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# Construction Delay Claims: Litigating Disputes Over Design Changes, Differing Site Conditions, and Sources of Delay

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Today's faculty features:

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## Construction Delay Claims: Litigating Disputes Over Design Changes, Differing Site Conditions, and Sources of Delay.

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# Construction Delay Claims: Litigating Disputes Over Design Changes, Differing Site Conditions, and Sources of Delay.

## I. Types of Construction Delays

# TYPES OF CONSTRUCTION DELAYS

- Causes of Delays on Construction Projects
  - Contractor Caused
    - Slow performance
    - Subcontractor defaults
    - Poor planning
    - Material acquisition delays
    - Overly optimistic baseline schedule
    - Errors in the Work
    - Inadequate staffing
    - Untimely submittals

# TYPES OF CONSTRUCTION DELAYS

- Causes of Delays on Construction Projects
  - Owner Caused
    - Failure to commence on time
    - Incomplete design/design errors
    - Changes
    - Differing site conditions
    - Delay in resolving issues
    - Untimely permits
    - Untimely performance of owner work
    - Untimely inspections

# TYPES OF CONSTRUCTION DELAYS

- Causes of Delays on Construction Projects
  - Force Majeure Caused
    - Weather/unusual weather
    - Pandemic/disease
    - Other natural events
    - Labor disputes
    - National emergency
    - Government intervention

# TYPES OF CONSTRUCTION DELAYS

- Claims Arising From Delays
  - Time Related Costs
    - Extended site overhead
    - Extended home office overhead
    - Labor escalation
    - Material/equipment price escalation

# TYPES OF CONSTRUCTION DELAYS

- Claims Arising From Delays
  - Loss of Efficiency Costs
    - Acceleration costs (OT)
    - Labor inefficiencies
    - Out of sequence work
    - Losing subcontractor work windows
    - Decreased quality due to extended period of acceleration
    - Work pushed into winter weather

# TYPES OF CONSTRUCTION DELAYS

- Types of Construction Delays
  - Critical Path Delays
    - Longest path in CPM schedule
    - Activity is on the critical path if a delay to the activity will cause delay to finish date
    - Delays to critical path activities drives the schedule
    - Near critical path activities can become critical
    - Non-critical items have float, which is amount of delay before activity becomes critical

# TYPES OF CONSTRUCTION DELAYS

- Types of Construction Delays
  - Excusable/Non-Excusable
    - Excusable delays allow for time extension
    - Force majeure delays
    - Owner delays
    - Any delay for which risk is not on contractor
    - Non-critical items have float, which is amount of delay before activity becomes critical
    - Concurrent delays

# TYPES OF CONSTRUCTION DELAYS

- Types of Construction Delays
  - Compensable Delays
    - Delays defined in contract that provide for compensation to contractor (and time extension)
    - Owner delays
    - Sometimes force majeure delays
    - Delays to which contractor is not entitled to a time extension are compensable to owner

# TYPES OF CONSTRUCTION DELAYS

- Types of Construction Delays
  - Concurrent Delays
    - Two concurrent events impacting the critical path
    - Both must delay a critical path activity
    - Usually one cause is contractor's responsibility and other is owner's responsibility
    - Net of a true concurrent delay is an excusable delay (non-compensable time extension)
    - Must the two events start on the same date?

# TYPES OF CONSTRUCTION DELAYS

- Types of Construction Delays
  - Concept of Pacing
    - Each day the critical path is delayed, activities with float gain a day of float
    - If critical path delay extends too long, contractor may delay non-critical path work
    - Maybe for efficiency, coordination of planning purposes
    - Does pacing excuse what would otherwise be a concurrent delay?
    - Yes, if events must start on the same day

# Construction Delay Claims – Proving and Defending Damages

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# II. Proving or Defending Delay Claims

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# Critical Elements

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- Contract terms
- Contemporaneous project records
- Accurate accounting records
- Schedule expert
- Who is the decision-maker?

