# Risky Business: The "Active Interference" Exception to No-Damage-for-Delay Clauses

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In these precarious economic times, a contractor's successful delay claim can turn an owner's otherwise profitable project into a financial wasteland. Consequently, owners often seek to limit their financial risk by shifting it to other contracting parties. This is reflected in form documents published by the American Institute of Architects,[1] the demand for new insurance products in the marketplace,[2] and the use of contractual exculpatory provisions,[3] such as the popular and controversial "no-damage-for-delay" clause.[4] Although clear and unequivocal no-damage-for-delay clauses[5] are recognized as valid in most jurisdictions,[6] courts have carved out a number of exceptions to the enforceability of such provisions, including "active interference" by the owner.[7]

The "active interference" exception generally requires proof of "intentional" and "willful" conduct,[8] but a growing number of courts have found it to exist where the alleged wrongful actions were merely "negligent"[9] This lack of uniformity has resulted in the gradual weakening of the no-damage-for-delay clause as an effective exculpatory tool. It is now poised to convert what was long thought to be a safe harbor into an owner's worst nightmare: years of litigation, extensive attorneys' fees, and the threat of unlimited damage exposure, all of which could result in settlements or adverse verdicts that deplete the owner's bank account or end in bankruptcy.

In light of this development, those seeking to enforce a no-damage-for-delay clause must take steps—even before the commencement of litigation—to neutralize the effect of the "active interference" exception, First, counsel for the owner must anticipate the active interference exception as early as the drafting stage by carefully drafting a no-damage-for-delay clause that addresses the recent trend toward a negligence standard. Then, at the outset of any litigation, counsel for the owner should highlight to the court the absence of facts giving rise to negligence, fraud, bad faith, or willful conduct, in addition to emphasizing the "heavy burden" placed upon the proponent of the active interference exception.[10] This brings to mind the famous Boston Massacre Trials, when John Adams told the jury that "facts are stubborn things and whatever may be our wishes, our[11] inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence"" That same logic should apply in defending a claim of active interference: focus on the facts, and fast! Counsel for the owner should ferret out the truth and test the contractor's active interference theory as early as possible in the litigation, ideally through a motion to dismiss, motion to strike, or motion for summary judgment. These efforts at the very least will assist you in maneuvering the case to a successful settlement or outcome at or before trial.

There has been surprisingly little commentary on the breadth and limitations of the active interference exception, and none examining its judicial expansion.[12] A recent article in this journal[13] summarized the various limitations to the enforceability of a no-damage-

for-delay clause, including active interference This article will focus exclusively on the active interference principle and its impact upon no-damage-for-delay clauses in the face of attempts to expand the doctrine. A proposed jury instruction has been included, should the delay claim proceed to trial.

## Overview of "Active Interference" Exception and the Literal Definitional Approach

The active interference exception arises from the notion mat every construction contract contains an implied promise not to prevent, hinder, or impede the contractor's performance.[14] What constitutes "active interference" in a given case, however, is a matter of considerable confusion, because courts apply no uniform definition or standard. Even decisions within the same jurisdiction often differ from each other. As one federal court recently observed, tine concept of active interference "has not attained any precise judicial description."[15]

One of the earliest attempts to grapple with the exception can be found in the seminal case of *Peter Kiewit Sons' Co. v. Iowa Southern Util. Co.*,[16] where the court held that to be guilty of active interference, the public agency would need to commit "some affirmative, willful act, in bad faith, to unreasonably interfere with plaintiff's compliance with the terms of the construction contract."[17] In arriving at this definition, the *Peter Kiewit* court adopted the approach used in *Cunningham Bros., Inc v City of Waterloo*[18] where the Iowa Supreme Court defined "interference" as it appeared in *Webster's Third International Dictionary*: "[t]o come in collision; to clash; also to be in opposition; to run at cross purposes "[19] Taking the analysis employed in *Cunningham* one step further, the *Peter Kiewit* court noted that *Webster's New International Dictionary* defined the term "active" to mean "[c]ausing action or change; characterized by change; opposed to passive," and that the term "active," by its common usage, "implies some degree of aggressiveness or commission."[20] In employing a literal definitional approach, the *Peter Kiewit* court concluded that active interference required both "willfulness" and "bad faith".

Although the *Peter Kiewit* standard has been adopted by numerous federal and state courts,[21] the bad faith component of that definition has all but been eviscerated due to the recognition of a separate "bad faith" exemption from a no-damage-for-delay clause.[22] Accordingly, in states recognizing a separate bad faith exception, it would be redundant to require bad faith as a predicate for "active interference." In other words, in jurisdictions espousing the modern version of the *Peter Kiewit* literal definition, a plaintiff contractor claiming active interference on the part of the defendant owner would need to show only that the defendant owner committed an affirmative, willful act that Unreasonably interfered with the plaintiff's performance of the contract, regardless of whether it was undertaken in bad faith.[23]

While it may no longer be necessary to show bad faith or reprehensible conduct, courts applying the *Peter Kiewit* definition have steadfastly resisted attempts to equate active interference with "negligence".[24] Use of the term "active" to modify "interference" is a significant consideration for these jurisdictions. As explained by the *Peter Kiewit* court, active interference requires "more than a simple mistake, error in judgment, or lack of total effort, or lack of complete diligence."[25] The rejection of a negligence standard also appears to make sense as a practical matter; to hold otherwise would expose the proponent of a no-dam-age-for-delay clause to inquiries into the reasonableness of every delay.[26]

