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COMMENT

BARGAINING IN THE DARK: WHY THE CALIFORNIA LEGISLATURE SHOULD RENDER “NO DAMAGE FOR DELAY” CLAUSES VOID AS AGAINST PUBLIC POLICY IN ALL CONSTRUCTION CONTRACTS

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INTRODUCTION

In the high-risk world of construction, a contractor’s ability to recover damages associated with project delays caused by other parties can mean the difference between realizing expected profits and suffering harsh financial losses.¹ This Comment addresses the enforceability of

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¹ J. Bert Grandoff & Patricia E. Davenport, *The “No Damage for Delay” Clause: A Public Policy Issue*, 75 FLA. B. J. 8, 8 (Oct. 2001) (“A contractor who experiences delays during performance is likely to incur increased costs.”); *see also* ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 49 (3d ed. 2011), *available at* Westlaw CDRTC § 2.03 (noting the “enormous economic impact of construction delays due to the highly time-sensitive nature of construction costs”); *id.* § 2.01 (“The typical contractor’s profit margin—the percentage difference between revenues and costs—is very small in comparison to its risk exposure. . . . [O]n almost every construction project, it is possible to lose much more money than it is possible to make. It is not unusual for a job that constitutes only five percent of a large contractor’s business to have the potential to destroy 50 percent or more of the company’s net

“no damage for delay” clauses, (hereinafter sometimes called NDFD clauses),² which bar contractors from recovering any delay damages, even when delay has been caused by an owner or its agents.³

The potentially devastating real-world consequences to contractors of a broadly worded “no damage for delay” clause are well-illustrated in the case of *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*.⁴ In the summer of 1996, the United States Air Force awarded a \$17,724,714.00 federal contract to Harper/Nielsen-Dillingham (Harper) for the demolition, removal, and replacement of 143 base housing units in California.⁵ In order to complete the work, Harper then signed a \$720,500.00 subcontract with contractor KCI to perform certain landscape and irrigation services between July 1997 and January 1998.⁶ Significantly, the form contract between Harper and subcontractor KCI contained an NDFD clause stating that in the event of any delays, *even those caused by the fault of Harper or the United States government*, KCI would be barred from recovering any monetary damages.⁷ KCI’s general manager, who signed the subcontract, later testified that KCI had believed the NDFD clause to be “a boilerplate phrase that’s contained in most contracts that’s generally ignored because it’s not enforceable.”⁸ Unfortunately, KCI’s reliance on industry belief,⁹ as well as previous common-law and statutory treatment,¹⁰ proved highly damaging.

worth.”); 5 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 15:1 (2011), available at Westlaw BOCL § 15:1 (stating that during construction projects, the “unexcused, untimely completion of scheduled activities can result in enormous liabilities to all parties far exceeding anticipated profits and, at times, individual net worth”).

² These clauses are also known as “No Damage” or “No Damages for Delay” clauses. Maurice T. Brunner, Annotation, *Validity and Construction of “No Damage” Clause with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187, § 1[a] (1976).

³ See *id.* § 1[c].

⁴ *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667, 670 (2008) (applying California law in a federal case).

⁵ *Id.* at 669.

⁶ *Id.* at 670.

⁷ *Id.*

⁸ *Id.*

⁹ Robert T. Sturgeon, *Federal Court Holds “No Damage for Delay Clauses” Are Per Se Enforceable on Federal Public Works Projects in California*, CONSTRUCTION & INFRASTRUCTURE LAW BLOG (Mar. 23, 2010), www.constructionandinfrastructurelawblog.com/2010/03/articles/public-works/federal-court-holds-no-damage-for-delay-clauses-are-per-se-enforceable-on-federal-public-works-projects-in-california (“Many California practitioners believe that the [rule against ‘no damage for delay’ clauses] does or should extend generally to all construction contracts, both public and private.”); see Stephen G. Walker, *Statutory Responses to “No Damage for Delay” Clauses*, 6 CONSTRUCTION LAW 9, 10 (1985) (“California construction lawyers have long felt that a ‘no damage for delay’ clause would not be enforced where unreasonable delays have been caused by the project owner.”); *Construction Law Committee Compendium of Frequently Asked Construction*

Due to the work delays of another contractor hired by the United States, Harper’s progress in completing its own work was delayed by three months, which caused “a domino effect that pushed KCI’s work into the rainy season.”¹¹ KCI was consequently unable to complete its work until August of 1998, 223 days later than originally scheduled, and alleged that it was further delayed as a result of the federal government’s failure to issue final acceptance of the landscaping.¹² KCI estimated that the delays of Harper and the Air Force had directly caused it to incur \$770,565.00 in increased performance costs, an amount greater than the original contract price.¹³ To recover its costs, KCI sued Harper, and as part of a “Settlement Agreement and Mutual Release” between the parties, Harper agreed to pass through KCI’s claim as against the Air Force.¹⁴ However, when the United States Court of Federal Claims determined that the NDFD clause between private contractors was enforceable under California law, KCI was forced to absorb the total costs of damages caused by other parties’ delays.¹⁵

Law and Professional Liability Related Questions, THE HARMONIE GROUP, 14-15 (May 2008), www.harmonie.org/user_documents/COMPENDIUM%20FINAL%20WITH%20COVER.pdf (providing results of a survey of state law firms, in which the responses provided by three California firms with construction law practices indicated that “no damage for delay” clauses were not enforceable in the state); Daniel R. Frost, *No-Damages-for-Delay Clauses—They Still Work*, HOLLAND & HART LLP CONSTRUCTION LAW UPDATE 1, 3 (Jan. 2000), www.hollandhart.com/articles/99200.pdf?CFID=8840471&CFTOKEN=95709572 (“Conventional wisdom is that enforcement of no-damages-for-delay clauses is becoming harder and harder, if not completely impossible. As a result, those clauses receive less and less attention in the negotiating and administration process. In fact, at times, they are simply ignored, whether in or out of the contract.”).

¹⁰ STEPHEN J. FOWLER, MILLER AND STARR CALIFORNIA REAL ESTATE 3D §27:85 (2010), available at Westlaw MILCALRE § 27:85 (explaining that “‘No Damage for Delay’ provisions in construction contracts of public agencies and subcontracts thereunder are generally unenforceable in California,” and that while such clauses are typically enforced in private contracts, they are strictly construed and are “rarely enforced to preclude the recovery of costs incurred by reason of owner-caused delays”).

¹¹ *Harper/Nielsen-Dillingham*, 81 Fed. Cl. at 670.

¹² *Id.* at 670-71.

¹³ *Id.* at 671.

¹⁴ KCI had no direct privity of contract with the federal government and thus was unable to sue the Air Force directly to recover its delay damages. In exchange for KCI’s agreement to dismiss its lawsuit against Harper with prejudice, Harper agreed to “pass through” KCI’s claim to the federal government under the Severin Doctrine. However, before a claim can be passed through to the federal government by a prime contractor under the Severin Doctrine, the prime contractor has the burden of proving that it is liable to the subcontractor for the damages sustained. The federal government moved for summary judgment, alleging that Harper could not demonstrate liability to KCI because of the NDFD clause in the contract between the parties. The court held that NDFD clauses were enforceable as between private contractors in California, and fell outside the scope of California Public Contract Code section 7102, which limits the enforceability of NDFD clauses in public construction contracts. *Id.* at 676.

¹⁵ *Harper/Nielsen-Dillingham*, 81 Fed. Cl. at 679.

As this case suggests, delays are a frequent subject of construction litigation¹⁶ because of their potential to inflate expenses for owners and contractors, beyond those anticipated at the time of contracting.¹⁷ It is therefore not surprising that owners would seek contractual methods of shifting the risks associated with delay to other parties.¹⁸ As demonstrated in *Harper/Nielsen-Dillingham*, one tool employed for this purpose is an NDFD clause.¹⁹ These exculpatory clauses vary widely in form, but they generally seek to deny a contractor²⁰ the right to recover delay damages, including those caused by the delay of an owner or its agents.²¹ “No damage for delay” clauses have been a subject of longstanding controversy in the construction industry²² because of their potential to cause significant monetary losses to contractors in the event of owner-caused delays.²³

In 1984, the California legislature enacted California Public Contract Code section 7102, which renders NDFD clauses void in public works contracts when owners are responsible for delays that are deemed “unreasonable” and “not within the contemplation of the parties.”²⁴

¹⁶ See BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 16.03 (4th ed. 2011), available at Westlaw CNDCL § 16.03 (noting that delay claims have become a common occurrence in the construction industry).

¹⁷ A.B.A. FORUM ON THE CONSTRUCTION INDUSTRY, THE CONSTRUCTION CONTRACTS BOOK, 117 (Daniel S. Brennan et al. eds., 2d ed. 2008) (stating that in the event of delay, contractors’ delay damages may include “increased labor and materials costs, extended job-site and home-office overhead, lost alternative job opportunities, and increased general conditions costs (including equipment rental, utilities charges, and site security). The contractor may also face claims from subcontractors affected by the delay.”); see Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 1.01.

¹⁸ Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857 (2005).

¹⁹ *Id.*

²⁰ Throughout this Comment the author will refer to the party seeking to enforce an NDFD clause as “owner” and the party against whom an NDFD clause operates as “contractor.” However, NDFD clauses may also bind subcontractors through application of “flow down” provisions incorporated in prime construction contracts, or through their inclusion in contracts formed between contractors and subcontractors. PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., 1 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 3:32 (2010), available at Westlaw BOCL § 3:32 [hereinafter CONSTRUCTION LAW]; see *Harper/Nielsen-Dillingham*, 81 Fed. Cl. 667.

²¹ Maurice T. Brunner, Annotation, *Validity and Construction of “No Damage” Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 § 1[c] (1976).

²² See Douglas S. Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471, 471 (1978); see also Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 2.16.

²³ See Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 472.

²⁴ CAL. PUB. CONT. CODE § 7102 (Westlaw 2011) (“Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee’s liability to an

However, section 7102 is inadequate to protect contractors from the harsh consequences associated with the ineffective and unfair NDFD clause, because it places limitations on the protection afforded to contractors in public works contracts and has no effect on private construction contracts.²⁵ These inadequacies have become more apparent in the wake of *Harper/Nielsen-Dillingham*, in which the court determined that under section 7102’s existing language, an express and unambiguous NDFD clause creates an “iron-bound bar against any potential liability” on the part of the owners in all private construction contracts, including sub-contracts under contracts involving the United States.²⁶

The purpose of this Comment is to urge the California legislature to revise section 7102 in order to render an NDFD clause void as against public policy in every construction contract when delay is caused in whole or in part by the acts or omissions of the owner or its agents. Part I of this Comment provides the reader with a brief explanation of how construction contracts are formed and describes the nature of liability associated with delay in the construction industry. Part II includes a brief overview of the general enforceability of NDFD clauses and chronicles the numerous exceptions to their enforcement that have evolved through common law and state statutes. Part III presents policy arguments against the enforcement of NDFD clauses and rebuts some common arguments posed in favor of their enforcement. Part IV discusses the current treatment of NDFD clauses in California and challenges the effectiveness of existing legislation in the wake of *Harper/Neilson-Dillingham*. Part V presents suggested language for the revision of section 7102, modeled on the current Ohio Revised Code Annotated, and explains the practical effect of the proposed revisions. Finally, this Comment concludes by urging the California legislature to revise California Public Contract Code section 7102 to render NDFD

extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor. No public agency may require the waiver, alteration, or limitation of the applicability of this section. Any such waiver, alteration, or limitation is void. This section shall not be construed to void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages.”).

²⁵ STEPHEN J. FOWLER, MILLER & STARR CALIFORNIA REAL ESTATE 3D § 27:85 (2010), available at Westlaw MILCALRE § 27:85.