# Contract Terms

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- Schedule relief terms, e.g., *force majeure*
- Allocation of risk terms
- Changes clause
- Design risk
- Owner decision, interaction, interference

# Contemporaneous Project Records

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- Credibility arises out of the detail
  - Worker tally, work areas, activities, obstructions, material shipments, preparedness, sequence and sequence changes
- The detail needs to be a regular part of the project
- Facts can't be rearranged afterwards to suit the analytical approach
- Reality checks are required

# Accurate Accounting Records

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- Establish cost code(s)
- Project management must allocate costs at the time cost is incurred
- Process must start as soon as delay is recognized
- Costs should be maintained in regular course
- After-the-fact allocations are not as credible

# Schedule Expert

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- Considerations:
  - In-house versus independent
  - Approach to schedule analysis
    - What schedule delay technique will the expert employ?
    - Is this technique consistent with administration of the schedule during the project?
  - Testifying experience required or not
    - What is the overall strategy for resolution?

# Methodology

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- **As-planned versus as-built**
  - Simple, but fails to include causative factors.
- **Impacted as-planned**
  - Assumes original logic was fine; fails to incorporate actual events.
- **Collapsed as-built**
  - Removes excusable delays in order to gauge actual completion in absence of such delays; may fail to account for logic or other changes.

# Methodology (cont'd)

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- Phase analysis (“windows” or “time slice”)
  - Breaks project down into phases or “windows” and looks at the impact of each portion. Requires accurate info.
- As-built
  - Often the only option if the original schedule was lacking in substance or detail.
- Contemporaneous
  - Considered to be most accurate, since logic changes and other current factors are treated appropriately.

# Proof to Jury or Arbitrator

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- Huge difference . . .
- For jury –
  - No assumptions about underlying facts; all terms explained
  - Discussion of methodology must balance between providing detail and avoiding tedium.
- For arbitrator –
  - Tailor presentation to arbitrator's requests or suggestions, as to level of detail.

# Construction Delay Claims: Litigating Disputes Over Design Changes, Differing Site Conditions, and Sources of Delay.

## III. Proving or Defending Delay Damage Claims

# PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Extended Site Overhead
  - State Claims
    - Requires some form of schedule analysis
    - Accounting for overhead costs
    - Can only recover costs that are time related
    - Rent, utilities, personnel typically are time related
    - Is equipment on the job time related or task specific?
    - Insurance is typically not time related

## PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Extended Site Overhead
  - Specific Issues on Federal Projects
    - DCAA or OIG Audit generally required
    - If over \$100k, must be certified under Contract Disputes Act and subject to False Claims Act
    - Must be approved at a settlement level
    - Must exhaust administrative remedies prior to appeal
      - CO Final Decision or Deemed Denial
      - Full schedule and cost analysis

## PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Extended Site Overhead
  - Impact of No Damage for Delay Clauses
    - Still viable in many jurisdictions
    - Some states place limits on such clauses
    - For example – Cal. Pub. Con. Code 7102
    - Does No Damage For Delay Cause preclude limited damages for Delay Clause?
- Such clauses are generally strictly construed
- Typical exceptions courts apply:
  - Delay not reasonably contemplated
  - Bad faith, fraud, active interference, or gross negligence by the owner or its representatives
  - Unreasonable delay amounting to an abandonment of the contract
- Labor inefficiency excluded by such clauses?

# PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Labor Inefficiency
  - General
    - **Proof Can Be Challenging**
      - Proof is the challenge; contemporaneous record-keeping is key
      - Measured Mile is the best, if not only, approach that will succeed; comparing efficiency to the isometric may be required
      - MCAA Factors, USACE, CII Studies are less desirable, but may be useful as a cross reference
      - “Sanity checking” results against cost report a must
  - Total cost approach nearly impossible

# PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Labor Inefficiency
  - General
    - **Total Cost Claims**
      - Only works in limited cases where parties “abandon” the contract claims procedure
        - Submission of change orders does not support abandonment theory
        - California – cannot undo a public contract, but total costs okay as measure of damages
        - Have to follow the four elements of total costs claim
      - Cardinal change not recognized in all states

## PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Home Office Overhead
  - Home Office Overhead – *Eichleay*
    - Theory is “unabsorbed home office overhead”
      - Unearned profits on idle forces?
      - *Eichleay Corporation*, ASBCA No. 5183, 60-2 BCA ¶2688 (1960), *aff'd on recon.*, 61-1 BCA ¶2894
      - Recent case law restricting use of *Eichleay*
      - *Eichleay* looks at the amount of overhead covered by specific project and amount that is not covered due to delays

## PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Contractor Home Office Overhead
  - Home Office Overhead – *Eichleay*
    - **Federal**
      - Federal law is clear
      - *Eichleay Corporation*, ASBCA No. 5183, 60-2 BCA ¶2688 (1960), *aff'd on recon.*, 61-1 BCA ¶2894
      - Recent case law restricting use of *Eichleay*
    - **State**
      - Not much different – Maryland, Virginia, Ohio, Texas, others follow *Eichleay*

# PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Owner Damages
  - Scope of Recoverable Damages
    - **Direct Damages**
      - Site costs
      - CM and A/E costs
    - **Home Office Costs**
      - Recoverable if not direct?
      - No equivalent Eichleay theory.
    - **Liquidated Damages**
      - Rather than actual damages?
    - **Consequential Damages**
      - The big unknown

# PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Owner Liquidated Damages
  - General
    - **State and Federal**
      - Now in virtually all contracts
      - Unenforceable if considered a penalty
      - Only assessable on inexcusable, contractor-caused delay
        - Will “no harm no foul” apply?
    - **Are liquidated damages good for the owner and/or contractor?**

# PROVING/DEFENDING DELAY DAMAGE CLAIMS

- Consequential Damages
  - Basic Principles
    - **State**
      - Are limitations in contracts enforceable?
      - Are consequential damages defined?
    - **Federal**
      - No consequential damages
      - Argue over what constitutes consequential damages
    - **Practical Solutions to Consequential Damage Exposure**
      - Complete waiver
      - Reasonable limitations

# IV. Best Practices to Minimize Construction Delay Claim Litigation

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# Best Practices – Contract Terms

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- Notice
  - Be fair
  - Avoid “forfeiture” clauses
- Liquidating delay costs
  - Consider specifying per diem amount
- No damages for delay clause
  - Polarizing clause
  - Per diem on general conditions is often acceptable
  - Or carve out owner- or designer-caused delay

# Look for Common Ground

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- Define nature of schedule info and data required
  - Include periodic updates, plus updates in the event of a major event or change
  - Schedule obligations should match the project size, scope and complexity
- Define rights of the parties on schedule issues
  - Identify allocation or use of float
  - Identify whether owner can insist on acceleration in the event of an otherwise excusable delay
  - Specify contractor's obligations for work-around if there is contractor-caused delay

# Communicate, communicate, . . .

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- Communication is key
- Team spirit really works
- Culture of problem-solving works
- If you can't avoid the claim:
  - Be factual
  - Support position with facts, including schedule updates
  - Mitigate delays
  - Keep an open mind

# Real-Time Claim Resolution

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- Multi-step dispute resolution process
  - Project-level personnel given 48 hours
  - Escalate to project-management level, for 48 hours
  - Then escalate to upper management
  - Include next step if still no resolution (e.g., mediation)
- Claims don't go away on their own
  - Usually become more protracted
  - Project personnel become wedded to positions
  - Upper management sometimes does not hear the truth

# Real-Time Claim Resolution (cont'd)

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- Consider use of schedule expert/consultant for interim assessment
  - Shared by the parties?
- Bring all involved parties to the table
  - e.g., subs, vendors, designers who played a role in the delay events
- Make sure all associated aspects of the schedule claim are resolved, with no loose ends

# Post-Project Dispute Resolution

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- Direct negotiation
- Facilitated negotiation (mediation)
- Joint expert
- Arbitration
- Litigation

# Questions?

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