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## Client Advisory

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### What's in a Word? New Hope for Avoiding "No Damage for Delay" Clauses

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Despite very real financial implications, courts routinely enforce "no damage for delay" clauses. Under such clauses, an equitable extension of time is the sole remedy in the event of a delay, thereby forcing contractors to absorb all associated costs, i.e. overtime, resequencing, winter conditions, etc. As a result, contractors routinely try to categorize damages incurred as something other than "delay damages," though rarely with any real success. A recent Massachusetts superior court decision, Mecca Construction Corp. v. All Interiors, Inc., highlights an argument which may allow a contractor to avoid some of the adverse effects of a "no damage for delay" clause.

Mecca Construction was a drywall subcontractor to All Interiors. The subcontract had a standard "no damage for delay" clause. Mecca Construction brought suit to recover, among other things, for additional work it had to perform due to lack of coordination between subtrades. Mecca Construction claimed that these "hindrances" caused it to work out of sequence and incur additional costs to complete the job timely. Not surprisingly, All Interiors asserted that "hindrances" were just another way of saying "delays," and therefore the "no damage for delay" clause barred this claim. Not a bad argument!

Mecca Construction argued that there is a distinction between a "delay" and a "hindrance." It pointed out that it was not seeking to recover costs for a delay – the job was completed timely. However, to do so, it incurred increased labor costs by having to conduct the work piecemeal, out of sequence, and in winter weather. Thus, rather than delay costs, it was only seeking to recover the increased costs required to meet the schedule due to project mismanagement, i.e. costs incurred in successfully avoiding a delay. While All Interiors argued that this was a distinction without a difference, the Court noted that due to the harshness of "no damage for delay" clauses, courts routinely construe such clauses strictly. Thus, because this "no damage for delay" clause did not expressly preclude damages caused by "hindrances," Mecca Construction would have its day in court to prove its loss.



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This decision clearly demonstrates that courts understand the inherent inequity of a “no damage for delay” clause. By recasting damages as the result of a “hindrance,” damages incurred to prevent a “delay” might be recoverable notwithstanding a “no damage for delay” clause. By separately tracking these costs as distinct from those incurred to complete a job after the contractual completion date, there may be an opportunity for some recovery. Costs incurred for having to work beyond the contractual completion date, however, will likely still be barred by a “no damage for delay” clause. That notwithstanding, the previously empty glass may now be half full.

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