Proof of Delay and Disruption Damages in Court

Charles B. Long

Krebs, Farley & Pelleteri

Delay defined

- Delay relates to period of time a contract has been extended due to circumstances not anticipated when parties entered into contract.
- Delay claims are damages over and above costs expended to remedy cause of delay.

Different classifications of delay

- Excusable or non-excusable
- Concurrent or non-concurrent
- Compensable or non-compensable

Excusable or non-excusable delays

- Excusable delays often defined by contract
- AIA Doc. A201-2007, examples include "labor disputes, fire, unusual delay in deliveries, unavoidable casualties *or other causes beyond the Contractor's control*."
- Differing site conditions, designer errors, changes in scope, weather and Acts of God.

Non-excusable delays

- Those for which contractor has assumed the risk under the contract.
- Delays caused by contractor, subcontractors, suppliers or employees

Concurrent or non-concurrent delay

- Concurrent delay defined
- Concurrent delay often sited by owner as defense to delay claim
- Apportionment of damages complex

Compensable or non-compensable

- Compensable delays defined
- Non-compensable delays caused by Acts of God, are excusable but not compensable.

Disruption

- Disruption defined
- Disruption distinguished from delay
  - Micro v. macro analysis
  - *US Industries v. Blake Construction,* 671 F. 2d 539 (D.C. Cir. 1982)
- Disruption damages are lost labor productivity and labor cost overruns
- Disruption often cause of project delay

Acceleration

- Acceleration defined
- 3 types of acceleration
  - Directed
  - Constructive
  - Voluntary
- *See Dep't. of Transp. v. Anjo Constr. Co.*, 666 A.2d 753,757 (Pa. Commw. Ct. 1995).

5 elements of acceleration claim

1. Contractor experienced excusable delay entitling it to time extension;
2. Contractor properly requested extension;
3. Owner failed or refused to grant extension;
4. Owner demanded project be completed by contract date despite excusable delay; and
5. Contractor accelerated work to complete project and incurred costs as result.

Acceleration (continued)

- Acceleration is disruptive
- Contractor required to increase labor/equipment costs, bring in additional crews, overtime
- Damages can be awarded for directed and constructive acceleration
- Damages not available for voluntary acceleration

Proving delay damages

- Difficult task
- Contractor should document all activities that may be affected
- Updating schedule is key
- Establish ripple effects through project

Documentation

- All correspondence/emails
- Daily job reports
- Progress reports
- Time cards
- Photographs
- Invoices, purchase orders, pay apps
- Accounting records
- Dairies/notes of project manager

Documentation (continued)

- Job meeting minutes
- CPM updates
- Weather records
- Test and inspection reports
- Shop drawings and RFI logs
- Change orders

Notice requirements

- Defined by contract
- AIA Doc A201-1997, must be in writing within 21 days of event or within 21 days after claimant recognizes condition giving rise to claim.
- Untimely notice will defeat a claim. *See Envirotech Corp. v. Tennessee Valley Auth.*, 715 F.Supp. 190, 192 (W.D. Ky. 1988)
- Notify the appropriate parties and supply supporting documentation

Owner delay damages

- Liquidated damages defined
- La. Civil Code art. 2009
- May be attacked as disguised penalty provision, *Serv. Investors Ltd. v. Scully,* 2008-1062 (La. App. 3 Cir. 03/04/09); 9 So. 3d 910
- La. Civil Code art. 2769
- Actual damages include: loss of use, loss of rentals, lost profits, insurance and loan expenses

Contractor delay damages

- Project supervision costs
- Extended general conditions
- Jobsite rentals
- Equipment rentals
- Increased material costs
- Lost productivity
- Hourly labor rate increases
- Demobilization and remobilization expenses

Use of Schedules

- Bar charts
- Network Diagrams

Bar charts

- Frequently used construction schedule
- Contains collection of activities with bars showing length of time to complete each
- Less effective than network diagrams
- Cannot show relationship between activities

Network Diagrams

- Most common is Critical Path method
- More effective because can show interrelationships between multiple causes of delay

Ways to quantify delay damages

- Detailed damage calculation based on actual costs
- Jury verdict approach
- Total cost method
- Quantum meruit
- Recovery of home office overhead
- “Measured mile” analysis

Detailed damage calculation

- Best proof of a delay claim
- Actual cost information taken from contractor's accounting books, damage calculation presents direct cost for each item of delay

Jury verdict approach

- Used when damages cannot be calculated with certainty
- Use often results in final damage award being on low side

Total cost method

- Disfavored
- Contractor doesn't tie costs to events
- Rather contractor seeks difference between actual cost of performance and anticipated costs
- Flaw in assumption that original contract price was proper and all additions due to delay.
- Baldi Bros. case

Quantum meruit

- Contractor may recover in quasi-contract
- Contractor compensated for reasonable value of labor/materials provided to avoid unjust enrichment of owner

Recovery of home office overhead

- "Eichleay formula"
- Four step process explained

- Issues with Eichleay formula
  - Considered an estimate
  - Must prove actual overhead costs real
  - Some overhead may be questioned
  - May be considered speculative

"Measured mile" analysis

- Way of demonstrating lost productivity
- Compare cost of impacted work with cost of similar unimpacted work
- Shows what work could be performed absent delaying factors
- Determine whether analysis should be based on hours and/or dollars

Forums for dispute resolution

- Negotiation
- Mediation
- Arbitration
- Litigation

Contract clauses may impact claims

- "No damages for delay" clauses
- Prohibited under the Louisiana Public Works Act, See La. R.S. 38:2216(H)

Questions or comments?

- Charles B. Long

  Krebs, Farley & Pelleteri

  400 Poydras Street

  Suite 400

  New Orleans, LA 70122

  Phone: (504)299-3570

  Email: clong@kfplaw.com