



## The Critical Path

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## Understanding “No Damages for Delay” Construction Clauses in Ohio

by Andrew L. Smith



### Introduction

A common form of construction litigation damages comes in the form of delay damages. So what exactly are delay damages? They are generally defined as any form of damages stemming from a construction project delay, and routinely include site overhead, unabsorbed home office overhead, liquidated damages, escalation, idle labor and equipment, and additional material storage. Under Ohio law, to recover from a contractee for delay a contractor must prove:

1. There was delay;
2. The delay was caused by the contractee;
3. The delay damaged the contractor and;
4. The amount of damages.

*Backus Associates, Inc. v. State, Dept. of Natural Resources*, 47 Ohio Misc. 11, 352 N.E.2d 663, at syllabus (1976).

Contracting parties are also permitted to freely negotiate and potentially limit liability for delay damages. A “no damages for delay” clause<sup>[1]</sup>, has been standard in construction contracts and, until fairly recently, routinely valid and enforceable. The reasoning behind enforcing such clauses originated from protecting the public. The clauses are also potentially enforceable between private contracting parties. According to *Owen Construction Co., Inc. v. Iowa State Dept. of Transp.*, 274 N.W.2d 304, 306 (Iowa 1979):

*They protect public agencies which contract for large improvements to be paid for through fixed appropriations against vexatious litigation based on claims, real or fancied, that the agency has been responsible for unreasonable delays.*

As the U.S. Supreme Court in *Wells Bros. Co. v. United States*, 254 U.S. 83, 87, 65 L. Ed. 148, 41 S. Ct. 34 (1920), noted long ago:

*Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties 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 exacted for the work.*

This article will further explore the common law background of no damages for delay clauses, and provide an up to date analysis of where Ohio law stands today regarding enforceability of these clauses.

### Ohio Common Law

Initially, in *Carrabine Constr. Co. v. Chrysler Realty Corp.*, 25 Ohio St.3d 222, 495 N.E.2d 952 (1986), the Ohio Supreme Court upheld summary judgment in favor of Chrysler because Carrabine Construction had entered into a contract with a no damages for delay clause. The broad and comprehensive clause in *Carrabine* stated:

*The Contractor shall have no claim against the Owner for an increase in the contract price or a payment or allowance of any kind based on any damage, loss or additional expense the*

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*Contractor may suffer as a result of any delays in prosecuting or completing the work under the contract, whether such delays are caused by the circumstances set forth in the preceding paragraph or by any other circumstances. It is understood that the contractor assumes all risks of delays in prosecuting or completing the work under the contract.*

#### Contract Interpretation

Because these clauses are contractual in nature they are subject to the basic common law rules of contractual interpretation. By way of example, in *Royal Electric Constr. Corp. v. Ohio State Univ.*, 10th Dist. No. 93AP-399, 1993 Ohio App. LEXIS 6181 (Dec. 21, 1993), two state agencies hired a contractor to complete two renovation projects. The contractor filed a breach of contract action against the state agencies for financial losses suffered as a result of delays. The trial court found in favor of the contractor. However, the court refused to enforce a no damages for delay clause against the electrical contractor because the clause was ambiguous.

In particular, the court analyzed the following clause:

*There is no liability for damages resulting from delay caused by third persons which is not the result of interference on the part of the State as a contracting party. Any liability that may ensue that is caused by the failure of any Contractor to finish its portion of the work at a scheduled time is the responsibility of that Contractor and its Surety.*

Because the contract did not define "third persons" the court held an ambiguity was present as to whom that term applied. In deciding the enforceability of this provision, the court in *Royal* recognized such clauses have been strictly construed against the drafter, and thus unenforceable in this instance.

To the contrary, in *Cleveland Constr. v. Reynoldsburg City Sch.*, 10th Dist. No. 96APE02-242, 1996 Ohio App. LEXIS 2751 (June 28, 1996), the court reached a different result in analyzing a very similar clause:

*Regardless of other provisions in the Contract Documents to the contrary, the Contractor will not be entitled to damages or additional compensation from the Owner or Architect or CM on account of delays caused by persons.*

Similar to the circumstance found in *Royal*, the term "persons" is used and, likewise, undefined. However, the court reasoned unlike the term "third persons" found in *Royal*, the term persons is defined numerous times in the Revised Code. Relying on the Revised Code, the court held a corporation constitutes a person and the defendant board of education was protected from suit for delay damages caused by another contractor's abandonment of concrete work and the failure of the board to find a replacement contract.

Therefore, like any other contractual provision, you must pay particular attention to the terms used in crafting a no damages for delay clause, including definitions, scope, and limitations. This is especially true since the clause could later be construed against the drafter and deemed unenforceable in its entirety.

#### Affirmative Defense

A no damages for delay clause defense is an affirmative defense subject to waiver if not properly and timely pled in an answer. *Gibbons-Grable-Goettle v. Northeast Ohio Reg. Sewer Dist.*, Eighth Dist. No. 49132, 1986 Ohio App. LEXIS 5368, \*10-\*12 (Jan. 23, 1986).

