. v. Solis, 951 S.W.2d 384, (Tex. 1997)

Drafting Solutions To Common No Damage For Delay Issues-Enumerate Delay

8.3.3 •[A]n extension in the Contract Time..., shall be the sole remedy of the Contractor ...whether or not such Delays are foreseeable, unless a Delay is caused by the acts of the Owner constituting intentional interference with the Contractor's performance of the Work, and only to the extent such acts continue after the Contractor furnishes the Owner with notice of such interference.

Drafting Solutions To Common No Damage For Delay Issues-Enumerate Delay

• The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling, or correction of the Work), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as intentional interference with the Contractor's performance of the Work.
DRAFTING SOLUTIONS TO COMMON NO DAMAGE FOR DELAY ISSUES-ENUMERATE DAMAGES

• In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration.

CONSEQUENTIAL DAMAGE WAIVERS:
SECOND LINE OF DEFENSE

SOME [BUT NOT ALL] CATEGORIES OF DELAY DAMAGES

• EXTENDED GENERAL CONDITIONS (PROJECT DELAY COSTS)
• LOST PROFITS ON THE WORK
• INTEREST
• LOSS OF BONDING CAPACITY
• LOSSES OF BUSINESS AND REPUTATION
• LOSS OF PRODUCTIVITY
• ACCELERATION
• IMPACT DAMAGES
• HOME OFFICE OVERHEAD
AIA A201
§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES
The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:
1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

Texas Supreme Court’s Explanation of Difference between Direct and Consequential Damages
DIRECT DAMAGES
• Damages that “are the necessary and usual result of the defendant’s wrongful act; they flow naturally and necessarily from the wrong.”

CONSEQUENTIAL DAMAGES
• Damages that “result naturally, but not necessarily, from the defendant’s wrongful acts...[and] need not be the usual result of the wrong, but must be foreseeable...and must be directly traceable to the wrongful act and result from it.”

Adkins v. Perry Equipment, 941 S.W.2d 812, 816 (Tex. 1997)

“The Ohio Clause”
• “[A]ny extension of time granted shall be the sole remedy which may be provided by the Owner, and the Contractor shall not be entitled to additional compensation or mitigation of Liquidated Damages for any delay, interference, hindrance or disruption, including, without limitation, costs of acceleration, consequential damages, loss of efficiency, loss of productivity, lost opportunity costs, impact damages, lost profits or other similar remuneration. The Contractor agrees that the possibility that the Contractor may accelerate its performance to meet the Construction Schedule is within the contemplation of the parties and that any such acceleration is solely within the discretion of the Contractor.
Parties seeking to limit consequential damages and limit other specifically enumerated damages could also mark-up of the AIA General Conditions

15.1.6 Waiver of Certain Damages

- The Contractor and Owner waive all Claims against each other for consequential, incidental, or special damages arising out of or relating to this Contract. In addition, the following damages, whether consequential, direct, or otherwise, are also waived:
  - 1 damages incurred by the Owner for [specific list of waived damages] and
  - 2 damages incurred by the Contractor for [specific list of waived damages].

LIQUIDATED DAMAGES

- Viewed as a “compromise” to waiver of consequential damages

- “Designed to “fill the void left by the elimination of consequential damages” in a construction contract.

- Key Question- Is the Provision Enforceable?
AGC Consensus Document 6.5.1

6.5 LIQUIDATED DAMAGES

6.5.1 SUBSTANTIAL COMPLETION. The Owner and the Contractor agree that this Agreement
shall be evidenced by a Memorandum of Understanding or a written agreement based on
the Date of Substantial Completion.

6.5.1.1 The Contractor undertakes that if the Date of Substantial Completion established by
the Agreement, or any delays caused by Subcontractor Delays, is not obtained, the Owner
will incur damages which are difficult to determine and accurately quantify. The Contractor
agrees that if the Date of Substantial Completion is not obtained, the Contractor shall pay the
Owner daily damages of $5,000.00 or such other damages and not as a penalty to
each Day that Substantial Completion is not obtained Date of Substantial Completion.
The liquidated damages provided herein shall be in lieu of all liability for any cost, expenses,
interest, or any other damages of whatever nature
incurred by Owner which is conditioned by any delay in achieving the Date of Substantial
Completion.

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