Consistent with the foregoing approach, many courts that have found "active interference" have based their conclusion on *direct, active, and willful disruption by the owner*[27] One of the most egregious examples can be found in *Newberry Square Dev. Corp. v. Southern Landmark, Inc.*,[28] where there was evidence that the owner delayed approving plans and change orders, but ordered that construction not proceed absent such direction.[29] In addition, the owner repeatedly failed to make payments required by the contract and threatened to "break" the contractor before he would pay him.[30] Based upon these facts, the court concluded that there was adequate evidence to present to a jury the question of whether the owner

actively interfered with the contractor's work.[31]

Similarly, in US *for Use and Benefit of Evergreen Pipeline Constr. Co., Inc v Merritt in Meridian Constr.Corp.,*[32] the Second Circuit invalidated a no-dam age-for-delay clause based on its finding that the delays were caused by a general contractor's bad faith and malicious conduct toward the subcontractor, which included, inter alia, (a) failing to honor repeated promises to provide surveyors to the subcontractor, which were required for the subcontractor to be able to begin its work; (b) backcharging the subcontractor for delays even though the owner had granted an extension of time; (c) grossly inflating backcharges in an attempt to "break" the subcontractor; (d) stealing $20,000 worth of excavated material that the subcontractor intended to use as backfill; and (e) failing to make payments to the subcontractor by claiming that it had not been paid by the owner, when it had been paid.[33] Additionally, the general contractor terminated the subcontract one day prior to the completion of work, asserting that the subcontractor failed to pay its insurance premiums, even though the general contractor had previously paid the premiums or advanced the subcontractor money to do so.[34] The totality of this conduct prompted the Second Circuit to conclude that the no-damage-for-delay clause was inapplicable, and it upheld a jury award of $ 157,302 in delay damages for the subcontractor.[35]

It is significant to note that not every case of active interference involves facts as egregious as those found in *Newberry Square* or *Merruit Meridian*. And courts following the Peter Kiewit definition consistently have rejected attempts to invalidate a no-damage-for-delay clause on the grounds of active interference where the alleged owner misconduct was neither "affirmative" nor "willful" One of the most explicit examples of this occurred in *PT, & L Construction Co., Inc. v. State of New Jersey Dep't of Transportation*,[36] wherein the New Jersey Supreme Court held that a public agency's failure to coordinate the work of utilities subcontractors on a highway project did not constitute "active interference." In so deciding, the court reaffirmed the rule that when there is a disclaimer of liability, such as a no-damage-for-delay clause, "in the absence of bad faith, the State will not be liable for delays in carrying out its duty to coordinate, even if the delay is unreasonable."[37]

In its opinion, the New .Jersey Supreme Court rejected a negligence standard for active interference, explaining that active interference "connotes more than negligence . [i]t contemplates reprehensible behavior beyond 'a simple mistake, error in judgment, lack of total effort, or lack of complete diligence,' "[38] The PT & L court reasoned that to adopt a negligence standard, as had been urged by the plaintiff contractor, would "subject [the owner] in almost every case to the question of whether the delay was unreasonable, thereby rendering the [no-damage-for-delay] clause meaningless" since "[t]he very purpose of the clause was to avoid that type of exposure,"[39] The *P.T. & L* court noted, "[t]his is precisely the latitude that the State bargains for in its contracts, namely, that it shall not be liable for the cross-delays occasioned by the various contracting efforts Nor shall it expose itself to inquiries into the reasonableness of every delay"[40] Thus, in addition to adhering to *Peter Kiewit*'s literal definition of "active interference," the New Jersey Supreme Court identified one other factor militating in favor of a "willfulness" standard: the notion that parties should be free to contract and thus any interpretation of contractual provisions should conform to the parties' expressed intention.

## A Minority of Jurisdictions Consider Negligent Conduct to Be "Active Interference"

Despite the logical construction of the terms "active," which connotes willfulness and purposeful intent, and "interference," which suggests an affirmative act, an increasing number of courts have receded from the Peter Kiewit literal definition, finding active interference where the challenged conduct was "negligent" at most One of the earliest cases to articulate a negligence standard is *Kalisch-Jarcho, Inc v City of New York*[41] wherein the New York Court of Appeals held that a no-damage-for-delay clause would be unenforceable if the owner had acted in bad faith, or otherwise engaged in willful, malicious, or "grossly negligent" conduct during its performance of the contract[42] As explained by the

*Kalisch-Jarcho* court:

> [a]n exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.[43]

Under this standard, a contractor confronted with a no-damage-for-delay clause need only argue that the owner's conduct was "grossly negligent" to recover delay damages.[44] Other jurisdictions also recognize "gross negligence" as an exception to the no-damage-for-delay clause, but only as a separate doctrine independent from that of active interference.[45]

Further support for a negligence standard can be found in one of the earliest Florida decisions examining the active interference exemption, *Southern Gulf Utilities, Inc v. Boca Siega Sanitary District*:[46]

> The cases are clear that a willful failure to provide the right-of-way will not allow the public authority to hide behind the no-damages clause [internal citations omitted]. The question on simple negligence is closet; and in formulating a workable rule we must bear in mind that the delay can result from either a knowing or an ignorant failure. The contractor cannot sit idly, comforted by the thought that he will either get his rights-of-way on time and earn a profit on the contract, or, if delayed, obtain damages merely on account of the delay On the other hand, the public authority cannot allow in employees to remain idle on the comfortable assumption that the no-damages clause is to be taken literally. We cannot precisely define the conceptual line to which the no-damages clause permits the public [authority] to neglect the duties assumed to it under the contract. Clearly, there is some extent to which the no-damages clause would protect [the public authority] against ordinary lethargy which is not counteracted by a good faith effort on the contractor's part to expedite the acquisition of rights of way[47]