²⁶ *Harper/Neilson-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667, 678-79 (2008) (“The court agrees with the government that, . . . California law does not provide exceptions to the enforceability of clear and explicit ‘no damage for delay’ clauses in contracts between private parties, including, as here, in subcontracts under contracts involving the United States.”).

clauses unenforceable in all public and private contracts where the owners cause delay.

I. A CONSTRUCTION PRIMER: THE BIDDING PROCESS AND LIABILITY ASSOCIATED WITH DELAY

Before discussing the significance of NDFD clauses in detail, it will be helpful to begin with a brief overview of the general process through which construction contracts are obtained and the nature of damages stemming from delays.

A. FORMATION OF CONSTRUCTION CONTRACTS

Many private²⁷ and most public construction contracts are awarded through a process called competitive bidding.²⁸ The procedure for competitive bidding on public projects is determined by state statutes and regulations.²⁹ Typically, invitations to bid on a project are published in local construction-industry trade papers and include materials such as a project description, complete plans, instructions to bidders, bid forms, and other contract documents.³⁰ These documents must provide full, complete and accurate plans and estimates of cost to the extent necessary to allow a competent mechanic or builder to carry them out.³¹ On the basis of the information contained in the bid documents, contractors are asked to submit bids for the total cost of their work.³² The bidding process remains open for a specified period of time, after which all of the

²⁷ See JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS 252 (5th ed. 2010), available at Westlaw SCICA s 9.07 (“Generally, public contracts must be awarded on the basis of competitive bidding. Even most private contracts, with the option of bidding or negotiating, are awarded after competitive bidding. Only experienced owners, who must deal with a small number of contractors, perhaps only one, with the technical skill needed, are likely to use negotiation.”); see also PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., 1 BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 2:22 (2011), available at Westlaw BOCL § 2:22 (explaining that the process of sealed competitive bidding is mandated almost universally by statute in public construction contracts, but is not widely used in private construction contracts; yet, “[e]ven where the prime contract is negotiated . . . trade subcontracts frequently are awarded through sealed bidding. Therefore, some form of competitive sealed bidding also continues to be well accepted in both international public works and private contracting.”); KENNETH C. GIBBS & GORDON HUNT, CALIFORNIA CONSTRUCTION LAW 71 (16th ed. 2000).

²⁸ JAMES ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL § 7:2 (6th ed. 2004), available at Westlaw CACLM § 7:2.

²⁹ JAMES ACRET, ATTORNEY’S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES § 2.3 (2d ed. 1990).

³⁰ *Id.*

³¹ 53 CAL. JUR. 3D, *Public Works and Contracts* § 36 (2012), available at Westlaw CALJUR PUBLICWORK § 36.

³² Bruner & O’Connor, CONSTRUCTION LAW at § 2:23.

bids submitted are reviewed and the contract awarded to the contractor providing the most favorable bid.³³

In public contracts, competitive bidding is thought to promote the public interest by stimulating competition, thereby ensuring a fair price and protecting against government favoritism or corruption.³⁴ Accordingly, public-contract statutes commonly require that a contract be awarded to the “lowest *responsible* bidder.”³⁵ Technically, the responsibility criterion means that in addition to price, a public entity may consider the contractors’ trustworthiness, quality, fitness, capacity and experience necessary to successfully complete the project when determining which bid to accept.³⁶ In practice, however, rejecting the lowest bid as “irresponsible” for any but the most compelling reasons is considered highly unethical.³⁷ As a result of this practice, contractors commonly expect construction projects to be awarded to the contractor offering the lowest bid.³⁸

Although the competitive bidding process benefits owners by placing contractors into free and open competition with one another, it is inherently risky for the contractors.³⁹ After all, in order to remain in business, a contractor must be the lowest bidder on a certain number of projects.⁴⁰ To be the lowest bidder, a contractor must bid aggressively on the basis of information concerning future conditions and factors that

³³ *Id.*

³⁴ See JAMES ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL § 7:2 (6th ed. 2004), available at Westlaw CACLM § 7:2.

³⁵ *Id.* (emphasis added); see CAL. PUB. CONT. CODE § 10180 (Westlaw 2011) (requiring that in California, state construction contracts be awarded to the lowest responsible bidder where competitive bidding is required).

³⁶ STEPHEN J. FOWLER, MILLER AND STARR CALIFORNIA REAL ESTATE 3D § 27:33 (2010), available at Westlaw MILCALRE § 27:33; see PUB. CONT. § 1103.

³⁷ See Alain Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 434 (2002) (“To find out who is the low bidder, sealed bids are often compared to one another on the basis of only one factor: price.”); JAMES ACRET, ATTORNEY’S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES 60 (2d ed. 1990) (explaining that if the bidding process is already restricted to a “prequalified” set of contractors, a public agency that selects a contractor other than the lowest bidder may face allegations of favoritism or corruption); JOHNATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS 250-51 (2010), available at Westlaw SCICA s 9.07 (stating that in competitive bidding “[t]he lowest responsible bidder (a bidder capable of doing the job) is desired, but an award to anyone but the low bidder can invite a lawsuit”); see also Bruner & O’Connor, CONSTRUCTION LAW at § 2:23 (stating that “selection for the award may be made on the basis of price alone”).

³⁸ See Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 434.

³⁹ See *id.* at 430.

⁴⁰ See *id.* at 434.

may be largely unknowable at the time of bidding.⁴¹ A successful bidder may need to speculate whether there will be a future increase in materials costs, anticipate how future events will affect construction and estimate the impacts of any details not included in the drawings.⁴² At the same time, contractors are afforded little to no bargaining power over the underlying terms of the contract.⁴³ The owner is responsible for creating the project specifications and is typically able to determine both the form of contract and the extent of risk-sharing between the parties.⁴⁴ In this highly competitive system, any attempt by a contractor to alter the material terms of the underlying contract may result in an owner's decision to reject the contractor's bid and select a more compliant contractor from the range of available competitors.⁴⁵ Thus the contractors' relative lack of bargaining power, coupled with industry knowledge that contracts will be awarded to the lowest bidder, gives rise to "kamikaze-style" bidding practices and creates a system that rewards contractors who undervalue construction costs and associated risks.⁴⁶

B. LIABILITY ASSOCIATED WITH DELAY DAMAGES

Delay is recognized as "a way of life" in the construction industry and is known to be one of the most prevalent and costly risks faced during construction projects.⁴⁷ This is to be expected because the

⁴¹ See *id.* at 430.

⁴² See *id.*

⁴³ See *id.* at 434; see also Douglas S. Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471, 482 (1978) ("When a project is advertised, a contractor may not generally negotiate with regard to the specific terms of the contract. He must either submit a bid on the contract as offered to the public or simply refrain from bidding. In this situation, it is the owner who generally has the superior bargaining position."); PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., 1 BRUNER AND O'CONNOR ON CONSTRUCTION LAW §2:9.50 (2011), available at Westlaw BOCL § 2:9.50 ("Because of wide industry use of the competitive sealed bid process of contract formation in the public sector and its mandated contract terms, from which no material exception may be taken without risk of rejection of bid as "nonresponsive," there is perhaps less bargaining between owner and contractor over initial contract terms in the construction industry than in other areas of commerce.").

⁴⁴ See Bruner & O'Connor, CONSTRUCTION LAW at § 2:9.

⁴⁵ See *id.* § 2:9.50.

⁴⁶ See Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 434.

⁴⁷ ROBERT A. REUBEN ET AL., CONSTRUCTION CLAIMS: PREVENTION AND RESOLUTION 52 (2d ed. 1992); see ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 477 (3d ed. 2011), available at Westlaw CDRTC § 16.02 ("By far the most commonly and hotly litigated claims of contractors involve delays caused by the owner or by persons for whom the owner is responsible.").

modern construction process is inherently complex.⁴⁸ Building projects often require the coordination of separate yet interdependent performances by numerous parties, and timely completion can be affected by factors beyond any one party's control.⁴⁹ The ability of contractors to recover monetary damages stemming from the delay of others is critical, because the scope of such damages would be difficult, if not impossible, to anticipate and bargain for at the time of contracting.⁵⁰

There are many situations in which contractors may incur damages stemming from owner-caused delays.⁵¹ For example, a contractor may be delayed due to an owner's tardy submission of changes to the original project specifications, untimely discovery of errors in the plans, failure to obtain permits or issue immediate approvals for permitted work, or intentional frustration of the contractor's performance.⁵² A contractor could also experience delay as a result of the owner's failure to coordinate the work of any number of other independent contractors under its control.⁵³ When construction projects involve the coordination of separate performances by numerous parties, any one delayed performance can cause a domino effect of further delays due to the inability of other parties to begin performances on the agreed date.⁵⁴

⁴⁸ See John W. Hinchey, *Visions for the Next Millennium*, in 1 CONSTRUCTION LAW HANDBOOK 29, 31-33 (Robert F. Cushman ed., 1999) (explaining that a construction project of average complexity may involve between five and fifteen firms working on the design process, as well as forty to a hundred companies that are engaged in construction and many more companies hired to supply materials and services necessary to complete the project); see Bruner & O'Connor, CONSTRUCTION LAW at § 1.2.

⁴⁹ S. GREGORY JOY ET AL., ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS 7 (2010), available at Westlaw ACSCC § 1.02 (explaining that ordinary construction projects require the participation and risk the financial resources of a large number of parties). "If one falls down, many others may follow. The chain of risk extends far beyond those who have direct contracts with a failing party." *Id.* See RICHARD A. LORD, *Conditions Relating to Time of Performance*, in 15 WILLISTON ON CONTRACTS § 46:7 (4th ed. 2010), available at Westlaw WILLSTN-CN § 46:7.

⁵⁰ See Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. 1857, 1877 (2005).

⁵¹ See BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 3.02 (4th ed. 2011), available at Westlaw CNDCL § 3.02; ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 477 (3d ed. 2011), available at Westlaw CDRTC § 16.02.

⁵² Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 3.02; see Douglas S. Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471, 474-76 (1978).

⁵³ Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 3.02; see Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 476.

⁵⁴ Andrew D. Ness, *Construction Damages*, in CONSTRUCTION LAW 255-62 (2001).

Even delays of short duration can trigger a speedy increase in a contractor's project costs.⁵⁵ For example, typical contractor delay damages include the costs associated with increased labor and materials,⁵⁶ extended job-site and home-office overhead, laying off and rehiring work crews, loss of efficiency of work crews who have to work around delayed projects, loss of alternative construction job opportunities, or items such as rental equipment, utilities, and site securities.⁵⁷ Depending upon the nature and cause of the delay, a contractor may be contractually bound to incur such costs for an extended period of days, months, or even years beyond that stipulated in the original contract.⁵⁸ Given the numerous possible methods of delay resulting from the actions of owners and the exponential nature of damages stemming from delays that do occur, a blanket ban on a contractor's ability to recover delay damages represents an "enormous and almost unquantifiable risk."⁵⁹

Thus, in the absence of an NDFD or alternate exculpatory clause, a contractor is usually entitled to recover damages associated with owner-caused delays, and the contractor will be granted additional time to complete its performance when the delay stems from conditions beyond

⁵⁵ See JAMES ACRET, ATTORNEY'S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES 272 (2d ed. 1990); see also *W.C. James, Inc. v. Phillips Petroleum Co.*, 485 F.2d 22, 23 (10th Cir. 1973) (three-month delay in completion of work on a pipeline construction led to an alleged \$760,875.43 in delay damages); *Tonkin Constr. Co. v. Cnty. of Humboldt*, 188 Cal. App. 3d 828, 830, 832 (Ct. App. 1987) (holding that county was liable for \$27,276.08 in costs incurred by contractor when it was required to perform extra work on a seawall it had constructed due to a two-month delay in services of county's dredging contractor).

