

**Legal Update for 12/12/2018 Advisory Board Meeting
Eric Hawkins, Durazzo, Eckel & Hawkins, PLLC**

No Damages for Delay Clauses

'No Damages for Delay' clauses are common in construction contracts and typically they are enforceable. These clauses can prevent a Contractor or Subcontractor from recovering monetary damages where there has been a delay during construction. However, in a recent Appeals Court case the Court discussed possible exceptions to enforceability.

In *Sw. Concrete Paving Co. v. SBBI, Inc.*, No. 1 CA-CV 17-0294, 2018 Ariz. App. Unpub. LEXIS 761 (Ct. App. May 22, 2018), the General Contractor contended that the 'no damages for delay' clause limited Subcontractor's remedy for delays to "a reasonable extension of time only." The Subcontractor argued that Arizona should adopt an "active interference" exception to enforcement that has been recognized by other courts, in other states.

As an example Connecticut courts have held that: "Many, if not most, other states recognize a separate, judicially created active interference exception to 'no damages for delay' clauses."

In Florida, clauses providing for 'no damages for delay' are enforceable except in the case of fraud, bad faith, or active interference.

Several states require that to defeat a 'no damages for delay' clause a party must show "an affirmative, willful act."

The Arizona Court of Appeals decided the SBBI case based on other factors. However, the discussion is instructive that the Court might consider an "active interference" exception in the future. This would mean that a party could overcome a 'no damages for delay' clause if it could show that it was delayed because of active interference or willful acts of another party.