Although the *Southern Gulf* court left unanswered the question of whether "simple negligence" could nullify an otherwise valid no-damage-for-delay clause,[48] many courts have found active interference where the challenged conduct was neither affirmative nor willful. These include cases involving (a) the improper sequencing of work,[49] (b) the submission of defective plans or specifications,[50] (c) the failure to coordinate the work of other contractors properly,[51] (d) the failure to make the work site available,[52] and (e) the failure to giant timely extensions[53] Although such decisions do not explicitly articulate a negligence standard for active interference, they do suggest that virtually any kind of owner misfeasance or nonfeasance resulting in delay may be sufficient to overcome an otherwise valid no-damage-for-delay clause.

A more recent decision, *Triple R Paving, Inc v. Broward County*,[54] also has led some commentators to conclude that "simple negligence may be sufficient to defeat a no damage for delay clause."[55] In *Triple R*, a contractor sued a municipality after a construction project was delayed due to, among other things, a design flaw in the horizontal sight distance The design was prepared by the municipality's engineer.[56] At trial, the contractor presented evidence that the engineer knew prior to construction that the plans for the project did not meet horizontal sight distance standards, and that he failed to alert the contractor to this fact after construction commenced.[57] The contractor claimed that it sustained damages resulting from the inability to proceed efficiently with its work.[58] The case proceeded to trial, and at the close of the contractor's case, the engineer moved for a directed verdict on the basis that the contractor failed to prove that the delays were the result of fraud, bad faith, or active interference. The trial judge reserved ruling, the jury eventually returned a verdict awarding the contractor $112,929 31 in delay damages, and the court denied the motion for directed verdict.

On appeal, the engineer argued that the contractor failed to establish sufficient proof of fraud, bad faith, or active interference to overcome the validity of the "no-damage-for-delay" clause.[59] The appellate court in *Triple R* disagreed, finding that the facts surrounding the delay were sufficient to allow the case to proceed to jury trial for a determination of the issues of fraud, bad faith, or active interference.[60] The appellate court concluded that the engineer's early knowledge of the design flaw and his subsequent failure to apprise the contractor of that fact constituted "willful concealment of foreseeable circumstances which impacted timely performance," sufficient to overcome the defense of the no-damage-for-delay clause.[61]

In our view, *Triple R* does not support a simple negligence standard for active interference An owner's failure to disclose material facts long has been a basis for nullifying an otherwise valid no-damage-for-delay clause. For example, numerous courts have held that an owner's premature issuance of a notice to proceed with construction constitutes active interference if the owner was aware of a delay-causing condition yet opted to remain silent, thereby causing the contractor to unnecessarily incur additional costs and delays.[62] In *United States Steel Corp v Missouri Pacific RR Co.*,[63] the U.S. Court of Appeals for the Eighth Circuit held that a railroad company actively interfered with a bridge contractor by issuing a notice to proceed knowing that another contractor's work, upon which the bridge contractor's project depended, would not be completed on time.[64] The court reasoned that this was an affirmative, willful act, and that the requisite bad faith was demonstrated by the railroad company's silence in the face of its knowledge that delay-causing conditions existed.[65]

It was this rationale, and not some unfettered expansion of the active interference exception, that led to the nullification of the no-damage clause in T*riple R*. Apparently, the real significance of *Triple R* lies in the fact that Florida recognizes "willful concealment of foreseeable circumstances" as a separate exception to the enforceability of a no-damage clause,[66] whereas most other jurisdictions still view it as a subset of active interference. The only difference is in the label. Regardless of how one interprets Triple R or the line of cases involving the premature issuance of a notice to proceed, one cannot ignore the fact that courts are expanding the definition of the "active interference" to cover situations that would not satisfy the bright-line approach articulated in *Peter Kiewit*.

## How to Counteract the Expansion of the "Active Interference" Exception

The judicial expansion of the active interference exception is problematic on a number of levels. From the perspective of an owner (or a general contractor dealing with a subcontractor), the fallout is obvious: the apparent shift to a negligence standard will result in more delay claims proceeding to trial notwithstanding the existence of an otherwise valid no-damage clause, Faced with this changing landscape, it is incumbent on counsel for the owner, and in some instances for the general contractor, to take a proactive role in protecting their clients no-damage clauses from attack.

### *Redrafting the No-Damage-for-Delay Clause*

Counsel can undertake several steps to counteract the apparent expansion of an active interference exception Begin with the exculpatory provision itself. Specifically, owners and some general contractors should expand the scope of their no-damage clauses by expressly disclaiming negligence as a basis for nullifying the clause. In many jurisdictions, an exculpatory clause purporting to relieve a party's liability for negligence generally will be enforced when the clause expresses the parties' intent in clear and unequivocal terms.[67] In this instance, the "clear and unequivocal" standard is not a particularly high bar for the skilled draftsperson, since it may be sufficient to add as little as the following exculpatory language: *"The provisions of this paragraph shall apply if loss or damage results from the negligence of [the owner], its agents or employees."* This exact language was approved by the appellate court in *Elite Professionals, Inc v. Carrier Corp.*[68] as constituting "a clear and unequivocal expression of exemption from liability for negligence,"[69] and there is no reason why similar disclaimer language could not be employed in a no-damage clause. For good measure, add a space for the parties to initial this provision.