#### **Exceptions to Enforceability**

There are several exceptions to the enforceability of a no damages for delay clause. In Ohio, the exceptions apply to delay that:

1. Was not intended or contemplated by the parties to be within the purview of the provisions; or
2. Resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; or
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.



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*Digioia Bros. Excavating v. City of Cleveland*, 135 Ohio App.3d 436, 450, 734 N.E.2d 438 (1999).

Moreover, construction law practitioners have recognized the following additional exceptions to no damages for delay clauses:

1. "Cardinal" change in the scope or character of the work; or
2. First to breach defense (i.e. if the owner breaches its own contract first then the owner is precluded from relying on exculpatory provisions in the contract); or
3. The argument a no damages for delay clause is irreconcilable with a "time is of the essence" clause and neither clause should be enforceable; or
4. Inconsistency with other contract provisions such as "liquidated damages", "changes", "differing site conditions", "compensable and non-compensable time extensions", "time and material", etc.; or
5. General waiver.

### [Summary Judgment Concerns](#)

In *Nix, Inc. v. Columbus*, 111 Ohio App. 133, 145, 171 N.E.2d 197 (1959), the court found a no damages for delay clause would not be enforced when conditions arise which are not within the contemplation of the parties at the time the contract was made. Furthermore, in *Royal*, the court held "while a certain amount of delay in a construction project may be foreseeable, the accumulation of delays can be of such a magnitude that, taken together, the extent of delay becomes unforeseeable." *Id.* at \*15.

Considering the extent and magnitude of the accumulation of delay and foreseeability issues may present a question of material fact and prevent summary judgment for defendants in situations where the applicability of a no damages for delay clause otherwise appears obvious. Likewise, evidence of bad faith, fraud, or other exceptions enumerated above present fact-intensive inquiries outside the general limits of summary judgment.

### [Ohio Legislature and R.C. 4113.62\(C\)](#)

In 1998, the General Assembly declared no damages for delay clauses void and unenforceable as against public policy in certain circumstances. In a nutshell, an owner or contractor cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language.

Specifically, pursuant to R.C. 4113.62(C):

1. Any provision of a construction contract, agreement, or understanding, or specification \* \* \* 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 \* \* \* is void and unenforceable as against public policy.
2. Any provision of a construction subcontract, agreement, or understanding, or specification \* \* \* 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 \* \* \* is void and unenforceable as against public policy.

(Emphasis added).

### ["Delay" Defined](#)

The case of *Cleveland Constr., Inc. v. Ohio Pub. Empl. Ret. Sys.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, examined the precise terminology and broad scope of R.C. 4113.62(C). In the construction context, the term "delay" encompasses loss of efficiency, disruption, and hindrance. Delay is the result caused when something is postponed, hindered, or slowed. Black's Law Dictionary (8 Ed.2004) 458. "In construction litigation, a project owner's delay can give rise to a number of different types of damages, including inefficiency costs, acceleration costs, loss of productivity costs, and unabsorbed home office overhead costs." *Id.* at ¶18.

For instance, in the context of bond reduction in public improvements, a delay claim is a claim that arises due to default on provisions in a contract regarding the time when the whole or any specified portion of work contemplated in the contract must be completed.

### [Proximate Cause](#)

Nevertheless, for the statute to apply and prohibit a no damages for delay clause, the delay in issue must be proximately caused by the party seeking to enforce the clause.

In *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Commn.*, 10th Dist. No. 12AP-588, 2013-Ohio-3827, the evidence establishes the site delay was attributable to unanticipated soil conditions. Because the project owner neither knew nor should have known about the poor soil conditions before the discovery of such conditions at the commencement of the project, the court upheld enforcement of the clause at issue prohibiting delay damages against the owner.

#### Limiting Damages vs. Precluding Damages

In addition, the statute does not prohibit the parties from limiting recovery of delay damages, but rather solely prohibits waiver or preclusion of delay damages. This is a fine line distinction.

In *B.I. Chipping Co. v. R.F. Scurlock Co.*, 10th Dist. No. 04AP-1219, 2005-Ohio-6748 (Dec. 20, 2005), the court upheld a contract provisions limiting the recovery of delay damages to the amount recovered from the Ohio Department of Transportation claims process. Indeed, according to the court, "because the contract allows appellant to recover for delays in the amount that appellee receives through the ODOT claims process, and thus does not preclude all liability for delays, R.C. 4113.62(C) does not apply and does not render any provision of the contract unenforceable." (Emphasis added) *Id.* at ¶11.

#### **Points to Remember**

When evaluating a delay damage claim beware of no damages for delay clauses and consider the following:

- Contracting parties are permitted to freely negotiate and potentially limit liability for delay damages.
- Pay particular attention to the exact terms and definitions contained in the no damages for delay clause.
- Pursuant to statute, in Ohio an owner or contractor generally cannot cause a delay, and then avoid the natural consequences for causing the delay by using a no damages for delay clause.
- General exceptions to enforceability exist for certain delays as discussed above.

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[1] Also commonly referred to as "no damage delay clause."

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