⁵⁶ Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 476 ("Although a standard Changes Clause may provide for compensating the contractor for the increases in material and labor costs which are directly attributable to the work changed by the owner, the contractor is likely to incur significant additional damages due to the impact of such changes in holding up other segments of its work which were not directly changed.").

⁵⁷ Eric Berg, *No Damages for Delay*, in THE CONSTRUCTION CONTRACTS BOOK 117 (2008); see Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 476-77.

⁵⁸ See, e.g., *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667 (2008) (upholding application of an NDFD Clause following a 223-day delay); *Kent v. United States*, 228 F. Supp. 929 (S.D.N.Y. 1964) (contractor hired to install an approach lighting system at J.F.K. International Airport was barred from recovery of an alleged \$7,803.40 incurred due to a four-month delay stemming from the government's issuance of a notice to proceed); *Am. Bridge Co. v. State*, 283 N.Y.S. 577, 584 (App. Div. 1935) (stating that it was doubtful that an NDFD clause would be interpreted to bar recovery of damages stemming from delay of nearly 2 years); *Endres Plumbing Corp. v. State*, 95 N.Y.S.2d 574, 575, 580 (Ct. Cl. 1950) (finding that a six-month delay was not so unreasonable as to invalidate an NDFD clause).

⁵⁹ Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. 1857, 1877 (2005).

either party’s control.⁶⁰ In practice, however, this general rule represents somewhat of an oversimplification, because the ultimate determination of liability for delay damages is governed by the agreement between the parties.⁶¹ “No damage for delay” clauses can be understood in this context as a contractual tool used by owners to shift virtually all of the risk of construction-project delays to contractors.⁶² The following Part will explore the common-law and statutory treatment of NDFD clauses.

II. THE ENFORCEABILITY OF “NO DAMAGE FOR DELAY” CLAUSES

A “no damage for delay” clause exculpates an owner from liability for damages suffered by a contractor as a result of project delays, including delays caused by or attributable to the owner or its agents.⁶³ In the event of delay, an NDFD clause limits a contractor’s remedy to an extension of time in which to complete the project.⁶⁴ Although NDFD clauses vary widely in form, a typical example may be worded as follows:

Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted shall be the sole remedy of the Contractor for any (i) delay in the commencement, prosecution, or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims (collectively referred to in this Subparagraph as “Delays”) whether or not such Delays are foreseeable, within the contemplation of the parties, or caused by the acts of the Owner or its agents. In no event shall the Contractor be entitled to any

⁶⁰ See PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., 5 BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 15:29 (2010), available at Westlaw BOCL § 15:29 (explaining that liability for delay is often assessed based upon a determination of which party “controlled” the time-impacting event, and providing a general definition of “compensable delay” as “[d]elay caused by an event *within the control of the owner and beyond the control of the contractor*, for which the contractor and its affected subcontractors and suppliers are entitled to an extension of contract time and damages or an equitable adjustment.”); see also BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 1.01 (2011), available at Westlaw CNDCL s 1.01 (providing a detailed discussion of the general principles surrounding excusable, inexcusable, compensable and non-compensable delays in construction contracts).

⁶¹ ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 477 (3d ed. 2011), available at Westlaw CDRTC s 16.02.

⁶² Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW 32 (2002).

⁶³ NDFD clauses have also been incorporated into construction contracts between contractors and subcontractors, and they have been held to bind subcontractors in some instances through the application of “flow down” provisions incorporated in prime contracts. Bruner & O’Connor, CONSTRUCTION LAW at § 3:32; see *Harper/Nielsen-Dillingham*, 81 Fed. Cl. 667.

⁶⁴ Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 2.16.

compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration.⁶⁵

The consequence of a broadly worded NDFD clause is that a contractor must absorb all of its monetary damages associated with delay, even if the delay is caused by the actions of the owner or its agents, including poor site design, interference with the site, or delayed administration.⁶⁶

The enforceability of NDFD clauses has been a long-standing topic of controversy in the legal field due to their exculpatory nature and frequent scholarly recognition of their potential to cause harsh and inequitable results.⁶⁷ The following section discusses the widely varied state practices with regard to the enforceability of NDFD clauses. Notably, NDFD clauses are not included in three widely used standard-form construction industry contracts: the American Institute of Architects (AIA) construction industry documents, ConsensusDocs, and the Engineers Joint Contract Documents Committee.⁶⁸ Additionally, the federal government refrains from including NDFD clauses in its standard contracts, citing the express purpose of avoiding the inequities associated with barring a contractor's recovery of damages associated with government delay.⁶⁹

⁶⁵ Dean B. Thomson, *Legislative Update: No Damage for Delay Clauses Barred*, FABYANSKE, WESTRA, HART & THOMSON, P.A. (May 1, 2002), www.fwhtlaw.com/articles/legislative_update_no_damage.cfm.

⁶⁶ Gatlin, 22 CONSTRUCTION LAW. at 32; Susan Sisskind Dunne, "No Damage for Delay" Clauses, 19 CONSTRUCTION LAW. 38 (1999).

⁶⁷ See, e.g., Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. 1857, 1859 (2005); Douglas S. Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471 (1978); Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425 (2002); Stephen G. Walker, *Statutory Responses to "No Damage for Delay" Clauses*, 6 CONSTRUCTION LAW. 9 (1986); Cordell Parvin, *No Damages/Delay Clauses Fair?*, 6 ROADS & BRIDGES 8 (Oct. 1990); Dunne, 19 CONSTRUCTION LAW. at 38; see J. Bert Grandoff & Patricia Davenport, *The 'No Damage for Delay' Clause: A Public Policy Issue*, FLA. B. J. 8, 8 (Oct. 2001).

⁶⁸ Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 2.16 (explaining that AIA construction industry documents do not preclude recovery by either the owner or the contractor); see Eric Berg, *No Damages for Delay*, in THE CONSTRUCTION CONTRACTS HANDBOOK 117 (2008).

⁶⁹ Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 489; see Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 2.16 (stating that federal construction contracts expressly allow for the recovery of delay damages by a contractor under the suspension clause).

A. COMMON-LAW EXCEPTIONS TO ENFORCEMENT

The enforceability of NDFD clauses depends entirely on state law,⁷⁰ and in the absence of specific legislation, the varied treatment of NDFD clauses at common law has led to difficulties for contractors in determining when they will be enforced.⁷¹ Courts in most jurisdictions regard NDFD clauses as generally valid contractual provisions⁷² but disfavor their enforcement due to their potential to create harsh and inequitable results.⁷³ For this reason, courts strictly construe the language of NDFD clauses against their drafters.⁷⁴ Accordingly, courts may decline to enforce the most broadly worded forms of NDFD clauses, such as those purporting to exculpate owners for delays stemming from “any cause,” because the wording of such clauses is too ambiguous.⁷⁵

In addition to the common-law policy of strict construction, a wide range of well-recognized exceptions may bar enforcement on a case-by-case basis.⁷⁶ These exceptions vary by jurisdiction, but they generally include 1) a delay not covered by the plain language of the clause, 2) a type of delay not contemplated by the parties when entering into the agreement, 3) a delay of unreasonable duration, 4) a delay resulting from the active interference or wrongful conduct by the owner, 5) waiver of the clause by the actions of the parties, and 6) fundamental breach by the owner justifying non-enforcement of the clause.⁷⁷ The vast majority of state courts that have considered the issue of NDFD clauses⁷⁸ have

⁷⁰ Berg, *No Damage for Delay* at 117.

⁷¹ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. at 1870; see Maurice T. Brunner, Annotation, *Validity and Construction of “No Damage” Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 (1976) (providing an overview of common-law exceptions recognized by state).

⁷² Brunner, 74 A.L.R.3d 187 at § 3.

⁷³ *Id.*; see Oles, *“No Damage” Clauses in Construction Contracts: A Critique*, 53 WASH. L. REV. at 479.

⁷⁴ See Brunner, 74 A.L.R.3d 187 at § 3.

⁷⁵ See *id.* § 5[a].

⁷⁶ *Id.* § 7[a] (providing general discussion of commonly recognized judicial exceptions to the enforcement of an NDFD clause); see Alain Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 446 (2002) (stating that as of 2002, “out of fifty states, forty-eight states either have (1) passed laws invalidating the clause, (2) recognized that it is not an absolute bar to recovery or (3) not confronted the issue”).

⁷⁷ BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, *CONSTRUCTION DELAY CLAIMS* § 2.16 (4th ed. 2011), available at Westlaw CNDCCL s 2.16.

⁷⁸ As of 2008, courts in Arizona, Hawaii, Iowa, Nevada, New Hampshire, New Mexico, South Dakota, Vermont, and West Virginia had never directly considered the enforceability of NDFD clauses. *Construction Law Committee Compendium of Frequently Asked Construction Law*

recognized at least one of these judicial exceptions to their enforcement.⁷⁹ However, the real-world application of such exceptions has been highly inconsistent,⁸⁰ leading one commentator to conclude, “If a court finds enforcing the clause inherently unfair, then it will find an exception to apply.”⁸¹

For example, while multiple states recognize an exception to the NDFD clause for delays that are of “unreasonable duration” and therefore not considered to have been within the contemplation of the parties,⁸² the specific length of time that constitutes an “unreasonable” delay is subject to court discretion.⁸³ Thus, the Michigan Court of Appeal has invalidated an NDFD clause on the grounds that the delay suffered was of “unreasonable duration” when the contractor suffered a nine-and-half-month delay on a project originally scheduled for completion in twenty-four months,⁸⁴ while the Supreme Court of Nebraska has upheld an NDFD clause following a delay of 162 days on a contract scheduled for completion in 300 days.⁸⁵ Likewise, inconsistent holdings have resulted from court applications of the “active interference” exception, which is applied to bar NDFD clauses when the delay is due to an owner’s own interference with the work of the contractor. In applying this exception, a minority of state courts have invalidated NDFD clauses when the interference resulted from the owner’s negligence,⁸⁶ while others have required a showing of gross negligence or intentional misconduct.⁸⁷

and Professional Liability Related Questions, THE HARMONIE GROUP (May 2008), www.harmonie.org/user_documents/COMPENDIUM%20FINAL%20WITH%20COVER.pdf.

⁷⁹ Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 446.

⁸⁰ Cordell Parvin, *‘No Damages/Delay’ Clauses Fair?*, ROADS AND BRIDGES 8 (Oct. 1990) (“Courts have been all over the map in deciding delay cases where there is a ‘No Damages for Delay’ provision.”).

⁸¹ *Id.*

⁸² See Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 2.16.

⁸³ Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1866 (2005).

⁸⁴ See *E.C. Nolan Co. v. State*, 227 N.W.2d 323, 327 (Mich. Ct. App. 1975).

⁸⁵ See *Siefford v. Hous. Auth.*, 223 N.W.2d 816 (Neb. 1974).

⁸⁶ Steven B. Lesser & Daniel L. Wallach, *Risky Business: The “Active Interference” Exception to No-Damage-For-Delay Clauses*, 23 CONSTRUCTION LAW. 26, 29 (2003); see, e.g., *Blake Constr. Co. v. C. J. Coakley Co.*, 431 A.2d 569, 579 (D.C. Ct. App. 1981) (holding active interference exception applied where owner had provided defective plans to contractor); *Commonwealth of Pa., State Highway & Bridge Auth. v. Gen. Asphalt Paving Co.*, 405 A.2d 1138, 1141 (Pa. Commw. Ct. 1979) (holding active interference exception applied where state failed to grant time extensions to contractor in a timely manner).