Proponents of no-damage clauses also may wish to include language stating that the contractor's sole remedy for delay is the right to seek extensions of time under the contract. A contractor's failure to request extensions of time, particularly where that right is expressly conferred, acts as a waiver of the contractor's right to seek delay damages. In *Marriott Corp v. Dasta Constr. Co*,[70] the Eleventh Circuit held the contractor's failure to request time extensions, a right to which it was entitled under the contract, precluded its claim for active interference.[71]

Dasta provides an excellent illustration of a no-

damage clause that expressly disclaimed owner negligence and conditioned the remedies for delay upon the contractor first making a legitimate request for an extension of time under the contract. The language used by the owner in *Dasta* (and blessed by the Eleventh Circuit) stated:

> [If] the Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner or by any contractor employed by Owner, or by changes ordered in the scope of the work, or by fire, adverse weather conditions not reasonably anticipated, or any other causes beyond the control of the Contractor, then the required completion date or duration set forth in the progress schedule shall be extended by the amount of time that the Contractor shall have been delayed thereby However, to the fullest extent permitted by law, Owner . and [its] agents and employees shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner . or [its] agents or employees, or any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees chat the sole right and remedy therefor shall be an extension of time.[72]

Based upon *Dasta*, the contract should require the contractor to specify the cause and length of the delay as well as the length of the requested extension [73] This contractual obligation ultimately will enable the owner to ascertain the basis of the alleged "delay-causing" event prior to litigation. Armed with this information, the owner will be in a better position to evaluate the legitimacy of the contractor's claim, and determine whether the request should be honored or rejected.[74] Moreover, such information is the pretrial equivalent of discovery, which could then be used by the owner to counteract a later, inconsistent claim by the contractor: for example, that the owner's active interference caused the delay. Even if the contractor's active interference claim were consistent with its prior notices to the owner requesting an extension of time, the owner still would benefit from this contractual notice requirement if the contractor failed to request time extensions commensurate with the delay it later claims during litigation At the very least, this provision requirement will shed light on the contractor's active interference allegations at the earliest possible moment—during construction—as opposed to years later during litigation.

***Identifying the Contractor's Theory of Active Interference as Early as Possible***

In the event that the proponent of a no-damage clause is sued for delay damages on the basis of active interference, the contractor's theory of "active interference" should be tested early, While this ordinarily can be accomplished through the use of a contractual notice provision similar to the one in *Dasta*, parties operating under an existing no-damages clause may not have the benefit of such protection, Therefore, an owner, in many instances, may not even receive notice of the alleged "delay-causing" event until after commencement of litigation.

Many jurisdictions already require that fraud be pled with particularity, and since "active interference" often has been equated with fraud,[75] the proponent of a no-damage-for-delay clause may file pretrial motions requiring that the initial pleading allege those facts that constitute active interference.[76] Otherwise, the proponent of the clause would likely face a moving target: the contractor not only would be free to assert the active interference exception relatively late in the case, but it conceivably could allege numerous alternative theories of interference in the hope that one or more will survive summary judgment. Aside from those jurisdictions requiring that active interference be initially pled, counsel must pursue dismissal through pretrial practice and discovery, with the hope of success on a motion for summary judgment or at trial.

***Dismissing the Active Interference Claim***

Identifying the factual basis for a contractor's active interference claim is one thing: eliminating it from the lawsuit is a much more formidable task When practicing in those jurisdictions following the *Peter Kiewit* definition of "active interference," an early dismissal should be pursued. If the contractor alleges the basis for active interference in its initial pleading, and such allegations involve owner conduct that is not willful, affirmative, unreasonable, and in bad faith (the standard posited by *Peter Kiewit*), the owner should immediately move to dismiss and/or strike the plaintiff's delay claims on the ground that

the allegations fail to satisfy the *Peter Kiewit* definition of "active interference" This strategy was successfully employed by the public agency owner in *Brown Bros., Inc. v Metropolitan Government of Nashville and Davidson County*,[77] wherein the court, in declining to invalidate a no-damage clause on the ground of active interference, noted that the contractor failed to allege "some kind of reprehensible conduct" on the part of the government agency.[78]

But rare is the case where "active interference" is ruled upon early in the proceedings.[79] Recognizing this, the proponent of a no-damage clause should be prepared to use discovery as a means of "locking in" the contractor's theory of active interference This should be done as early as possible to prevent the contractor from shifting bases as discovery unfolds. Toward this end, interrogatories coupled with a request for production of documents can best serve to identify and limit a contractor's theory of active interference. Ideally, the interrogatories should request the contractor to articulate the nature and basis of its delay claim, the cause of each delay, and all facts that support its contention that the delays were caused by the proponent of the no-damage-for-delay clause.[80] After this discovery has been reviewed, counsel should require the contractor to produce for deposition the person with the most knowledge of the factual basis for the active interference exception.[81]

Admissions established through the foregoing discovery can be utilized by the proponent of a no-damage clause in connection with a summary judgment motion seeking the dismissal of a contractor's delay claim, Regardless of whether the motion is granted, the proponent of a no-damage clause still stands to benefit by educating the trial court on the active interference issue at the earliest possible opportunity. This process can pay dividends down the road, particularly if the contractor asserts a different or inconsistent position at trial.

