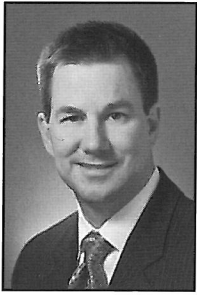


## ASK AN ATTORNEY



This month's article written by **Michael W. Winfield, Esq.**, of **Rhoads & Sinon, LLP**, Harrisburg.

**Q: If I have a no damage for delay clause in my contract, is there any circumstance where I can still seek damages resulting from delays to my work caused by the owner or someone under the owner's control?**

**A:** Ordinarily, Pennsylvania Courts will enforce no damage for delay clauses. Such clauses typically provide that a contractor cannot recover any damages arising out of or relating to any delays or impacts to its work, regardless of the cause, or the party responsible for the cause. Sometimes, these provisions specifically state that they include delays caused by the owner. In almost all cases, the provisions provide for a time extension to the contractor as the contractor's sole remedy for any delays to its work.

Pennsylvania Courts, however, recognize an exception to the above where the delay or impact to the contractor's work is caused by either (1) an affirmative or positive interference by the owner (or the owner's agent) with the contractor's work, or (2) a failure on the part of the owner (or the owner's agent) to act on some essential matter necessary for the prosecution of the work. An owner has an implied duty not to act in a way that will hinder or otherwise delay a contractor's performance. Where the owner breaches this implied duty, it may not seek protection from the contract for the damages flowing from that breach. Thus, when a Court determines that the owner has engaged in positive or active interference with the contractor's work, it will find the no damage for delay

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clause unenforceable, and permit recovery of damages by the contractor. This is true even if the clause specifically states that it applies to "owner interferences."

Whether or not the actions of the owner rise to the level of a positive interference will largely depend on the particular facts of each case. Courts have recognized an owner's failure to provide access to the worksite, to timely address design problems, and to obtain appropriate permits for the work to be the type of interference that warrants relief from the application of a no damage for delay clause. The point to be made here is that the mere presence of a no damage for delay clause does not necessarily mean that delay damages are not recoverable. Experienced legal counsel should be able to help identify if the factual circumstances in any particular case give a basis for seeking delay damages.

*The preceding article was written for informational purposes only and does not constitute legal advice. Before taking any action related to the issues addressed above, you should consult with legal experts.*

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