⁸⁷ See Bramble & Callahan, CONSTRUCTION DELAY CLAIMS at § 2.16; Lesser & Wallach, 23 CONSTRUCTION LAWYER at 26; see, e.g., *Gasparini Excavating Co. v. Pa. Tpk. Comm’n*, 187 A.2d

The practical effect of such numerous and inconsistently applied judicial exceptions is to create uncertainty over whether an NDFD clause will be enforced by courts; all NDFD clauses walk a thin line between validation and invalidation, with courts tending to err in favor of invalidation.⁸⁸ It is therefore difficult for parties to predict the consequences of an NDFD clause included within a building contract.⁸⁹

B. STATUTORY LIMITS ON ENFORCEMENT

In addition to the common-law exceptions, a number of states have statutorily limited or barred the enforcement of NDFD clauses.⁹⁰ Currently, at least twelve states have adopted legislation that limits the enforceability of NDFD clauses: Arizona, California, Colorado, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Virginia, and Washington.⁹¹ Of these, Kentucky,⁹²

157, 162, 164 (Pa. 1963) (holding active interference exception applied where owner had ordered contractor to begin work but denying access to the work area that was occupied by another contractor); *P.T. & L. Constr. Co. v. N.J. Dep’t of Transp.*, 531 A.2d 1330, 1343 (N.J. 1987) (holding no active interference exception applied due to owner’s failure to adequately coordinate work of subcontractor).

⁸⁸ Alain Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 447 (2002).

⁸⁹ Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1859-60 (2005).

⁹⁰ *Construction Law Committee Compendium of Frequently Asked Construction Law and Professional Liability Related Questions*, THE HARMONIE GROUP (May 2008), www.harmonie.org/user_documents/COMPENDIUM%20FINAL%20WITH%20COVER.pdf; Stephen G. Walker, *Statutory Responses to “No Damage for Delay” Clauses*, 6 CONSTRUCTION LAW. 9 (1985-1986).

⁹¹ CAL. PUB. CONT. CODE § 7102 (Westlaw 2011); COLO. REV. STAT. § 24-91-103.5 (Westlaw 2011); KY. REV. STAT. ANN. § 371.405(2)(c) (Westlaw 2011); MASS. GEN. LAWS ANN. Ch. 30, § 390 (Westlaw 2011); MINN. STAT. ANN. § 15.411 (Westlaw 2011); MO. ANN. STAT. § 34.058 (Westlaw 2011); N.C. GEN. STAT. ANN. § 143-134.3 (Westlaw 2011), N.J. STAT. ANN. § 2A:58B-3 (Westlaw 2011); OHIO REV. CODE ANN. § 4113.62 (Westlaw 2011); VA. CODE ANN. § 2.2-4335(A) (Westlaw 2011); WASH. REV. CODE ANN. § 4.24.360 (Westlaw 2011); see Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 446, 456-64 (providing general synopsis of current legislation limiting the enforcement of NDFD clauses by state).

⁹² KY. REV. STAT. ANN. § 371.405(2)(c) (Westlaw 2011) (declaring provisions in construction contracts void as against public policy if they purport to “waive, release, or extinguish the right of a contractor or subcontractor to recover costs, additional time, or damages, or obtain an equitable adjustment of the contract, for delays in performing the contract that are, in whole or part, within the control of the contracting entity. Unusually bad weather that cannot be reasonably anticipated, fire, or other act of God shall not automatically entitle the contractor to additional compensation under this paragraph.”).

Ohio,⁹³ and Washington⁹⁴ have enacted the most expansive statutes, in that they render NDFD clauses per se unenforceable in public and private contracts under certain conditions.⁹⁵ In fact, the number of states that have chosen to enact formal legislation limiting the enforceability of NDFD clauses has more than quadrupled since California first enacted its Public Contract Code section 7102 in 1985.⁹⁶ Indeed, it appears that “[l]egislation against the NDFD clause is in; passing the buck is not.”⁹⁷ Perhaps this trend evidences a growth in state recognition that such clauses represent a public policy concern.⁹⁸

⁹³ OHIO REV. CODE ANN. § 4113.62(C) (Westlaw 2011) (“(1) Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, 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, or that waives any other remedy for 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 or other documentation that is made part of a construction subcontract, agreement, or understanding, 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, or that waives any other remedy for 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.”).

⁹⁴ WASH. REV. CODE ANN. § 4.24.360 (Westlaw 2011) (“Any clause in a construction contract, as defined in RCW 4.24.370, which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable. This section shall not be construed to void any provision in a construction contract, as defined in RCW 4.24.370, which (1) requires notice of delays, (2) provides for arbitration or other procedure for settlement, or (3) provides for reasonable liquidated damages.”).

⁹⁵ OHIO REV. CODE ANN. § 4113.62 (Westlaw 2011); WASH. REV. CODE ANN. § 4.24.360 (Westlaw 2011).

⁹⁶ See ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 477 (3d ed. 2011), available at Westlaw CDRTC s 16.02 (stating that Colorado, California, Massachusetts, and Washington were the first states to enact statutes addressing NDFD clauses); see also KY. REV. STAT. ANN. § 371.405(c) (Westlaw 2011) (enacted in 2007); MINN. STAT. ANN. § 15.411 (Westlaw 2011) (enacted in 2002); OHIO REV. CODE ANN. § 4113.62 (Westlaw 2011) (enacted in 2000); VA. CODE ANN. § 2.2-4335(A) (Westlaw 2011) (enacted in 2001).

⁹⁷ Alain Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 446 (2002); see also Cushman, CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR at 496 (“[T]he recent surge of activity in state legislatures in an effort to restrict or preclude enforcement of the ‘no damage for delay’ clauses in public construction contracts indicates that the pendulum is starting to swing back and treat the construction industry with more fairness.”).

⁹⁸ Other states have recently attempted to pass legislation limiting the enforceability of NDFD clauses as well. Notably, the New York Legislature passed a bill limiting the enforceability of NDFD clauses in 1998. However, the bill was ultimately vetoed by the governor, despite his express agreement with the central purpose and intent of the bill. Contractors renewed their efforts. Henry L. Goldbert, *Albany Eyes Damages for Delay in Public Works*, LAW/COURTROOM NEWS

III. POLICY ARGUMENTS REGARDING THE ENFORCEMENT OF "NO DAMAGE FOR DELAY" CLAUSES

The enforceability of NDFD clauses has been a subject of longstanding debate. This Part reviews a number of core arguments and policy concerns advanced by both sides of the controversy and concludes that NDFD clauses should not be enforced because of their 1) potential to result in harsh and inequitable consequences that are disfavored by common law, 2) inherent inefficiency as tools for apportioning the risks of delay in construction contracts, and 3) potential unconscionability.

A. FREEDOM TO CONTRACT

Proponents of NDFD clauses commonly rely upon the policy of freedom to contract, a principle long idealized in American jurisprudence.⁹⁹ This argument is based on the premise that at the time of contracting, both parties are aware of risks associated with delay in construction contracts and should be allowed to bargain between themselves to apportion these risks in a manner that they deem most beneficial.¹⁰⁰ Proponents assert that contractors are sophisticated business parties who can bargain during the bidding process for the inclusion of other favorable terms or a higher rate for their services as required to adequately shield themselves from the risks associated with NDFD clauses.¹⁰¹ However, "freedom to contract" is not an absolute concept and is often limited through legislative and judicial restrictions applied to protect public interests.¹⁰² Opponents have effectively

(July 2006), <http://newyork.construction.com/opinions/law/archive/2006/07.asp>; see Cushman, CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR at 496 (stating that the 1998 NY bill provided compensation for excusable delay which was defined as "(1) the cause of the delay arises after award of the public contract and was caused by the public owner's acts or omissions and/or is attributable to changed conditions or differing site or subsurface conditions; (2) the contractor, subcontractor, or materialman demonstrates that completion of the work or delivery of material will be actually and necessarily delayed; (3) the effect of such cause cannot be avoided or mitigated by the exercise of all reasonable precautions efforts and measures whether before or after the occurrence of the cause of the delay; and (4) the contractor, subcontractor or materialman properly submits notice to the public owner in accordance with the provisions of the public contract.").

⁹⁹ Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. 1857, 1870 (2005).

¹⁰⁰ See *id.* at 1870-73.

¹⁰¹ See *id.*

¹⁰² 8 WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 1070 (10th ed. 2005), available at Westlaw 8 WITSUM Ch. X, § 1070 (stating that while some older cases have asserted that freedom to contract is the rule, and restrain the exception, this position has been abandoned; this is especially true in contracts regarding terms of employer-employee relations); see 16A C.J.S. *Constitutional Law* § 721 (2011) ("Liberty to contract is not an absolute right, but is qualified and

attacked the “freedom to contract” argument on the basis that enforcing NDFD clauses, especially in instances of owner-caused delay, is contrary to public policy interests.¹⁰³

Opponents urge that the “freedom to contract” argument is overly simplistic when applied to NDFD clauses because it assumes a system in which both parties possess equal power to bargain for the terms most favorable to them. Proponents suggest that a contractor can protect itself from the risk of delay by increasing its bid for the project to account for the possibility of future delays.¹⁰⁴ This may not be the case with regard to NDFD clauses in construction contracts. Rather, the bargaining power of contractors with regard to an NDFD clause may be severely eroded by both the competitive bidding process¹⁰⁵ and the inherent difficulty of predicting the significance of such clauses at the time of contracting.¹⁰⁶ As discussed previously, most public and many private construction projects are secured through competitive bidding.¹⁰⁷ In this system,

limited by the legitimate supervision of the government. The right is subject to regulations or restrictions that are reasonable in light of the purposes to be accomplished. Liberty of contract may be limited, restrained, and circumscribed in order to protect an overriding public interest.”)

¹⁰³ J. Bert Grandoff & Patricia E. Davenport, *The “No Damage for Delay” Clause: A Public Policy Issue*, FLA. B. J. 8, 12 (Oct. 2001) (“It is the policy of the law, generally, to furnish everyone with legal remedies for any injuries received. Accordingly, a no damage for delay clause which on its face imposes a penalty on a contractor by denying a legal remedy, while excusing owner default, is contrary to public policy.”); Alain Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 456 (2002) (“Is the public really interested in allowing—as a matter of policy—one party to ‘sell’ to another responsibility for delay caused by the same party just because there should be freedom to contract, where the ‘buying’ party must either take the contract or leave it, and close its doors?”); see Douglas S. Oles, *“No Damage” Clauses in Construction Contracts: A Critique*, 53 WASH. L. REV. 471, 497 (1978) (“Because ‘no damage’ clauses are either unnecessary to bar a contractor’s recovery when delays are foreseeable, or impose an unreasonable burden on a contractor when delays are unforeseeable, equity would best be served by denying them any operative effect.”).

¹⁰⁴ Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW at 32 (2002).

¹⁰⁵ See Oles, *“No Damage” Clauses in Construction Contracts: A Critique*, 53 WASH. L. REV. at 482; Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 432-36.

¹⁰⁶ See Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1877-78 (2005).

¹⁰⁷ See PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., 1 BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 2:22 (2011), available at Westlaw BOCL § 2:22 (explaining that the process of sealed competitive bidding is mandated almost universally by statute in public construction contracts, but is not widely used in private construction contracts. Yet, “[e]ven where the prime contract is negotiated... trade subcontracts frequently are awarded through sealed bidding. Therefore, some form of competitive sealed bidding also continues to be well accepted in both international public works and private contracting.”); JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS 252 (2009), available at Westlaw SCICA s 9.07 (“Generally, public contracts must be awarded on the basis of competitive bidding.

owners typically occupy a much stronger bargaining position than the contractors, who are under pressure to place low bids in order to secure projects.¹⁰⁸ In fact, a competitive bidding process may leave contractors with no meaningful opportunity to bargain for alternate terms.¹⁰⁹ As one commentator observed:

[A] contractor may not generally negotiate with regard to the specific terms of the contract. He must either submit a bid on the contract as offered to the public or simply refrain from bidding. . . . Of course, it might be argued that a contractor can always go elsewhere and bid on work which is advertised with more favorable contract terms, but where exculpatory provisions such as "no damage" clauses are commonly in use and held valid, it may become difficult to obtain sufficient contract work not imposing such conditions.¹¹⁰

A number of commentators have recognized the weak bargaining position of contractors involved in statutorily mandated sealed competitive bidding processes.¹¹¹ A contractor that includes a contingency for delay damages associated with the NDFD clause in its bid may not receive the job if other contractors elect to bid without a contingency.¹¹² The competitive bidding process thus undermines the central premise of the "freedom to contract" argument: that the parties will be able to effectively bargain between themselves for the most favorable terms.