***Proposed Jury Instruction on "Active Interference"***

All is not lost, however, even if a contractor's active interference claim survives summary judgment. The trial still presents a plethora of opportunities for overcoming an active interference claim. While the burden of proof in a civil case is generally a preponderance of the evidence, the proponent of a no-damage clause should seek a jury instruction that closely adheres to the *Peter Kiewit* definition of active interference along with an instruction that recites that the burden of proving one of the exceptions to a no-damage clause is "a heavy burden".[82] The following proposed jury instruction illustrates this approach:

> In order to be guilty of active interference which would permit [Contractor] to recover delay damages notwithstanding the existence of the "no damage for delay clause" in the parties' construction contract, [Owner] would have to have committed some affirmative, willful act, in bad faith, to unreasonably interfere with [Contractor's] compliance with the terms of the construction contract There must be more than just a simple mistake, error in judgment, lack of total effort, or lack of complete diligence As implied by the term "active," [Owner's] negligence or gross negligence cannot be the basis of a finding of active interference.
>
> The burden of proving "active interference" is a heavy one You may not find [Owner] guilty of active interference unless you specifically find that [Owner's] alleged acts of interference were direct, willful and unreasonable, and materially interfered with [Contractor's] ability to timely complete its work under the parties' contract

## Conclusion

There is no clear consensus as to what constitutes "active interference." The interpretation of this exception varies from state to state (and even within states), as courts no longer rigidly adhere to the *Peter Kiewit* definition. Many jurisdictions require specific evidence of fraud, bad faith, or willful conduct, whereas other states appear to have adopted a negligence standard for active interference. Given the lack of a uniform criterion, the contract stage represents the earliest and best opportunity to mitigate the financial consequences of delay and defeat the active interference exception. During this stage, construction counsel should draft and negotiate a no-damage clause that encompasses negligent conduct. Furthermore, the clause should require that those seeking delay damages disclose the nature and extent of the delay claim as well as to produce all documentation supporting the claim. A carefully drafted no-damage clause also should stipulate that lack of compliance with these disclosure requirements would waive any claim for delay damages.

Against this backdrop, counsel should propound discovery and pursue pretrial motions to challenge

those facts that allegedly serve as the underlying basis for an asserted finding of active interference, This process is not an easy task. However, through careful drafting and an aggressive pretrial! attack to challenge the factual basis for the active interference exception, counsel for the owner has the ability to convert a client's risky business into a profitable one.

## Endnotes

1 *See generally* Lisa K. Miller & Brian .I O'Rourke, Drafting the Contract for Construction, CONSTR . BRIEFINGS NO . 2002-7 (Fed Pub, July 2002); Daniel J Donohue & John Randall Scott, A User's Guide to the 1996 AlA Design-Build Standard Form Contracts, CONSTR. BRIEFINGS No 97-6 (Fed. Pub, May 1997); Michael C. Loulakis and Bennett D Greenberg, The New DBIA Design-Build Standard Form Contracts, CONSTR BRIEFINGS NO 98-13 (Dec 199.8)

2 See generally James D Weier, Seth D L James Lamden, et al., Preserving Consequential Damages Through Limited Waiver and Insurance Coverage, CONSTR LAW, Summer 2002, at 24-27

3 BLACK'S LAW DICTIONARY defines an exculpatory clause as a "provision in a contract which protects a party from liability arising, in the main, from negligence" BLACK'S LAW DICTIONARY 566 (6th ed 1990) See generally Gwen Seaquist & Marlene Barken, Use of Exculpatory Clauses Is Subject to a Wide Variety of Definitions and Circumstances, 74 NYS BJ 27 (Apr 2002) In the construction industry, exculpatory clauses used by parties typically include disclaimers, assumption of risk, and indemnification clauses, as well as releases of liability Steven B Lesser, The Great Escape—How to Draft Exculpatory Clauses That Limit or Extinguish Liability, 75 FLA B.J. 10(NOV 2001)

4 "No-damage-for-delay" clauses (hereafter occasionally referred to as "no-damage" clauses) generally preclude a contractor from recovering compensation for project delays See generally J Bert Grandoff & Patricia E Davenport, The "No Damage for Delay" Clause. A Public Policy Issue, 75 FLA B J 8 (Oct 2001); Susan Siskind Dunne, "No Damage for Delay" Clauses, Constr. LAW, Apr 1999, at 38

5 Generally, to be enforceable, an exculpatory clause must be clear and unambiguous. If there is any ambiguity in the exculpatory language, the no-damage-for-delay clause likely will be adjudged unenforceable. See Forward Industries, Inc, v. Rolm of N.Y. Corp., 123 A D 2d 374, 375-76, 506 N.Y.S. 2d 453 (2d Dep't 1986) (holding that no-damage clause failed to satisfy this contractual prerequisite); Gayon v Bally's Total Fitness Corp., 802 So 2d 420 (Fla 3d DCA 2001) ("exculpatory clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away")

6 There are some noteworthy exceptions. In at least seven states, no- damage-for-delay clauses in public contracts are void and unenforceable. See COLO REV. STAT ANN §§ 24 91-103.5 (1991); CAL. PUB CONT. CODE § 7102 (West 1985); LA REV STAT. ANN § 38:2216(H) (West); Mo. REV STAT ANN § 34 058 (1990); N C GEN STAT § 143-134,3 (1997); OR REV. STAT § 279 063 (1985); VA. CODE ANN § 11- 56.2 (Michie 1991) In two states, the clauses are unenforceable in both public and private contracts OHIO REV. CODE ANN, § 4113 62(C) (West 1998); WASH REV CODE ANN § 4 24 360 (West 1979). See Joseph C Kovars & Michael E Peters, No Damage for Delay Clauses, CONSTR BRIEFINGS No. 2000-3 (Fed Pub., March 2000)

