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Cutting the Knot on Concurrent Delay

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I. Introduction

Complex private construction projects of today involve more participants, activities, and risks than ever before. Of course, when such construction projects suffer delays, this increased complexity leads to myriad possibilities in fairly calculating and apportioning damages. Generally, the hope is that courts and decision makers will apply legal reasoning and analyses to disputes that reflect and appreciate this complexity. Unfortunately, the legal and industry understanding of these complex delay scenarios is often mired in the easily-applied "dogma" of buzzwords like "concurrent delay" and other similar concepts. The result of the routine application of this dogma, without consideration of its roots, often leads to results different to the reasonable commercial expectations of the parties and results that are often incomplete or simply inequitable.

This article seeks to examine the underpinnings of the "easy" approach to resolving concurrent delays, which is typically the doctrine of "time but no money." In taking the progression of this rule back to its roots, it is evident that the modern doctrine of concurrent delay is premised not on the equitable resolution of construction delays, but is instead based on past litigants' failure or inability to effectively prove their cases and the older courts' hostility toward liquidated damages, among other bases. Over time, these factors merged and evolved into the legal doctrine of "concurrent delay." After several years, the later courts stopped delving into the "real" analyses of these early courts, and instead rotely applied these early courts' resolutions of concurrent delay as a "rule" for resolving all overlapping construction delays. As this article highlights, modern courts should move away from this line of precedent as it is not based on any clear legal analysis and does not provide an accurate or equitable mechanism for resolving construction delay claims.

II. What is the Doctrine of Concurrent Delay?

Prior to reviewing the legal foundations of the doctrine of concurrent delay, it is helpful to establish a definition, or explanation of the term "concurrent" as used in this context. While the term "concurrent" has various connotations, it is generally understood to mean

1. acting in conjunction; co-operating
2. occurring at the same time; existing together.¹

Similarly, BLACK'S LAW DICTIONARY defines "concurrent" as

1. Operating at the same time; covering the same matters <concurrent interests>.
2. Having authority on the same matters <concurrent jurisdiction>.²

As such, the term "concurrent" appears to have a consistently understood meaning relating to the simultaneous impact or happening of disparate actions or actors. Notably, the

dictionary definition of this term relates more to causative factors, rather than to effects or outcomes.³

Applied to construction delays, the concept of concurrency has generally been understood as follows: "[e]ffects are 'concurrent' when their respective causes (whether simultaneous or sequential) operate or have their effects simultaneously upon a single work element or phase of contract performance." ⁴In contrast, "[e]ffects are 'segregable' when they are non-concurrent or can be quantified discretely by probative evidence, but are 'nonsegregable' or 'inextricably intertwined' when they cannot be quantified discretely by probative evidence."⁵ Simply put, two causes of delay are generally considered concurrent when they both independently cause delay to the same schedule period at the same time.

In light of this understanding of the meaning of "concurrent," courts, scholars, and attorneys have attempted to fashion a unified doctrine to address concurrent delays affecting the progress of a construction project. As discussed below, this doctrine, in its various iterations, has become known as the doctrine of concurrent delay. This doctrine was developed in the public contracting arena; however, the doctrine originates from private construction cases. As related to construction delay, the concept of concurrent delay has been obliquely described as "a risk allocation principle that operates to distribute the costs associated with contemporaneous delays on a status quo basis; i.e., each responsible party bears its own costs."⁶ Specifically, "concurrent delay" refers to the "delay to the project's critical path caused concurrently by multiple events not exclusively within the 'control' of one party."⁷

However, the courts have not simply endeavored to define "concurrent delay;" the decisions involving this concept have led to a rich tradition of case law that seeks to resolve the rights and liabilities of the parties where concurrent delay has impacted a project. Generally speak-

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ing, modern courts reviewing situations falling under the rubric of concurrent delay have fashioned three primary rules to be applied to the competing claims:

Where each party is responsible for a concurrent cause of delay, neither party can recover damages from the other party for that period of delay.⁸ The only contract remedy for the delaying parties is an extension of the contract time.⁹

If there are competing delay claims as between the parties causing the concurrent delay, such claims should be “offset” from each other using the “day” of delay as a unit by which the claims are offset.¹⁰

The foregoing principles have now been established as bedrock doctrines for resolving delay claims in public contracting as well as private.