Even most private contracts, with the option of bidding or negotiating, are awarded after competitive bidding. Only experienced owners, who must deal with a small number of contractors, perhaps only one, with the technical skill needed, are likely to use negotiation."); KENNETH C. GIBBS & GORDON HUNT, CALIFORNIA CONSTRUCTION LAW 71 (16th ed. 2000).

¹⁰⁸ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1872.

¹⁰⁹ See *id.*

¹¹⁰ Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 482.

¹¹¹ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1872 ("In reality, owners occupy a much stronger bargaining position than the contractors who work for them. In many cases the bidding contractors have no choice but to accept no damages for delay clauses and other owner-friendly contract provisions if they wish to participate in the work."); Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW at 32 (2002) ("Recognizing that contractors cannot practically protect themselves with contingency bidding, courts strictly construe no-damage-for-delay clauses and give only restrained approval."); see Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 482; Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 432-36 (2002).

¹¹² Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW at 32.

Furthermore, a contractor's ability to effectively bargain concerning the inclusion of NDFD clauses is undermined by the enormous difficulty of predicting both the enforceability of such clauses and estimating their potential future impacts if they are enforced.¹¹³ As discussed previously, the statutory limitations on the enforcement of NDFD clauses, considered in tandem with the myriad state-specific judicial exceptions, render the ultimate enforceability of an NDFD anything but certain.¹¹⁴ As *Harper/Nielsen-Dillingham* illustrates, a contractor's inability to accurately predict at the time of contracting whether an NDFD clause will be enforced can have steep financial consequences.¹¹⁵

Additionally, the "freedom to contract" argument assumes that a contractor is able to weigh the risk of project delays and respond by bargaining for a sufficient contingency amount in the initial project estimates.¹¹⁶ Yet the enormity of liability associated with any and all potential project delays, including those caused by an owner or its agents and thus outside of the contractor's control, may be beyond calculation.¹¹⁷ In reality, "the risk of delay is an enormous issue in construction, and the proof and calculation of delay damages can be extraordinarily challenging, even after a delay has occurred. . . . [A] blanket ban on recovery under a no damages for delay clause is an enormous and almost unquantifiable risk."¹¹⁸ Even if contractors were

¹¹³ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1884; cf. Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 487 ("[E]nforcement of a 'no damage' clause may have the oppressive effect of forcing a contractor to gamble on the quality of the owner's specifications, the owner's promptness in contract administration, and the owner's moderation in exercising authority under the Changes Clause, since delay damages arising from the owner's failures in these areas may be held nonrecoverable.").

¹¹⁴ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1870 ("The question of whether any given no damages for delay clause is judicially enforceable is ultimately a very difficult one. . . . In most states, however, confusion continues to be the rule and certainty the exception.").

¹¹⁵ *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667, 670 (2008) (noting that KCI's general manager who signed the subcontract later testified that KCI had believed the NDFD clause to be "a boilerplate phrase that's contained in most contracts that's generally ignored because it's not enforceable").

¹¹⁶ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1872.

¹¹⁷ See *id.* at 1884; Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW at 32.

¹¹⁸ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1877; see also Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 468 (2002) ("Proponents claim that the clause affords an opportunity to know upfront what the costs of delays will be in order

able to accurately predict the future enforcement of NDFD clauses, it remains unlikely that they could effectively bargain to protect themselves from the liability associated with owner-caused delays.¹¹⁹ The inability of contractors to bargain effectively to protect themselves against the far-reaching financial risks associated with NDFD clauses thus undermines proponents' "freedom to contract" argument.

B. FAIRNESS

The fairness of enforcing NDFD clauses has been a subject of heated debate.¹²⁰ Proponents argue that NDFD clauses are valuable tools for protecting an owner's ability to accurately project costs at the time of contracting.¹²¹ Proponents also suggest that NDFD clauses prevent contractors from making vexatious claims that result in costly litigation, compromising the economics and administration of the project.¹²² The policy goals underlying this argument are the strongest in the context of a public works contract, given the public interest in protecting public tax dollars against "vexatious litigation based on claims, real or fancied, that the agency has been responsible for unreasonable delays."¹²³ However, when private parties enter agreements involving NDFD clauses, there is less public interest to protect through limiting litigation.¹²⁴ Additionally, proponents suggest that the use of NDFD clauses discourages contractors from causing project delays due to the knowledge that they will not be able to seek monetary compensation.¹²⁵

In contrast, opponents of NDFD clauses have strongly criticized the provisions as unfair "draconian" tools that result in harsh

to better manage limited public funds. But this is a mirage. It is improbable, if not impossible, to accurately forecast delay events to any degree of mathematical certainty.").

¹¹⁹ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1877.

¹²⁰ See *id.* at 1859 ("No damages for delay clauses in construction contracts have always been very controversial."); see Cordell Parvin, *No Damages/Delay Clauses Fair?*, ROADS & BRIDGES 8 (Oct. 1990). But see David P. Gontar, *The Enforceability of "No Damages for Delay" Clauses in Construction Contracts*, 28 LOY. L. REV. 129 (1982).

¹²¹ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1871.

¹²² *Id.*; J. Bert Grandoff & Patricia E. Davenport, *The "No Damage for Delay" Clause: A Public Policy Issue*, FLA. B. J. 8, 8 (Oct. 2001).

¹²³ Gontar, *The Enforceability of "No Damages for Delay" Clauses in Construction Contracts*, 28 LOY. L. REV. at 130 (internal quotation marks and citation omitted).

¹²⁴ Douglas S. Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471, 488 n.70 (1978).

¹²⁵ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1871.

consequences.¹²⁶ The significance of uncompensated damages incurred by a contractor due to the enforcement of an NDFD clause was previously noted with regard to the California case of *Harper/Nielsen-Dillingham*.¹²⁷ In addition, literature analyzing the application of NDFD clauses is abundant with cases illustrating the potentially devastating consequences of NDFD clauses.¹²⁸ For example, the enforcement of an NDFD clause barred a New York contractor from seeking an estimated \$3,311,960 in damages that it had incurred over a twenty-eight-month delay allegedly caused by the City's "endless" revision of plans and failure to coordinate activities of prime contractors.¹²⁹ Similarly, an NDFD clause has been applied to bar a Texas contractor from recovering an estimated \$5,108,765.50 in damages that it had incurred due to an approximately two-year delay that allegedly resulted from the City's issuance of several hundred changes to the original plans.¹³⁰

In addition to the potentially harsh results induced by NDFD clauses, several commentators have called attention to the unfairness of broadly worded NDFD clauses that exonerate owners from all liability associated with negligent or even willful actions, while providing no remedy for contractors even if they have clearly been wronged.¹³¹ The enforcement of such clauses is contrary to the well-recognized public policy that courts should not interpret a contract so as to put one party at the mercy of another's negligence.¹³² Although owners have a valid interest in protecting themselves from project delays and vexatious litigation, "to suppose for the moment that owners themselves can be

¹²⁶ Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 427 (2002); see Maurice T. Brunner, Annotation, *Validity and Construction of "No Damage" Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 § 3 (1976) ("[B]ecause of the harsh results often induced by the 'no damage for delay' clause, such clause is given strict construction . . .").

¹²⁷ *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667, 669 (2008) (finding an NDFD clause barred subcontractor from asserting a claim against the federal government for estimated delay damages of \$770,565.00, an amount greater than the original contract price).

¹²⁸ See, e.g., Brunner, 74 A.L.R.3d 187 (providing analysis of multi-jurisdictional NDFD case precedent); Richard Gary Thomas & Fred D. Wilshusen, *How to Beat a 'No Damage for Delay' Clause*, 9 CONSTRUCTION LAW 17, 22 (1989).

¹²⁹ *Kalish-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 414-15 (N.Y. 1983).

¹³⁰ *City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App. 14th Dist. 1978).

¹³¹ Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 441.

¹³² 17A AM. JUR. 2D *Contracts* § 284 (2011); see Douglas S. Oles, "No Damage" Clauses in *Construction Contracts: A Critique*, 53 WASH. L. REV. 471, 481 (1978).

excused for delays occasioned by their own behavior entirely misses the mark on the purpose for the clause.”¹³³

Finally, NDFD clauses are unfair in application.¹³⁴ They are typically one-sided instruments that bar contractors from collecting monetary damages stemming from delay attributable to others, while placing no similar limitation on owners.¹³⁵ The contractor’s only remedy is an extension of the time for performance, which is “wholly inadequate because it fails to recognize that any delay will render the contractor’s performance more expensive.”¹³⁶ Although a standard Changes Clause provides for compensating the contractor for additional material and labor costs that are directly attributable to changes in the work, a delayed contractor will likely be forced to absorb a range of uncompensated costs while waiting to complete the project.¹³⁷ For example, a delayed contractor may need to pay additional money to retain its workforce during the delay period or may incur damages as a result of lost alternative opportunities for employment.¹³⁸

The unjust results of enforcing NDFD clauses are particularly apparent in contracts that also contain liquidated damages clauses, which protect owners from damages associated with the delay of contractors.¹³⁹ A liquidated damages clause requires the contractor to pay the owner a

¹³³ J. Bert Grandoff & Patricia E. Davenport, *The “No Damage for Delay” Clause: A Public Policy Issue*, FLA. B. J. 8, 8 (Oct. 2001).

¹³⁴ Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 442 (noting that NDFD clauses have been applied to bar contractors from obtaining damages even when the associated delay was due to deliberate owner interference.); Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 497 (“The operative effect of a ‘no damage’ clause is to bar a contractor from recovering impact damages arising from unforeseeable delays which are attributable to the owner. When it is so enforced, the clause works the oppressive effect of subjecting a contractor to broad and uncertain liability for which it cannot adequately provide in its bid.”); Grandoff & Davenport, FLA. B. J. at 12 (“A no damage for delay clause which on its face imposes a penalty on a contractor by denying a legal remedy, while excusing owner default, is contrary to public policy.”).

¹³⁵ Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 441.

¹³⁶ Robert A. Rubin, *Summaries of Debate at the April 28 Fourth Annual Meeting of the ABA Forum Committee on the Construction Industry Held at Tampa, Florida*, 8 CONSTRUCTION LAW 41 (1988) (summarizing Robert A. Rubin’s presentation: “No Damage for Delay”—Fair or Foul? The Contractor’s Perspective).

¹³⁷ Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 476-77.

¹³⁸ *Id.*

¹³⁹ See Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 437-40; see Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 491; Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1873 (2005).

fixed amount of money per day for each day a project is delayed.¹⁴⁰ Although liquidated damages clauses have a similar purpose to NDFD clauses, a liquidated damages clause will not be enforced by courts if it is determined to be unreasonable at the time of contracting.¹⁴¹ By contrast, NDFD clauses—which relieve owners of all liability for damages associated with their own delays—have been enforced by courts regardless of their reasonableness.¹⁴² As commentator Alain Lecusay explained in his 2002 article on NDFD clauses in Florida:

When a contractor delays a project, the owner collects damages from the guilty contractor by invoking the “Liquidated Damages” clause (“LDC”). The LDC seeks to compensate an owner who cannot make beneficial use of the project because the contractor has not completed the work. When an owner delays a project, however, the guilty owner does not have to pay the contractor. The owner, instead, raises a shield and says to the contractor, “I don’t have to pay you even if I delayed this job.”¹⁴³

A construction contract containing both an NDFD and liquidated damages clause is unfair in that it creates a legal double standard; a contractor remains liable for damages associated with its own delays, while the owner is not.¹⁴⁴ An NDFD clause operates in a similar manner to a liquidated damages provision, but it is not governed by any of the same reasonableness restrictions that apply to liquidated damages provisions as a matter of law.¹⁴⁵ The inherent unfairness present in such situations, coupled with the high risk of forfeiture associated with NDFD clauses, should lead legislators to render NDFD clauses void as against public policy in all construction contracts when the owner causes delay.