7 The authors recognize that owners are not the only parties to construction contracts that utilize no-damage-for-delay clauses—general contractors and other participants to design and construction also frequently employ no-damage-for-delay clauses to reduce their financial exposure to delay claims. However, for the sake of brevity, this article will presuppose a general factual scenario where an owner is seeking protection based upon a no-damage-for-delay clause and the general contractor invokes the active interference exception in order to override the clause

8 See, e.g., Peter Kiewit Sons' Co v Iowa S. Util Co., 355 E Supp. 376 (S D Iowa 1973); P.T & L Constr Co, Inc. v. State of NJ. Dep't of Transp, 531 A 2d 1330, 1343 (N.J. 1987); United States Steel Corp v Missouri Pacific R Co , 668 H2d 435,438 (8th Cir), cert denied, 459 US 836 (1982)

9 See, e.g., Triple R Paving, Inc. v Broward County, 774 So 2d 50 (Fla 4th DCA 2000); Blake Constr Co., Inc. v C.J Coakley Co , Inc., 431 A 2d 569 (D C Ct App 1981); United States ex rel Wallace v Flintco Inc., 143 F.3d 955 (5th Cir. 1998); Felhaber Corp v. State of N Y, 410 N.Y.S 2d 920 (3d Dep't 1978)

10 The burden of proving one of the exceptions to the enforceability of a no-damage-for-delay clause has been described as "a heavy one" Manshul Constr. Corp v. Bd of Educ, 559 NYS2d 260, 261 (1st Dep't 1990)); United States ex rel Evergreen Pipeline Constr Co , Inc. v Merritt Meridian Constr Corp , 95 F.3d 153,167 (2d Cir 1996) (citing Manshul, 559 NYS 2d at 261)

11 John Adams, Argument in Defense of the [British] Soldiers in the Boston Massacre Trials (December 1770), reprinted in BARTLETT'S FAMILIAR QUOTATIONS 337 (36th ed 1992), Hugh E Williamson, John Adams Counselor of Courage, 54 ABA J 148, 150 (1968); David McCullough, JOHN ADAMS (Touchstone Books, 2001)

12 See generally Dunne, supra note 4; 5 BRUNER AND O'CONNOR ON CONSTRUCTION LAW, § 15 77 (May 2002); Annotation, Validity and Construction of "No Damage Clause" with Respect to Delay in Building or Construction Contract, 74 A.L.R.3d 187(1976)

13 See Cheri Turnage Gatlin, Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations, CONSTR LAW, Fall 2002, at 32.

14 See United States Steel Corp v Mo Pac. R.R. Co, 668 F2d 435, 438 (8th Cir 1982), cert denied, 459 US 836, 103 S Ct. 80 (1982); Newberry Square Dev Corp v. S Landmark, Inc., 578 So 2d 750, 752 (Fla 1st D.C.A 1991); Pellerin Constr, Inc v Witco Corp, 169 F Supp2d 568, 584 (ED La 2001). In other words, "active interference" effectively violates the implied obligation of fair dealing inherent in every contract See Williams Elec Co v Metric Constructors, Inc., 325 S

C 129, 134, 480 S.E,2d 447, 449 (1997); Harry Pepper & Assocs, Inc. v. Hardrives Co, Inc., 528 So 2d 72, 74 (Fla 4th DCA 1988) ("It is one of the most basic premises of contract law that where a party contracts for another to do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing the agreed thing")

15 Pellerin Construction, 169 F Supp 2d at 583

16 355 F. Supp 376 (S D Iowa 1973).

17 Id at 399

18 117 NW 2d 46 (Iowa 1962)

19 Id at 49

20 Kiewit, 355 F.Supp.at 399.

21 See, e.g., P.T. & L Constr Co., Inc. v State of N.J. Dep't of Transp., 531 A2d 1330, 1343 (N.J. 1987); Edwin J Dobson, Jr., Inc. v State, 218 N.J. Super 123, 526 A.2d 1150, 1153 (N.J App. Div 1987); United States Steel Corp v Mo Pac R.R Co., 668 E2d 435, 438 (8th Cir, 1982), cert, denied, 459 US 836, 103 S Ct 80 (1982); Phoenix Contractors, Inc. v General Motors Corp, 355 NW2d 673, 677 (Mich App 1984)

22 See Williams Elec. Co, Inc v. Metric Constructors, Inc, 325 S C. 129, 480 S E.2d 447, 449 n 2 (1997) ("As there is already a specific exception for bad faith, we decline to adopt so much of [the Peter Kiewit definition] that requires a showing of 'bad faith1") But see P.T, & I Constr. Co., 531 A 2d at 1343 ("we reaffirm the rule that when there is a disclaimer of liability, in the absence of a specific finding of bad fail]], the State will not be liable for delays in carrying out its duty to coordinate, even if the delay is unreasonable"); Brown Bros , Inc v. Metro. Gov't of Nashville and Davidson County, 877 S.W.2d 745, 750 (Tenn Ct. App. 1993) (active interference requires "some kind of reprehensible conduct, something far more affirmative than lack of total effort or lack of complete diligence"); Edwin J, Dobson, Jr., 526 A.2d at 1154 (reversing lower court's judgment finding "active interference" since the owner's conduct in requiring plain tiff contractor to purchase material and supplies from particular manufacturer "was not motivated by evil-mindedness")

