



AN OWNER'S GUIDE TO RELATED CLAIMS

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An Owner's Guide to Related Claims

A. In General

Whether an owner recovers, absorbs, or becomes liable to the contractor for costs associated with time impacts largely depends upon the specific events causing the time impact and the terms of the contract. Often these issues turn on the existence and language of time-related clauses in the contract, such as a "time is of the essence" clause, time extension clause, force majeure clause, liquidated damages clause, waiver of damages clause, "no damages for delay" clause, acceleration clause and the like.

Even though these issues are fact dependent, they can be classified by asking whether the impact is excusable and, if so, whether it is compensable. Unless altered by contract, an impact to the contractor's time of performance is normally excusable if it was caused by an event or condition that was not the fault and beyond the control of the contractor, including its subcontractors and suppliers. Absent an exculpatory clause, an impact to the contractor's time of performance is typically compensable if it was caused by the owner. Thus, an impact to the contractor's time of performance will usually fit into one of three categories (1) inexcusable/non-compensable, (2) excusable/non-compensable and (3) excusable/compensable.

B. Inexcusable/Non-Compensable Impacts

An inexcusable/non-compensable impact may result in the contractor being liable to the owner for delay damages, which may or may not be liquidated. Typically, an inexcusable impact is an impact caused by a contractor or its subcontractors. However, an impact that is normally considered excusable may become inexcusable where a contractor assumes the risk of that impact or waives the available remedy for that impact by failing, for example, to request additional time.

A recent case involving a paving contract illustrates the point. The contract required completion of the paving work before a certain date because the owner did not want the contractor placing concrete during cold weather. The contractor's performance was delayed by unusual weather during the summer months, which entitled the contractor to a time extension but not an increase in the contract

price. However, the time extension would have required the contractor to re-mobilize in the spring to complete the work due to the seasonal deadline. Rather than request a time extension, the contractor agreed to assume the risk of any surface defects in the asphalt resulting from cold weather paving in exchange for a waiver of the season-related deadline. The road buckled the next spring allegedly as a result of the cold weather paving. Because the contractor failed to repair the buckled road within the contract time, plus extensions, the owner withheld liquidated damages. The contractor sued for final payment, alleging that the delays were excused. The court held that the delays were not excused because the contractor had assumed the risk of surface defects in exchange for allowing the paving to continue beyond the seasonal deadline.

In another recent case, the contractor sued an owner for final payment on a construction contract, which the owner withheld as liquidated damages. The contractor alleged that its delay in completion was excused because it had been impacted by the owner's separate prime contractor, unusual weather and design changes. During the progress of the work, the contractor requested only one time extension, which was granted. Importantly, the contractor failed to request time extensions for impacts caused by the owner's separate prime contractor, unusual weather and design changes. The court held that these impacts were not excused because they were waived by the contractor's failure to request a time extension as provided in the contract. As a result, the owner was justified in withholding the final payment to pay liquidated damages.

C. Excusable/Non-Compensable Impacts

An excusable/non-compensable impact typically results in the contractor's absorbing the cost of the impact and receiving a time extension as its sole remedy. Typically, these types of impacts are caused by force majeure events that are beyond the fault or control of either party to the contract, including Acts of God, unusual weather and fire.

D. Excusable/Compensable Impacts

1. Contractor's Delay claims

Every contract contains an implied obligation that neither party will do anything to prevent, hinder, or delay the other party's performance. Absent terms to the contrary, a contractor may recover delay damages proximately resulting from the other party's acts or omissions that prevent, hinder, or

delay its work. In a construction context, this typically involves showing (1) the extent of the delay, (2) the proximate cause of the delay and (3) actual damages resulting from the delay.

In a recent case, the Court held that the contractor was entitled to recover delay damages when the state enjoined its operations because the owner had failed to secure a valid right-of-way permit. In another case, the Court held that contractor was entitled to recover delay damages because the owner hindered its work by requiring it to surpass the requirements in the specifications.

Expert testimony is often helpful to show the impact to the contractor's completion date caused by a particular delay. A contractor must present specific evidence of how its performance was affected by the other party's act or omission. While a critical path analysis is not necessarily a per se requirement to recovery on a delay claim, courts are generally skeptical of other types of delay analysis. Broad generalities and inferences to the effect that the other party must have caused some delay because the contract took longer to complete than anticipated are not sufficient. Similarly, evidence of a delay to a specific work activity does not necessarily result in the recovery of delay damages because delay damages may only be recovered where there are impacts to a target date or a completion date.

Proof that an event proximately caused a delay often raises the issue of whether there were any concurrent events that potentially impacted the work. If there are concurrent causes of delay for which the other party is not responsible, the other party is not the sole reason for the delay. Some courts refuse to award any damages to either party if there were concurrent causes of delay. However, a majority of the courts allow recovery if there is a clear apportionment of the delay and expenses attributable to each party.

A contractor may recover delay damages even if the project was completed on time but the contractor could have completed its work ahead of schedule and thereby saved substantial sums of money, absent delays caused by the other party.

