

# CLAIMS AND DEFENSES TO THE OWNER'S ACTIONS

The implied duty not to hinder performance and the Prevention Doctrine

By Christopher S. Drewry

With many construction projects, it is an all too familiar scenario where the project is being delayed or impacted through the actions of the owner. However, one of the problems for contractors in these instances is that there is rarely a ready equivalent for the owner of the type of contractual provisions that hold a contractor liable or in default for its failure to perform adequately or timely. Also, contractors are often left fighting with an owner over delays to its work in relation to schedule relief or threatened default. What claims or defenses do contractors have available against owners?

## NOT TO HINDER PERFORMANCE

Very few express performance obligations are set out relating to what the owner must do or not do. So, how does a contractor find a viable basis of liability for the owner in these circumstances? One overarching answer to the question is the owner's implied duty not to hinder the performance of the contractor.

This implied duty is grounded in contract principles. In order for two parties to a contract to perform their individual duties and obligations, they must be free to act in the manner and time as envisioned and bargained for in the deal. Apart from the express terms and conditions that constitute the contract, there are duties and obligations that the law will read into or imply into the agreement. One of these is the general rule of contract law that neither party may hinder the other party's attempts to perform that contract.



Therefore, contractors can recover delay or impact damages against owners whose actions or inactions obstruct the progress of the project based on this general rule of law.

What does this mean in real terms on a project where the owner is driving up costs, delaying the work, hindering performance or otherwise adversely impacting the contractor? This implied duty not to hinder performance can serve as the linchpin of a contractor's entitlement to monetary and schedule relief. There are a number of different ways during the course of a job in which an owner has been held to be in breach of this general duty not to

hinder or interfere with the contractor's progress, including some that sound very familiar, such as when an owner:

- Failed to prepare the construction site in time for the contractor to perform
- Did not provide adequate access to the construction area
- Provided defective plans which resulted in delays
- Failed to coordinate or correct the work of parallel prime contractors properly and this resulted in delays to the contractor
- Failed to give written orders for directed additional work

## ABOUT THE AUTHOR

Christopher S. Drewry is a partner with the law firm of Drewry Simmons Vornehm, LLP, in Indiana ([www.dsvlaw.com](http://www.dsvlaw.com)). He focuses his practice on construction law and litigation, as well as labor and employment law and litigation. He is also a member of the Construction Law and Litigation Committee of the International Association of Defense Counsel. He can be reached at [cdrewry@dsvlaw.com](mailto:cdrewry@dsvlaw.com).

- Failed to approve drawings necessary for the job within a reasonable time
- Ordered a hold or suspension of the work
- Changed the plans and specifications and ordered substituted performance

Ultimately, delay and impact damages may be awarded for breach of an implied or an express contractual promise, including the owner's implied duty not to hinder performance.

### THE PREVENTION DOCTRINE

A related concept to that of the owner's implied duty not to hinder performance of the contract is the prevention doctrine. At its core, this means that a party cannot prevent a contractual precondition or event from occurring (i.e., hinder or preclude it outright) and then hide behind the contract term that makes the occurrence of this very condition the triggering event to its own contract performance.

Continuing the theme of the owner's duty not to hinder performance, the prevention doctrine also applies in similar performance scenarios. For example, if the contractor has been delayed in its work due to the actions of the owner but the owner refuses schedule relief and then threatens a default for delays and/or demands acceleration or recovery of the schedule, the prevention doctrine may come into play. In this particular instance, the doctrine may excuse the contractor's late performance as well as its duty to accelerate. Likewise, in the default and termination setting, the party attempting to exercise the default and termination remedy needs to make sure that it has not caused the very failure of performance for which it wants to declare a breach and termination.

### DOWNSTREAM APPLICATION

Contractors should also take heed of these principles because a subcontractor has the same claims and defenses available to it as the contractor has against the owner. With respect to the implied duty not to hinder performance, the contractor cannot hinder the subcontractor's ability and attempts to perform the work under the subcontract. Thus, subcontractors can also recover delay or impact damages against contractors

whose actions or inactions obstruct the progress of the project based on the same general rule of law.

The prevention doctrine also works downstream. Think of it in the context of a contingent payment clause, for example. If the reason that I have not paid you is because I have failed to perform my obligations upstream, which has led to my money being withheld, I cannot hide behind the lack of payment to me to excuse my payment obligation to you, arguing the contingent payment clause as a payment bar. This is the prevention doctrine in action.

Under the prevention doctrine, a contractor may not avoid its payment obligations to a subcontractor by relying upon a contingent payment clause when the very reasons for that nonpayment by the owner were due to the actions or fault of the contractor. When the contractor contributes or prevents the non-occurrence of the condition precedent (in this case payment by the owner), then the contractor cannot subsequently rely upon that contingency not occurring as a defense to its failure to pay. For example, in one appellate decision, the court found that the contractor's conduct hindered fulfillment of the contingent payment clause in the subcontract, and therefore, while finding that the clause initially was valid, its enforcement was waived.

### CONCLUSION

While there seemingly may be limited express performance obligations on the part of the owner during the construction phase of a job (other than to pay for the work done), when an owner delays, impacts or hinders the work, a contractor can fall back on the very important legal principle of the owner's implied duty not to hinder performance of the contract. Remember it well because the same principle will apply to a contractor's downstream contractual obligations with its subcontractors.

The prevention doctrine is an important defense to a claim of nonperformance or to a claim that further performance such as payment is due notwithstanding the existence of a contingent payment clause. This doctrine is important to remember as well, because it may determine the outcome of a contract dispute in your favor. ■

**Xo 55 duo**  
**That's the Power Mixer!**



Works the material,  
not your body!  
Powerful, long-lasting motor  
with counter-rotating blades for  
fast and perfect mixtures.  
Optimized ergonomics.

**Collomix®**  
[www.collomix.us](http://www.collomix.us)