23 See Williams Elec Co., 480 S E 2d at 449 n 2

24 See Peter Kiewit Sons' Co v Iowa S. Util. Co, 355 E Supp 376, 400 (S.D. Iowa 1973) ("[a]t most, there may have been some neglect and delay on the part of the steel contractor, but such neglect and delay does not rise to the level of 'active interference' by the defendants"); S Gulf Util., Inc v Boca Ciega Sanitary Dist., 238 So 2d 458, 459 (Fla 2d DCA), cert denied, 240 So. 2d 813 (1970) (stating that mere negligence or "bureaucratic bungling" by the project owner does not constitute active interference); John E Green Plumbing & Heating Co v Turner Constr Co , 500 F Supp 910, 913 (ED Mich 1980), aff'd, 742 F2d 965 (6th Cir 1984), cert denied, 471 US 1102 (1985) ("[m]ere negligence is not sufficient to avoid the consequences of the 'no damages for delay' clause plaintiff' cannot accomplish under a negligence theory what could not be accomplished in contract")

25 Kiewit, 355 F Supp at 397; accord, Pellerin Constr, Inc. v. Witco Corp., 169 K Supp 2d 568, 583 (E.D. La. 2001); Allen-Howe Specialties Corp v. US Constr, Inc., 611 P.2d 705, 709 (Utah App 1980)

26 See P.T & L Constr. Co , Inc v State of N.J. Dep't of Transp, 531 A 2d 1330,1343 (N.J 1987)

27 See United States Steel Corp. v. Mo. Pac R.R. Co, 668 R2d 435, 438 (8th Cir), cert denied, 459 US 836, 103 S. Ct 80 (1982) ("As the name implies, active interference requires a finding that defendant committed some affirmative, willful act in bad faith which unreasonably interfered with the contractor's compliance with the terms of the construction contract")

28 578 So 2d750(Fla lst. D.C.A 1991); Edwin J. Dobson, Jr., Inc v, State, 526 A 2d 1150,1153 (N.J. App Div 1987)

29 Newberry Square, 578 So 2d at 752.

30 Id

31 Id

32 95 F3d 153 (2d Cir 1996)

33 Id at 158, 167.

34 Id at 158

35 Id at 169

36 531 A 2d 1330 (N.J. 1987).

37 Id at 1343 (citing Broadway Maint. Corp v. Rutgers, 90 N.J. 253, 270,447 A 2d 906 (1982))

38 Id (citing Edwin I. Dobson, Jr., Inc v State, 218 N.J. Super 123, 526 A.2d 1150 (N J App Div. 3987)).

39 Id (quoting Broadway Maintenance Corp , 90 N.J. at 270-71)

40 Id

41 448 NE 2d 413 (Ct App 1983)

42 Id at 416-17

43 Id

44 See A R. Mack Constr Co , Inc v Cent Square Cent School Dist, 739 N.Y.S.2d 425, 426 (4th Dep't 2000); North Star Contracting Corp v City of New York, 611 NYS 2d 11, 12 (1st Dep't 1994)

45 See, e.g., Williams Elec Co, Inc v Metric Constructors, Inc., 325 S C 129, 137, 480 S E.2d 447,451 (1997) ("we find adoption of the gross negligence exception consistent with South Carolina law"); Gust K Newberg, Inc, v. Ill. State Toll Highway Auth, 506 N E 2d 658 (Ill App 1987) (Ill. law); State Highway Adm'n v Greiner, 577 A.2d 363 (Md, App 1990), cert denied, 321 Md 163, 582 A.2d 499 (1990) (Md law); Gregory and Son, Inc v. Guenther and Sons, 432 N W2d 584 (Wis 1988) (Wis law); White Oak Corp, v. Dep't of Transp, 585 A.2d 1399 (Conn 1991)(Conn law)

46 238 So 2d 458 (Fla 2d DCA 1970)

47 Id at 459 (emphasis added)

48 Grandoff & Davenport, supra note 4, at 10

49 See Blake Constr. Co, Inc. v. C.J. Coakley Co, Inc, 431 A 2d 569, 573-74 (DC Ct App 1981)

50 See, e g, Buckley & Co., Inc v State of N J, 356 A 2d 56, 59-61 (NJ Super 1975); Felhaber Corp. v State of N.Y., 410 NYS2d 920 (3d Dep't 1978); Caldwell-Wingate Co v. State of New York, 12 N.E. 2d 43 (1938)

51 See, e.g., Housing Auth of Dallas v Hubbell, 325 S W2d 880, 890 (Tex App 1959)

52 See, e.g., Coatesville Contractors & Eng'rs v. Borough of Ridley Park, 506 A 2d 862, 865 (Pa 1986); Commonwealth of Pa, State Highway &. Bridge Auth (Penn-DOT) v. Gen Asphalt Paving Co , 405 A 2d 1138 (Pa 1979) (city's failure to relocate water main constituted active interference with contractor's ability to begin work)

53 See. e.g., Miss Transp. Comm'n v. SCI, Inc., 717 So 2d 332

(Miss 1998) ("The Commission's refusal to grant extensions on a timely basis can reasonably be interpreted as active interference or bad faith" and would justify a damages award notwithstanding no-damage-for-delay clause)

54 774 So 2d50(Fla 4th D.C.A 2000)

