

# Design Professional Newsletter

## *Delay Claims: Introduction*

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The timely delivery of professional services is crucial for all clients on all projects. When a project's timeline is extended, a specific category of damages comes into play, delay damages. Delay damages are a category of damages that are often claimed against design entities when construction delays cause key deadlines to be missed, impacting subsequent milestones and/or the project's complete date. Understanding these damages can be key to protecting yourself against the claims. Let's start by defining delay damages and their source.

### **What are Delay Damages?**

Generally speaking, delay damages are those financial losses incurred due to a delay in the completion of work on a project which are not excusable or non-consequential. This is because not every delay gives rise to delay damages. There may be a reasonable basis/excuse for the delay, or the impact of the delay does not change critical benchmark dates and/or the date of completion. However, when a delay impacts the timely completion of tasks which cannot be cured without affecting the master schedule, these delays impact what is referred to as the critical path of the project. The critical path is an apt self-description of those combined events which are critical to meeting the completion date of the work, and where the only remedy for failure is adding more time to extend the completion date.

### **What Can Be Included in Delay Damages?**

The below categories of damages can be incorporated into a Delay Damages claim, but each is derived from a different type and cause of damages:

#### Actual Damages:

The actual cost of performing the additional work required under the subject contract. Generally, actual damages constitute additional labor, materials and associated costs with the change order entered for the extended time.

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Liquidated Damages:

Liquidated damages are a fixed sum of damages per day of delay which is agreed to by the owner and contractor in lieu of actual damages.

Consequential Damages:

Consequential Damages are damages that do not flow from the breach of contract, as actual damages do, but from those indirect damages that are foreseeable at the time of contracting. Consequential damages frequently exceed actual damages, or the cost of the entire construction contract, as these damages include loss of use, profits, rent, business opportunity, reputation and a host of other arguably foreseeable damages.

## Where do Delay Damages Originate?

The Contractor: Delay damages can be derived from those costs incurred by the contractor due to a delay, including:

- Lost profit
- Additional general conditions
- Additional field overhead expenses
- Additional home office overhead expenses
- Project superintendent/management expenses
- Loss of use of work crews and owned equipment
- Rental costs of leased equipment
- Cost of insurance
- De-mobilization/re-mobilization costs

The Owner: Delay damages can be also derived from those costs incurred by the owner/developer due to a delay, including:

- Supervision/owner's representative costs
- Additional general conditions

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- Additional construction loan costs
- Additional insurance costs
- Increase cost of labor and materials
- Miscellaneous costs associated with the extension of completion

## **How are Delay Damages Proven?**

Delay damages are proven at trial through the use of expert testimony where the party alleging the delays has the burden of proof to establish 1) that the insured/designer is responsible for the delay, 2) that the insured/designer was either the sole or contributing source of the delay, 3) that the delay diverted the project from its critical path/completion date, and 4) the claimant suffered damages that are alleged. It's important to note a standard of care expert is not usually qualified as a delay damages expert. In fact, it's common for dedicated delay damage experts to be retained as they are experts in the construction process and determining the critical path as compared to standard of care experts opining on what should reasonably be expected of other professionals practicing under substantially similar circumstances.

## **How to Protect Yourself**

Proper contractual protections are a key part of risk mitigation, in particular the removal of "time is of the essence" clauses. A "time is of the essence" provision exposes an insured to significant risk as such provisions provide that any delay will significantly impact the schedule and exposes the insured to a claim for delay damages. A "time is of the essence" clause could also provide a basis for a client to pass on other categories of damages, such as liquidated damages or consequential damages to an insured, in addition to delay damages. We also recommend adding beneficial provisions to your contract such as force majeure or limitation of liability clauses releasing the insured of liability for any delay not directly caused by its professional services.

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## Conclusion

Understanding delay damages, and how they differ from other types of damages, is critical to mitigating your risk of a claim. The foundation of key risk management practices begins with a well-drafted, fair and equitable contract. As a Great American policyholder, you have access to our contract review resources to help negotiate or address onerous contractual provisions. Once the project commences, proper documentation and problem solving during the life of a project can be key. Our Design Professionals program includes pre-claim assistance designed to endeavor to reduce the exposure of delay damages in a delay claim.

**About the Author:** Mark Bonavitacola is a Financial Products Claim Specialist in the Professional Liability Division at Great American Insurance Group. As a claims adjuster, Mark reports to the Divisional AVP and manages professional liability claims against architects, engineers, design firms, realtors, escrow agents, attorneys and other professionals and corporate entities insured by Great American. Mark also provides risk management services to agents and insureds. Prior to joining Great American, Mark spent over 10 years as a commercial litigator in the state and federal courts in Pennsylvania and New Jersey representing architects and engineers in professional liability suits, as well as representing owners, contractors, project managers and designers in complex commercial construction cases.

Mark received his J.D. from Syracuse University College of Law and graduated with a B.A. in history from Lafayette College. He is a licensed attorney admitted to practice law in Pennsylvania and New Jersey. Mark lives in Conshohocken, PA, and enjoys spending the weekends with his daughters, gardening, reading and painting landscapes