¹⁴⁰ RICHARD A. HOLDERNESS, HANDLING DISPUTES DURING CONSTRUCTION: HERE’S HOW AND WHEN TO DO IT 51 (2006).

¹⁴¹ Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 491.

¹⁴² See Maurice T. Brunner, Annotation, *Validity and Construction of “No Damage” Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 § 7[a] (1976) (“So long as the basic requirements for a valid contract are met, the ‘no damage’ clause is binding and generally will be enforced according to its terms. . . .”). *But see* Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 492 (arguing that “a ‘no damage’ provision in a construction contract is analogous to a liquidated damage provision. As a result, the former ought to be invalidated whenever it fails to meet the test of ‘reasonable forecast of just compensation . . . breach’ which limits the enforcement of [liquidated damage provisions].”).

¹⁴³ Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 437.

¹⁴⁴ See *id.* at 437-38.

¹⁴⁵ See Oles, “No Damage” Clauses in Construction Contracts: A Critique, 15 ST. THOMAS L. REV. at 437-40.

C. UNCONSCIONABILITY

In addition to general policy concerns over the fairness of NDFD clauses, opponents of NDFD clauses have argued that they may operate as unconscionable provisions.¹⁴⁶ It is a well-established principle of common law that courts may refuse to enforce a contractual provision that is unconscionable due to “an absence of meaningful choice on the part of the parties together with contract terms which are unreasonably favorable to the other party.”¹⁴⁷ In California, this doctrine has been codified in California Civil Code section 1670.5.¹⁴⁸ In order for a contractual provision to be deemed unconscionable, courts require a showing of both procedural and substantive unconscionability.¹⁴⁹ Procedural unconscionability is evident when the circumstances surrounding the formation of a contract involve “an absence of meaningful choice on the part of one of the parties.”¹⁵⁰ Substantive unconscionability is present where the contract terms are “unreasonably favorable” to one party.¹⁵¹ Furthermore, a showing of procedural and substantive unconscionability need not be present to the same extent in

¹⁴⁶ *Id.* at 480 (arguing that “when the effect of a ‘no damage’ clause is to impose such an unreasonable liability on the contractor as to be oppressive, a court might . . . invoke the rule against unconscionability” as a means of attacking their enforcement.); Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1873 (2005) (“[S]ome argue that it is unconscionable for owners and general contractors to exculpate themselves ahead of time for the costs of delays they cause contractors.”).

¹⁴⁷ Oles, *“No Damage” Clauses in Construction Contracts: A Critique*, 53 WASH. L. REV. at 481 n.44 (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

¹⁴⁸ CAL. CIV. CODE § 1670.5(a) (Westlaw 2011) (providing that “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).

¹⁴⁹ 14 CAL. JUR. 3D *Contracts* § 15 (2012), available at Westlaw CALJUR CONTRACTS § 15.

¹⁵⁰ *Williams*, 350 F.2d at 449 (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”); see also 14 CAL. JUR. 3D *Contracts* § 16 (“For purposes of determining whether a contract provision is unconscionable, the procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time; the element focuses on oppression or surprise. Oppression arises from the inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.” (footnotes omitted)).

¹⁵¹ *Williams*, 350 F.2d at 449; see also 14 CAL. JUR. 3D *Contracts* § 17 (“Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. Substantive unconscionability focuses on the terms of the parties’ agreement and whether those terms are overly harsh, or are so one-sided as to ‘shock the conscience.’” (footnotes omitted)).

order for a court to invalidate a contractual provision.¹⁵² California courts apply a sliding-scale analysis in that “[t]he more substantively oppressive the contract term the less evidence of procedural unconscionability is required to support the conclusion that the term is unenforceable, and vice versa.”¹⁵³

On a procedural level, scholars have observed that owners typically occupy a stronger bargaining position than contractors,¹⁵⁴ which undermines the ability of contractors to meaningfully negotiate over unfavorable terms.¹⁵⁵ In contrast, proponents of NDFD clauses have asserted that procedural unconscionability arguments are not applicable to most construction contracts because of the sophisticated and business-savvy nature of professional contractors.¹⁵⁶ However, scholars have noted that the opportunity for meaningful bargaining in both private and public construction contracts has been significantly eroded in recent years by the prevalent use of form contracts and the emergence of strong economic forces that are more readily capable of dictating contractual terms to smaller independent contractors and subcontractors.¹⁵⁷ Furthermore, even the significant commercial knowledge and experience of most contractors would likely fail to even the scales of power in the negotiation of many public and private construction contracts, due to the inherent “absence of meaningful choice” in the competitive bidding process previously discussed.¹⁵⁸ Thus, contractors in many public and

¹⁵² 14 CAL. JUR. 3D *Contracts* at § 15.

¹⁵³ *Id.*

¹⁵⁴ See Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1872 (2005); see also Douglas S. Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471, 482 (1978); JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS 12 (2011), available at Westlaw SCICA § 1.06 (stating that AIA construction industry documents generally assume that “the owner has greater bargaining power than the prime contractor, and that the prime contractor has greater power than subcontractors”).

¹⁵⁵ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. at 1872 (“In many cases the bidding contractors have no choice but to accept no damages for delay clauses and other owner-friendly contract provisions if they wish to participate in the work.”).

¹⁵⁶ David P. Gontar, *The Enforceability of “No Damage for Delay” Clauses in Construction Contracts*, 28 LOY. L. REV. 129, 140 (1982).

¹⁵⁷ See JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 20 (1970) (“[F]reedom of contract assumes two parties of relatively equal bargaining power who jointly negotiate an agreement. Through the development of mass produced contracts and the emergence of large blocs of economic power, this earlier model of the negotiated contract has become the exception.”).

¹⁵⁸ Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 482-83.

private contracts may have a strong argument for procedural unconscionability.

On a substantive level, a strong argument exists that NDFD clauses unreasonably favor the contractual interests of owners over those of contractors. First, NDFD clauses are inherently one-sided instruments that bar contractors from recovering in the event of owner-caused delay but provide no reciprocal bar upon the owners' ability to seek damages in the event of contractor-caused delay.¹⁵⁹ The one-sided nature of NDFD clauses is relevant because courts have considered lack of mutuality in contractual terms as a basis for determining substantive unconscionability.¹⁶⁰

Second, broadly worded NDFD clauses unreasonably favor the interests of owners over those of contractors, by requiring contractors to absorb substantial uncompensated delay damages, even when such delay is the result of an owner's negligent or unreasonable acts.¹⁶¹ In addition, NDFD clauses are inherently unreasonable by virtue of the fact that they offer no real consideration to contractors in exchange for their waiver of remedies, and instead place them in a position of "bargaining" for rights they already possess.¹⁶² Proponents of NDFD clauses argue that they evidence a meaningful bargain between the parties because the contractor is forgoing its right to recover damages in exchange for a right to a time extension equal to the length of the delay.¹⁶³ However, this argument ignores the "generally accepted principle of law that a party delaying the performance of a contract may not, even in the absence of an express term granting time extension, charge the contractor with the time damages for consequent delay."¹⁶⁴ In effect, NDFD clauses force contractors to abandon their general right to recover damages caused by the delay of others, while providing no value in return.

In summary, NDFD clauses have strong potential to operate as unconscionable provisions because they are unreasonably favorable to

¹⁵⁹ Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 441 (2002) ("But for a rare occasion, the NDFD clause does not apply to damages that an owner may incur from delays caused by a contractor.").

¹⁶⁰ See 14 CAL. JUR. 3D. *Contracts* §17 (2012), available at Westlaw CALJUR CONTRACTS § 17.

¹⁶¹ See Oles, "No Damage" Clauses in Construction Contracts: A Critique, 15 ST. THOMAS L. REV. at 441.

¹⁶² *Id.* at 482-83.

¹⁶³ *Id.* at 482.

¹⁶⁴ *Id.* at 483.

owners¹⁶⁵ and are commonly forced upon contractors through a competitive bidding process in which they have no meaningful opportunity to bargain.¹⁶⁶

D. RISK APPORTIONMENT

Regardless of their potential inequities, NDFD clauses should not be enforced because they do not fulfill their intended function of efficiently apportioning the risks associated with delay in construction contracts.¹⁶⁷ As previously noted, it is nearly impossible for a contractor to anticipate and accurately calculate monetary losses associated with a virtually infinite list of potential project delays, especially those caused by others.¹⁶⁸ The modern construction process is inherently complex, and delay could stem from the failure of any party involved in the project to perform by the agreed-upon time.¹⁶⁹ Thus, the vast majority of costs associated with delays, especially those stemming from the actions of parties other than the contractor, are not within the contemplation of the contractor at the time of contracting. As one scholar noted:

[T]he risk of delay is an enormous issue in construction, and the proof and calculation of delay damages can be extraordinarily challenging, even after a delay has occurred. Because delay claims can potentially have huge economic impacts on owners and contractors alike, a blanket ban on recovery under a no damages for delay clause is an enormous and almost unquantifiable risk.¹⁷⁰

It is therefore unreasonable to expect contractors to adequately protect themselves from the risk of forfeiture associated with such losses by

¹⁶⁵ See Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 441 (2002).

¹⁶⁶ See Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. 1857, 1872 (2005); Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW 32 (2002); see Oles, "No Damage" Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. at 482; Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. at 432-36.

¹⁶⁷ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1884.

¹⁶⁸ *Id.* at 1877.

¹⁶⁹ S. GREGORY JOY, EUGENE J. HEADY & JAMES E. STEPHENSON, *ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS* 7 (2010), available at Westlaw ACSCC s 1.02.

¹⁷⁰ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1877.

bargaining for an increased fee at the time of contracting; inequitable outcomes of such a practice are inevitable.¹⁷¹

Even if a contractor were in a position to effectively bargain at the inception of a project regarding potential delay damages, it would likely be unable to appreciate the significance of an NDFD clause due to the uncertainty of its enforcement.¹⁷² As noted above, because NDFD clauses are exculpatory in nature, the majority of courts strictly construe them against their drafters.¹⁷³ Some states have limited or prohibited the enforcement of NDFD clauses by statute.¹⁷⁴ In states where NDFD provisions are not per se unenforceable, several widely recognized judicial exceptions make the outcome of litigation uncertain.¹⁷⁵ Therefore, contractors cannot be expected to accurately anticipate the enforceability of NDFD clauses and to weigh their value accordingly in the bargaining process.

Fortunately, there is little need for states to continue enforcing NDFD clauses, given the availability of other widely accepted practices that can be used by parties to apportion delay risks and that do not result in total forfeiture. For example, a method similar to the liquidated damages clause could also be used by contractors as against owner-caused delays.¹⁷⁶ Effectively crafted liquidated damages clauses would give the parties a clear means of predicting their potential liabilities at the time of contracting and would simplify any future litigation.¹⁷⁷ A liquidated damages clause could be structured to include a cap on the total amount of delay damages recoverable.¹⁷⁸ This method would have many of the advantages of a standard liquidated damages clause, while providing additional protection for owners by allowing them to

¹⁷¹ See *id.* at 1877-78.

¹⁷² See *id.* at 1870.