55 See Grandoff & Davenport, supra note 4, at 12

56 The design engineer was a third-party defendant in the case. Triple R Paving, 774 So 2d at 52.

57 Id

58 Id

59 Id at 53

60 Id at 55

61 Id

62 See, e.g., United States Steel Corp v Mo Pac RR. Co., 668 F2d 435 (8th Cir), cert denied, 459 US 836 (1982J; Gasparini Excavating Co v. Pa Turnpike Comm'n, 187 A.2d 157 (Pa 1963); Garofano Constr Co v. State, 52 N YS 2d 186 (Ct Cl 1944); Am Bridge Co v. State, 245 App Div. 535, 283 NYS 577 (3d Dep't 1935)

63 668 F2d 435 (8th Cir 1982), cert denied, 459 US 836 (1982)

64 Id at 440

65 Id at 439 In nullifying the no-damage-for-delay clause, the Eighth Circuit also placed great weight on the fact that the bridge contractor had little choice but to comply with the railroad's premature issuance of the notice to proceed: "[t]he contract provisions clearly put [the owner] in the dominant position in determining when [the bridge contractor] should begin its work. [The owner] exercised the advantage of this position when it issued notice [The bridge contractor] was not in a position to undertake the risk of noncompliance which could result in a finding of breach, or in the event of late performance, assessment of liquidated damages " Id

66 See also Newberry Square Dev't Corp. v. S Landmark, Inc., 578 So 2d 750, 752 (Fla 1st DC A 1991); McIntyre v Green-Tree Cmtys,Inc,318So. 2dl97(Fla 2dDCA 1975).

67 See, e.g., Uribe Merchants Bank of NY, 91 N Y,2d 336, 341, 670 NY.S.2d 393, 396 (1998); Univ Plaza Shopping Center, Inc. v Stewart, 272 So. 2d 607, 508 (Fla 1973); Boehm v Cody County Chamber of Commerce, 748 P2d 704, 710-12 (Wyo 1987); Scwartzentruber v Wee-K Corp , 690 N E.,2d 941, 945 (Ohio App 4th Dist 1997); Russ v Woodside Homes, Inc., 905 P.2d 901, 905 (Utah App 1995)

68 827 P.2d 1195 (Kan App 1992)

69 Id at 1203.

70 26 E3d 1057 (11th Cir. 1994)

71 Id at 1067-68 See also Port Chester Elec. Constr Corp v HBE Corp , 978 F2d 820 (2d Cir. 1992) (holding that subcontractor could not recover delay damages absent proof it gave timely notice of claim pursuant to the contract)

72 Dasta, 26 F.3d at 1067 (emphasis supplied)

73 The contract in Dasta imposed such a requirement upon the contractor Id at 1067 (noting that in addition to a no-damage-for- delay clause, the contract contained an independent clause that required the contractor to submit a written request detailing the cause and length of the delay, as well as the length of the requested extension)

74 See Dasta, 26 F3d at 1067-68

75 See Triple R Paving, Inc. v. Broward County, 774 So 2d 50, 54 (Fla 4th DC A 2000); Cunningham Bros , Inc v City of Waterloo, 254 Iowa 659, 117 N.W2d 46, 49 (1962); Christiansen Bros, Inc v. State, 586 P.2d 840, 842 (Wash. 1978); Hallet Constr. Co v Iowa State Highway Comm , 154 N.W2d 71, 75 (Iowa 1967)

76 There is no guarantee that such a motion would succeed since there does not appear to be any case law requiring a contractor to allege "active interference" in its complaint Cf Appeal of DCO Construction, Inc., A S.B.C.A No. 5701 (May 2, 2002) (holding that contractor need not allege stand-by delay damages in its com plaint in order to withstand summary judgment on claim for unabsorbed home office overhead).

77 877 S W2d 745 (Tenn Ct App 3993)

78 Id at 750 See also Allen-Howe Specialties Corp v. U.S. Constr, Inc., 611 p.2d 705, 709 (Utah App 1980) (subcontractor's allegations that general contractor caused others to place structures and impediments on the job site that prevented the subcontractor from performing its work and that the general contractor required the subcontractor to proceed in sequence at locations other than those contemplated by the subcontractor did not constitute the type of active interference sufficient to nullify an otherwise valid no-darn age-for-delay clause)

79 Most of the reported decisions analyzing the "active interference" exception to the no-damage clause arose in the context of either a summary judgment motion or judgment following trial With the exception of die two cases cited in the preceding footnote (i.e., Brown Brothers and Allen-Howe), there do not appear to be any reported judicial decisions in which the sufficiency of a contractor's "active interference" claim was assessed solely on the pleadings

80 The authors propounded the following interrogatory in a case where "active interference" was asserted: "For each claim and subcategory of the claim for hindrance or delay that [Contractor] is asserting against [Owner] which you contend was caused by the active interference of [Owner], state the nature of each hindrance or delay, the cause of each hindrance or delay, all facts which support your contention that [Owner] actively interfered causing each hindrance or delay and specifically identify any documents that show each such hindrance or delay"

81 See Fed. R. Civ P. 30(b)(6)

82 See Manshul Constr Corp v Bd of Educ , 559 N.Y.S 2d 260, 261 (1st Dep't 1990); United States ex rel Evergreen Pipeline Constr. Co , Inc v. Merrill Meridian Constr Corp , 95 F3d 153, 167 (2dCir 1996) {citing Manshul, 559 NYS 2d at 261) ■