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What Do You Mean I'm Not Entitled to Recover My Damages – The Ramifications of Clauses that Limit Liability in Construction Contracts

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In the construction context, both an owner and general contractor often attempt to control their risks. Their motivations are for several reasons: (1) the different types and amounts of damages to which they are entitled are hard to predict; (2) these damages are often hard to quantify; and (3) the effort to contractually limit the other party's entitlement to such damages enables that party to regain a sense of certainty.

Over the years, the most common contractual "tools" used in the owner/contractor context to avoid the unpredictable mess surrounding these types of damages include: (1) limiting the contractor's right to recover damages for delay; (2) waiving the award of any consequential damages; and (3) including a liquidated-damages provision that stipulates the amount of damages in advance of any breach.

While these "tools" are important methods for simplifying the confusion surrounding certain construction damages, their usage also creates important ramifications for the party whose damages are limited. This paper introduces the three provisions commonly used in the owner/contractor context to limit liability and attempts to clarify the issues surrounding the enforceability of these provisions and the consequences that can follow.

Additionally, more courts are allowing design professionals to limit their liability in design contracts, provided doing so does not violate public policy or the state's anti-indemnification statute. This paper examines this nationwide trend and the effects, if any, it has on Texas practitioners and design professionals.

LIMITATION OF LIABILITY PROVISIONS IN CONTRACTS BETWEEN OWNERS AND GENERAL CONTRACTORS[1]

I.
NO DAMAGES FOR DELAY CLAUSES

THE GENERAL RULE

As a general rule in Texas,

> a contractor is entitled to recover damages for losses due to delay in the 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.[2]

[1] The author would like to thank Stephanie L. Holcombe, an associate at Porter & Hedges, L.L.P., for her research and other assistance on this paper.

Notably, this rule does not allow for the contractor to recover damages caused by its own delay.[3] Naturally, confusion can arise when the determination of who caused the delay is uncertain or the delay itself is shared between the contractor and the owner or where a delay is caused by multiple sources concurrently. Thus, to avoid this confusion and uncertainty, owners generally prefer to include a clause in the construction contract that prevents contractors from recovering any damages for delay. These clauses are typically called "no damage for delay provisions."[4]

The ramifications of an enforceable no damage for delay provision involve shifting the risk of delay from the owner to the contractor. As a result, a contractor could lose the right to recover any damages arising from delays, which might encompass most or all of the contractor's actual damages.

No damage for delay provisions have been used by owners in construction contracts since as early as 1886.[5] In *O'Conner v. Smith*, the construction contract between the owner and the contractor contained the following provision:

> In case the company shall be delayed in acquiring title to the lands required by the [owner], 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.[6]

The contractor sued the owner for damages caused by the owner's delays.[7] The court ultimately found that the provision did not apply under the circumstances because it only limited damages for delays that the owner could have *experienced* and did not expressly limit damages for delays the owner could have *caused*.[8]

For thirty years after *O'Conner*, owners relied on the owner-friendly no damage for delay provision, with the confidence that the provision would protect them from contractors' claims for damages caused by delays during construction. But, as the years progressed, this confidence would soon become weakened by the adoption of five contractor-friendly exceptions to the no damage for delay provision.

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[2] *Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761, 770 (Tex. App.—Dallas 1996).

[3] *Id*.

[4] *Id*.

[5] *O'Conner v. Smith*, 19 S.W.168, 169 (Tex. 1892).

[6] *Id*. at 171.

[7] *Id*. at 169.

[8] *Id*. at 171.

Title search: What Do You Mean I'm Not Entitled to Recover My Damage? The Ramifications of Clauses that Limit Liability in Construction Contracts

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