¹⁷³ Maurice T. Brunner, Annotation, *Validity and Construction of “No Damage” Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 § 3 (1976).

¹⁷⁴ *Construction Law Committee Compendium of Frequently Asked Construction Law and Professional Liability Related Questions*, THE HARMONIE GROUP (May 2008), www.harmonie.org/user_documents/COMPENDIUM%20FINAL%20WITH%20COVER.pdf; Stephen G. Walker, *Statutory Responses to “No Damage for Delay” Clauses*, 6 CONSTRUCTION LAW 9 (1985-1986).

¹⁷⁵ Brunner, 74 A.L.R.3d 187 at § 7[a].

¹⁷⁶ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. at 1879; see Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW 32, 36 (2002).

¹⁷⁷ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. at 1879-81.

¹⁷⁸ *Id.* at 1880-81.

determine their maximum liability for delay at the start of the project.¹⁷⁹ Because such modified liquidated damages clauses do not cause total forfeiture, they have been subject to less judicial scrutiny than NDFD clauses and are commonly enforced by courts.¹⁸⁰

Alternately, owners could place corridor provisions in their contracts,¹⁸¹ which function in essentially the opposite manner as a liquidated damages clause with a cap.¹⁸² A corridor provision allows the contractor to recover for delay damages, but only for delays beyond a specified period.¹⁸³ Put simply, the contractor would not be able to recover delay damages until the delay had reached a certain number of days.¹⁸⁴ For example, a corridor provision may be drafted that entitles a contractor to compensation for any delays in excess of thirty days, but no compensation for shorter delays. This type of clause would function to protect a contractor in the event of significant delays, while still providing incentive to the contractor to avoid short-term delays for which it could not recover.¹⁸⁵ Given such viable alternative techniques for apportioning delay risks in construction contracts, it appears that the elimination of the unfair and inefficient NDFD clause would not significantly affect the parties' freedom to contract.

IV. CALIFORNIA'S TREATMENT OF "NO DAMAGE FOR DELAY" CLAUSES

Effective January 1, 1985, the California legislature enacted California Public Contract Code section 7102, rendering an NDFD clause unenforceable in a public works contract when the delay is the fault of the owner, unreasonable under the circumstances involved, and

¹⁷⁹ *Id.*

¹⁸⁰ 5 BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 15:81 (2010), available at Westlaw BOCL § 15:81.

¹⁸¹ These clauses have also been referred to as "elimination periods." Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1881.

¹⁸² *Id.*; see Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW 32, 36 (2002).

¹⁸³ See Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW at 36.

¹⁸⁴ *Id.* (observing that a typical elimination clause may read, "The contractor shall be entitled to compensation for any delays in excess of 45 days caused by the Owner, Architect, Construction Manager, by the employee of any of them, by a separate contractor employed by the Owner, by changes in the work.").

¹⁸⁵ Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. at 1881.

not within the contemplation of the parties at the time of contracting.¹⁸⁶ Under these circumstances, section 7102 authorizes a contractor to recover monetary damages associated with delay in spite of the presence of an NDFD clause in a public agency’s prime contract and subcontracts.¹⁸⁷ The statute has no effect on the validity of provisions in California construction contracts that require notice of delay or provide for liquidated damages for delay.¹⁸⁸ Rather, California courts allow liquidated damages provisions in construction contracts¹⁸⁹ and even require them in certain public works contracts.¹⁹⁰ Section 7102 was enacted to bring the California Public Contract Code in line with common-law treatment of NDFD clauses, under which “California construction lawyers have long felt that a ‘no damage for delay’ clause would not be enforced where unreasonable delays have been caused by the project owner.”¹⁹¹

In addition to the statutory limitations contained within section 7102, California courts have also recognized several judicial exceptions to the enforceability of NDFD clauses.¹⁹² These exceptions include where the contractor’s claim is the result of 1) unreasonable delay,¹⁹³ 2) a type of delay that was not contemplated by the parties,¹⁹⁴ or 3) an

¹⁸⁶ CAL. PUB. CONT. CODE § 7102 (Westlaw 2011) (“Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee’s liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor. No public agency may require the waiver, alteration, or limitation of the applicability of this section. Any such waiver, alteration, or limitation is void. This section shall not be construed to void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages.”).

¹⁸⁷ JAMES ACRET, ATTORNEY’S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES 277 (2d ed. 1990); *see* JAMES ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL § 7:90 (6th ed. 2004), *available at* Westlaw CACLM § 7:90 (noting that statute has no effect on the validity of provisions in California construction contracts that require notice of delay or provide for liquidated damages for delay).

¹⁸⁸ *See* Acret, CALIFORNIA CONSTRUCTION LAW MANUAL at § 7.90.

¹⁸⁹ Acret, ATTORNEY’S GUIDE at 224.

¹⁹⁰ *See* PUB. CONT. §§ 10105, 10226 (requiring the inclusion of liquidated damages clauses for the contractor’s delay in every construction contract whose cost exceeds \$250,000); *see* RICHARD A. HOLDERNESS, HANDLING DISPUTES DURING CONSTRUCTION: HERE’S HOW AND WHEN TO DO IT 51 (2006).

¹⁹¹ Stephen G. Walker, *Statutory Responses to “No Damage for Delay” Clauses*, 6 CONSTRUCTION LAW 9, 10 (1985-1986).

¹⁹² Maurice T. Brunner, Annotation, *Validity and Construction of “No Damage” Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 § 7[a] (1976).

¹⁹³ *See* Hawley v. Orange Cnty. Flood Control Dist., 27 Cal. Rptr. 478, 484 (Dist. Ct. App. 1963); Brunner, 74 A.L.R.3d 187 at § 7[i].

¹⁹⁴ *Ozark Dam Constructors v. United States*, 127 F. Supp. 187, 190 (Ct. Cl. 1955); *Hawley*, 27 Cal. Rptr. 478; Brunner, 74 A.L.R.3d 187 at § 7[i].

owner's breach of contract.¹⁹⁵ The perception of contractors that NDFD clauses will not be universally enforced under California common law is supported by the existence of three other California statutes that affect their enforceability: 1) California Civil Code section 2782(b), which voids all provisions in construction contracts with public agencies that intend to impose on a contractor, or relieve a public agency from, liability for the active negligence of a public agency;¹⁹⁶ 2) California Civil Code section 1670.5, which provides that California courts may not enforce contractual provisions that are held to be unconscionable;¹⁹⁷ and 3) California Civil Code section 1442, which provides that California "courts must strictly construe forfeiture provisions [of a contract] against the party on whose behalf they are invoked."¹⁹⁸

Although California was among the first states to enact legislation limiting the enforceability of NDFD clauses, section 7102 provides only limited protection for California contractors against application of the unfair and inefficient "no damage for delay" clause.¹⁹⁹ The California legislature should therefore follow the example of a growing number of states that have responded to public policy concerns by enacting broader legislation to limit the enforcement of NDFD clauses.²⁰⁰

One significant limitation of section 7102 is its restricted application only to construction contracts involving a "public agency," a term defined elsewhere in the Code to mean state and local government entities.²⁰¹ The California legislature has been silent as to the enforceability of NDFD clauses in private construction contracts, despite the fact that many of the same policy concerns apply to private and public contracts alike. The legislature's failure to address the issue of NDFD clauses in private contracts was due to the fact that the passage of

¹⁹⁵ Brunner, 74 A.L.R.3d 187 at § 7[f].

¹⁹⁶ CAL. CIV. CODE § 2782(b) (Westlaw 2011).

¹⁹⁷ CAL. CIV. CODE § 1670.5 (Westlaw 2011); JAMES ACRET, ATTORNEY'S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES 277 (2d ed. 1990).

¹⁹⁸ Milenbach v. Comm'r, 318 F.3d 924, 936 (9th Cir. 2003); Richard A. Lord, *Conditions and Promises Which Would Cause a Forfeiture or Penalty*, in 14 WILLISTON ON CONTRACTS § 42:2 (4th ed. 2010), available at Westlaw WILLSTN-CN § 42:2.

¹⁹⁹ See Alain Lecusay, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 446, 456-64 (2002) (providing a survey of state legislation limiting the enforceability of NDFD clauses).

²⁰⁰ See *id.* at 455-64.

²⁰¹ CAL. GOV'T CODE § 4401 (Westlaw 2011) ("Public agency," as defined in this chapter, includes the State, its various commissions, boards and departments and any county, city, district or state agency authorized to enter into contracts for public work."); see Marc M. Schneider, *Severin Doctrine Bars Subcontractor's Pass-Through Claim, Because Under California Law a 'No Damages for Delay' Clause Shields the Prime Contractor from Liability to the Sub*, in 30 NO.1 CONSTRUCTION LITIGATION REPORTER 15 (2009).

section 7102 was intended to simply codify what were already well-recognized judicial exceptions to the enforcement of NDFD clauses in the state.²⁰² Thus, the legislature assumed that the existing common-law exceptions would continue to shield private contractors from harsh forfeitures suffered in association with NDFD clauses.

However, the recent result of *Harper/Nielsen-Dillingham*²⁰³ reveals the dangers of continued silence.²⁰⁴ In *Harper/Nielsen-Dillingham*, a federal court applying California law found that NDFD clauses were not per se unenforceable in all private contracts.²⁰⁵ In reaching its

²⁰² ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 477 (3d ed. 2011), available at Westlaw CDRTC s 16.02; see Stephen G. Walker, *Statutory Responses to “No Damage for Delay” Clauses*, 6 CONSTRUCTION LAW 9, 10 (1985-1986) (stating that, at the time section 7102 was passed, “California construction lawyers have long felt that a ‘no damage for delay’ clause would not be enforced where unreasonable delays have been caused by the project owner.”); 1987 Cal. Legis. Serv. ch. 98 (describing the Legislature’s intent in enacting section 7102 as follows: “Existing law provides that contract provisions in construction contracts of public agencies, and subcontracts thereunder, which limit the contractee’s liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor. This bill would provide that no public agency may require the waiver, alteration, or limitation of the applicability of this law and would provide that any such waiver, alteration, or limitation is void.” (emphasis added)).

²⁰³ *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667 (2008) (discussed in the Introduction of this Comment).

²⁰⁴ See Schneier, 30 NO.1 CONSTRUCTION LITIGATION REPORTER at 15 (noting that California law has been silent on the issue of whether NDFD clauses are enforceable in public contracts, and stating that the *Harper/Nielsen-Dillingham* court determined that “the only California case setting common law limits on the enforceability of “no damages” clauses—was superseded by the enactment of Public Contract Code § 7102”); see also Robert T. Sturgeon, *Federal Court Holds “No Damage for Delay Clauses” Are Per Se Enforceable on Federal Public Works Projects in California*, CONSTRUCTION & INFRASTRUCTURE LAW BLOG (Mar. 23, 2010), www.constructionandinfrastructurelawblog.com/2010/03/articles/public-works/federal-court-holds-no-damage-for-delay-clauses-are-per-se-enforceable-on-federal-public-works-projects-in-california/ (“The *Harper/Nielsen-Dillingham* court . . . held that ‘no damage for delay’ clauses in contracts between private parties on federal projects are per se enforceable under California law.”); *Harper/Nielsen-Dillingham*, 81 Fed. Cl. at 667 (holding that “outside of Cal. Pub. Cont. Code § 7102, which applies to ‘construction contracts of public agencies and subcontracts thereunder,’ neither the California legislature nor the California Supreme Court has set forth any exceptions to enforceability of express ‘no damage for delay’ clauses in agreements between private parties.”). But see Robert T. Sturgeon, *Federal Court Holds “No Damage for Delay Clauses” Are Per Se Enforceable on Federal Public Works Projects in California*, CONSTRUCTION & INFRASTRUCTURE LAW BLOG (Mar. 23, 2010), www.constructionandinfrastructurelawblog.com/2010/03/articles/public-works/federal-court-holds-no-damage-for-delay-clauses-are-per-se-enforceable-on-federal-public-works-projects-in-california/ (arguing that “it is not clear that the Claims Court correctly interpreted California law, or whether a California court deciding the issue would reach the same conclusion”).