2. Exculpatory clauses

An exculpatory clause releases a party from liability for its own wrongful acts or omissions. A common exculpatory clause in a construction contract is a "no damages for delay" clause, which in most cases seeks to bar a contractor from recovering damages for delays caused by the other party.

Even though “no damages for delay” clauses are enforced in most states, they are disfavored and typically strictly construed against those who seek their benefit.

In essence, the clause converts an excusable/compensable impact into an excusable/non-compensable impact. For example, a subcontractor on a one and one-half year project was denied recovery despite having alleged that it was delayed by two additional years as a result of the contractor’s poor coordination and abandonment of the work. Even though the delays were presumed to be unreasonable, the appellate court held that a clause in the subcontract stating that the subcontractor would be entitled to only a time extension in the event of delay was a clear expression of the parties’ intention to bar delay damages. Interestingly, a lower appellate court found the same clause ambiguous.

Notwithstanding the existence of a “no damages for delay” clause, many courts allow for damages to be recovered for: (1) unanticipated delays; (2) delays caused by the other party’s bad faith or its willful, malicious, or grossly negligent conduct; (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the other party; and (4) delays resulting from the other party’s breach of a fundamental obligation of the contract.

These exceptions are often narrowly construed. For instance, the fundamental breach of contract exception applies only for the breach of a fundamental, affirmative obligation the agreement expressly imposes upon the other party. For example, the court in a recent case refused to bar a contractor’s delay damages under a no-damages-for-delay clause because, the court held, the owner breached an express duty to coordinate the work of its other prime contractors. In a companion case, the same court enforced a no-damages-for-delay clause where the contractor alleged that the owner breached an implied duty to coordinate the work of its other prime contractors.

Similarly, the abandonment of the contract exception is typically limited to those situations where the contracting party is responsible for delays which are so unreasonable that they connote a relinquishment of the contract by the contracting party with the intention of never resuming it.

The active interference exception applied to a subcontractor’s claim where the contractor failed to coordinate the work of its other subcontractors, directed the subcontractor to perform piecemeal jobs, failed to require cleanup, improperly surveyed areas, failed to timely relocate utilities and failed to protect the subcontractor’s finished work.

The unanticipated delay exception limits the application of an exculpatory clause to delays that (1) were reasonably foreseeable, (2) arise from the contractor's work, or (3) are mentioned in the contract. For instance, a recent case held that the parties to a four month long rock excavation subcontract contemplated the excavation taking as long as eight months, but not that the contractor would fail to provide surveyors to establish grade.

Several state legislatures have recently enacted statutes voiding or limiting the use of no damages for delay clauses in some or all circumstances. Ohio and Washington void no damages for delay clauses in both public and private contracts. Arizona, California, Colorado, Louisiana, Massachusetts, Missouri, North Carolina and Virginia void no damages for delay clauses with respect to a contractor's right to recover damages for delays caused by a public entity.

3. Acceleration costs

Acceleration may occur from the other party's express or constructive order to increase the rate of production. An express order to accelerate does not have to be written or use the word "accelerate", although it must direct the contractor to increase its rate of production and reflects an intention or understanding that the increased effort will result in additional compensation.

In a recent decision, a contractor sent a letter to a subcontractor requiring that it increase its rate of production to meet the contractor's revised schedule. A hand-written note on the letter stated that "all costs for the above will be negotiated at close out." The contractor argued that the letter was not an order to accelerate because the subcontractor had caused the delay and the revised schedule gave the subcontractor more time to perform its work than the original schedule. The court held that the letter was an express order to accelerate because it directed the subcontractor to increase its rate of performance at a time when the weather conditions were less favorable than the original schedule and manifested an intention to pay the subcontractor additional sums for such increased performance.

Constructive acceleration is present when (1) the contractor encountered an excusable delay entitling him to a time extension; (2) the contractor requested an extension; (3) the request was refused or not acted upon in a timely manner; (4) the contractor was ordered to accelerate or finish the work as originally scheduled despite the excused delays; and (5) the contractor actually accelerated the work. All five conditions must be met,

although a request for a time extension and a denial of the request may be treated as an order to accelerate.

An order to accelerate does not have to be in explicit mandatory terms, as it may consist of merely pressing a contractor to take additional action at a time when the contractor could finish within the contract time plus excusable delays. For example, it may consist of an owner's unjustified pressure on a contractor to employ larger crews and add more equipment.

The basis for recovering for constructive acceleration is that the contractor encountered an excusable delay but the owner would not grant a time extension to recover the lost time. If the owner determines that the delay is inexcusable, the contractor may waive its construction acceleration claim if it does not dispute the determination.

D. Conclusion

Time impact claims are some of the most hotly contested claims in construction law. Owners and contractors frequently dispute every aspect of the claim, including whether timely notice was provided, causation and proper measure of damages. Often these claims result in large judgments and awards. Thus, it is important that the parties to a construction contract closely monitor the progress of the work, periodically update the schedule, provide timely notice of potential impacts and attempt to quantify the potential impact of a delay when it occurs. Otherwise, they may discover that time is truly money.

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