²⁰⁵ Robert T. Sturgeon, *Federal Court Holds “No Damage for Delay Clauses” Are Per Se Enforceable on Federal Public Works Projects in California*, CONSTRUCTION & INFRASTRUCTURE LAW BLOG (Mar. 23, 2010), www.constructionandinfrastructurelawblog.com/2010/03/articles/

conclusion, the court reasoned that previous case law that expressly applied common-law exceptions to the enforceability of NDFD clauses in private contracts had been superseded by the enactment of section 7102.²⁰⁶ Because the common-law exceptions no longer applied, the court found that an “express and unambiguous” NDFD clause constituted an “iron-bound bar” against potential liability as between private contractors and subcontractors in California.²⁰⁷ It is unknown whether a California court interpreting the same laws would reach this conclusion, creating even greater uncertainty for owners and contractors attempting to predict the import of NDFD clauses in private contracts.²⁰⁸

A second limitation of section 7102 is its exclusive applicability to NDFD clauses that are both “unreasonable under the circumstances provided” and “not within the contemplation of the parties,”²⁰⁹ rather than applying to all NDFD clauses in the event of owner-caused delay. As previously discussed, NDFD clauses are inherently unreasonable because they impose upon contractors virtually incalculable liability associated with owner-caused delay.²¹⁰ Furthermore, because contractors are unable to control the performances of owners and their agents, public policy should dictate that owner-caused delays are outside of the contemplation of the parties at the time of contracting.²¹¹ At present, these additional restrictions create an undesirable result: even in

public-works/federal-court-holds-no-damage-for-delay-clauses-are-per-se-enforceable-on-federal-public-works-projects-in-california/.

²⁰⁶ Schneier, 30 NO.1 CONSTRUCTION LITIGATION REPORTER at 15 (stating that “[t]he *Harper* court found that *Hawley*—the only California case setting common law limits on the enforceability of ‘no damages’ clauses—was superseded by the enactment of Public Contract Code § 7102”).

²⁰⁷ *Harper/Nielsen-Dillingham*, 81 Fed. Cl. at 678-79.

²⁰⁸ Robert T. Sturgeon, *Federal Court Holds “No Damage for Delay Clauses” Are Per Se Enforceable on Federal Public Works Projects in California*, CONSTRUCTION & INFRASTRUCTURE LAW BLOG (Mar. 23, 2010), www.constructionandinfrastructurelawblog.com/2010/03/articles/public-works/federal-court-holds-no-damage-for-delay-clauses-are-per-se-enforceable-on-federal-public-works-projects-in-california/ (“It is not clear that the Claims Court correctly interpreted California law, or whether a California court deciding the issue would reach the same conclusion.”).

²⁰⁹ CAL. PUB. CONT. CODE § 7102 (Westlaw 2011).

²¹⁰ See Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1877 (2005).

²¹¹ See *Hawley v. Orange Cnty. Flood Control Dist.*, 27 Cal. Rptr. 478, 483 (Dist. Ct. App. 1963) (citing the prevailing public policy that “[a] contract will not be so construed as to put one party at the mercy of the other”); *Harris v. Klure*, 23 Cal. Rptr. 313, 315 (Dist. Ct. App. 1962) (recognizing that in interpreting a contractual provision, courts as a matter of public policy should “avoid an interpretation which will make the contract unusual, extraordinary, harsh, unjust or inequitable”); see also Grandoff & Davenport, *The “No Damage for Delay” Clause: A Public Policy Issue*, FLA. B. J. 8, 12 (Oct. 2001) (“A no damage for delay clause which on its face imposes a penalty on a contractor by denying a legal remedy, while excusing owner default, is contrary to public policy.”).

public contracts when the owner causes delay, an unfair and inequitable NDFD clause will nevertheless be upheld unless a court exercises its discretion in determining that the disputed delay was both unreasonable and unforeseen by the parties.²¹² This is true even though section 7102 was enacted to bring California statutory law in line with common-law treatment of NDFD clauses,²¹³ and California courts have rarely enforced NDFD clauses to preclude the recovery of costs incurred as a result of owner-caused delays.²¹⁴ The current language of section 7102 allows continued judicial discretion over the determination of whether a particular delay is unreasonable or not within the contemplation of the parties. Such judicial discretion is undesirable because it will inevitably lead to inconsistent results, lingering uncertainty and protracted litigation between the parties.²¹⁵

V. CALL FOR LEGISLATIVE ACTION

The current limitations of California Public Contract Code section 7102 should be resolved by amending the statute to include language similar to that of Ohio Revised Code Annotated section 4113.62(C):

²¹² See *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 83 Cal. Rptr. 2d 590, 596-97 (Ct. App. 1998) (finding delay caused by a prime contractor’s concealment of project conditions to be unreasonable, thus voiding the application of a “no damage for delay” clause under CAL. PUB. CONT. CODE § 7102); see *Hawley*, 27 Cal. Rptr. at 484 (stating that it is a question of fact as to whether parties intend no damage for delay provision to preclude recovery of costs incurred by owner directed changes and owner caused delays); see Douglas S. Oles, “No Damage” Clauses In Construction Contracts: A Critique, 53 WASH. L. REV. 471, 483-84 (1978) (explaining that the determination of whether a particular form of delay was beyond the contemplation of the parties at the time of contracting is a question of foreseeability).

²¹³ Stephen G. Walker, *Statutory Responses to “No Damage for Delay” Clauses*, 6 CONSTRUCTION LAW. 9, 10 (1985-1986); see ROBERT F. CUSHMAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR 477 (3d ed. 2001), available at Westlaw CDRTC s 16.02.

²¹⁴ *Howard Contracting*, 83 Cal. Rptr. 2d at 595-96 (explaining that “California courts generally held that ‘no damage for delay’ clauses in public contracts did not apply to delays arising from a breach of contract caused by the other party to the contract”); see *McGuire & Hester v. City & Cnty. of S.F.*, 247 P.2d 934 (Cal. Dist. Ct. App. 1952) (a no damage for delay clause did not bar contractor’s recovery of delay damages caused by the failure of the city, for whom the work was being done, to perform its agreement to obtain rights of way prior to commencement of work); see *Maurice L. Bein, Inc. v. Hous. Auth. of L.A.*, 321 P.2d 753 (Cal. Dist. Ct. App. 1958) (an owner who concealed conditions it knew would later cause delay was estopped from asserting a no damage for delay clause to avoid liability).

²¹⁵ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. at 1869 (“The question of whether any given no damages for delay clause is judicially enforceable is ultimately a very difficult one.”).

(1) Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, 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, or that waives any other remedy for 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 or other documentation that is made part of a construction subcontract, agreement, or understanding, 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, or that waives any other remedy for 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.²¹⁶

The Ohio statute is broader than California Public Contract Code section 7102, in that it applies to all construction contracts, both public and private.²¹⁷ Additionally, the Ohio statute mirrors legislation in Washington²¹⁸ and North Carolina²¹⁹ by rendering NDFD clauses void under all circumstances when the delay is caused by an owner.²²⁰

By adopting language to this effect, California would render all NDFD clauses void in instances of owner-caused delay. This would eliminate the need for judicial determination of whether owner-caused delays are unreasonable or were within the contemplation of the parties at the time of contracting, thus alleviating some of the uncertainty contractors face in determining whether an NDFD clause will be enforced under section 7102. Furthermore, this language would also address issues of fundamental fairness, by preventing one party to a construction contract from being placed at the mercy of another's negligence,²²¹ and by furnishing all parties with legal remedies for

²¹⁶ OHIO REV. CODE ANN. § 4113.62(C)(1), (2) (Westlaw 2011).

²¹⁷ Susan Sisskind Dunne, "No Damage for Delay" Clauses, 19 CONSTRUCTION LAW. 38, 40 (1998).

²¹⁸ WASH. REV. CODE ANN. § 4.24.360 (Westlaw 2011).

²¹⁹ N.C. GEN. STAT. ANN. § 143-134.3 (Westlaw 2011).

²²⁰ Dunne, "No Damage for Delay" Clauses, 19 CONSTRUCTION LAW. at 40.

²²¹ 17A AM. JUR. 2D Contracts § 284 (2011).

injuries received.²²² Such statutory recognition that owner-caused delays should not preclude a contractor’s ability to recover delay damages would be more consistent with California’s common-law precedent.²²³

Additionally, by revising section 7102 as suggested, California would expand its statutory protections to cover instances of owner-caused delay in all construction contracts, which could prevent contractors in federal works and private contracts from suffering harsh results similar to those in *Harper/Nielsen Dillingham*.

CONCLUSION

The modern construction process is inherently complex, and delays caused by any one party may result in significant financial damages to others.²²⁴ Therefore, it is not surprising that parties seek contractual methods of protecting themselves from liability associated with construction delays.²²⁵ However, the NDFD clause has proven itself to be a draconian instrument²²⁶ that operates in contrast to public policy interests²²⁷ and functions as an ineffective tool for apportioning the risks of construction delays.²²⁸ A range of alternate methods exist through

²²² See J. Bert Grandoff & Patricia E. Davenport, *The “No Damage for Delay” Clause: A Public Policy Issue*, FLA. B. J. 8, 12 (Oct. 2001) (“A no damage for delay clause which on its face imposes a penalty on a contractor by denying a legal remedy, while excusing owner default, is contrary to public policy.”).

²²³ HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE 3D § 27:85 (2010), available at Westlaw MILCALRE § 27:85.

²²⁴ PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., 1 BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 1:2 (2010), available at Westlaw BOCL § 1:2; see John W. Hinchey, *Visions for the Next Millennium*, in 1 CONSTRUCTION LAW HANDBOOK § 2.01[A] (1999) (illustrating that a construction project of average complexity may involve between five and fifteen firms working on the design process, as well as forty to a hundred companies that are engaged in construction and many more companies hired to supply materials and services necessary to complete the project); see S. GREGORY JOY, EUGENE J. HEADY & JAMES E. STEPHENSON, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS 7 (2010), available at Westlaw ACSCC s 1.02 (explaining that ordinary construction projects require the participation and risk the financial resources of a large number of parties). “If one falls down, many others may follow. The chain of risk extends far beyond those who have direct contracts with a failing party.” *Id.*

²²⁵ Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1858 (2005).

²²⁶ See Douglas S. Oles, “No Damage” Clauses in Construction Contracts: A Critique, 53 WASH. L. REV. 471 (1978); see Alain Lecusay, *The Collapsing “No Damages for Delay” Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425 (2002).

²²⁷ See Grandoff & Davenport, *The “No Damage for Delay” Clause: A Public Policy Issue*, FLA. B. J. at 14.

²²⁸ See Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. at 1884.

which parties are able to allocate the risk of loss in a meaningful manner that will not result in total forfeiture.²²⁹ Thus, the absence of NDFD clauses will not burden parties in the construction industry.

Through enacting California Public Contract Code section 7102, California has taken an important step toward protecting contractors from an NDFD clause's harsh effects, but this is not enough. Additional legislative action is necessary to address strong public policy concerns surrounding NDFD clauses, as well as to clarify how NDFD clauses should be treated by California courts. The California legislature should respond to these concerns by revising section 7102 to extend the existing statutory protections to all public and private contracts when the owner causes delay, thereby joining the federal government and the growing number of states and professional associations that have decided not to impose or enforce NDFD clauses under such conditions.

²²⁹ See *id.* at 1879-84; see also Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, 22 CONSTRUCTION LAW. 32 (2002).