As applied to cases where there is a contractor claim for delay against the government, and a corresponding government claim for liquidated damages, the use of the concurrent delay doctrine has some appeal. In this scenario, if the delays are deemed “concurrent,” the contractor avoids liquidated damages for the concurrent delay period by virtue of a schedule extension but it loses its claim for money damages against the government for that delay. In a sense, the application of the concurrent delay doctrine waives recovery for each side for the period in question.

However, when applied to a more complex, private project, the results can become problematic. For example, in the traditional design-bid-build project delivery system, there are typically three parties at issue (designer, contractor, and owner) in any delay scenario. Where the owner suffers delay based on a concurrent contractor/designer delay, the doctrine of concurrent delay will give the contractor “time but no money.” Further, as applied to the architect, concurrent delay principles would arguably provide the same defense. As such, in this scenario, the owner suffers a breach and a resulting delay of its project and is left without a cognizable remedy for its damages, even though it is innocent in

this scenario. Given this seemingly inequitable result, a review of the underpinnings and validity of the doctrine of concurrent delay is necessary.

III. Legal Foundations of Concurrent Delay Doctrine

From a historical perspective, the formulation of concurrent delay as a tool to resolve competing construction delay claims was not isolated from the broader trends of more detailed apportionment and “results oriented” decision-making of the early 20th century. During this time and throughout the latter part of the century, the law of torts, for example, underwent a radical shift toward more complicated apportionment theories in opposition to strict “all or nothing” rules that disfavored claimants.¹¹

Of course, unlike tort law, which, under these modern trends will often permit recovery even where the plaintiff bears some fault, the development of concurrent delay has reached an opposite outcome, while being based on the same legal foundations. That is, instead of parsing through the fault of competing parties in order to isolate the respective fault of each party, as modern tort law typically requires, concurrent delay looks to whether two or more parties were complicit in the same fault, and then essentially disregards the resulting damages.

As will be discussed below, the concurrent delay doctrine was developed, in part, as a tool to relieve a contractor from harsh liquidated damages where the owner had also contributed to the delay. While this tool may have been effective in light of unforgiving common law rules which would tax the contractor for delays, even if the owner had delayed the project, the modern application of the concurrent delay doctrine is often confused, and leads to results inapposite to those urged by the trend toward comparative fault, of which concurrent delay was born.¹²

Turning to specific milestones in the development of concurrent delay, one decision which highlights a one of the earliest recorded applications of concurrent delay is the case of *Stewart v. Keteltas*.¹³ This case involved construction of a building at 88 Leonard Street in Manhattan. The specific details of the delays involving the building are vague, but it appears that at least some of the contractor's delays occurred during times in which certain trades separately hired by the owner were delaying the project. When faced with the owner's allegations of contractor delay, the contractor urged that its work was "so connected with that of others employed by the [owner] upon the building, that at times its progress necessarily depended upon that of the other work, and that in consequence of delays in that, they were prevented from completing their work within the time limited in the contract."¹⁴ Essentially the contractor argued the doctrine of concurrent delay.

The *Stewart* court found that "there can be no question but that hindrances by the [owner], rendering it impossible for the [contractor] to fulfill [its] contract, would afford a legal excuse for their non-performance."¹⁵ In considering the owner's argument, the *Stewart* court held "that a contractor is not to be excused for delays caused by [the owner] unless they rendered it impossible to complete the contract work within the stipulated time," however, the court did not find this argument dispositive. The parties' reference to this early notion of concurrent delay as one of "hindrance" or the degree of it, is notable, as it reflects the early understanding of concurrent delay as a remedy to an affirmative interruption of the contractor's work by the owner (i.e. the contractor's delay was dependent upon the owner delay) and not simply as a tool to resolve simultaneous project delays.

The effective result of the court's decision was that, by his conduct "[t]he [owner] thus released the [contractor] from all claims he might have had against [it] for breach of the contract." Thus, the *Stewart* decision is one of the earliest

examples of the notion that an owner cannot, under principles of contract law, recover for a contractor's delay if it itself is causing or contributing to the delay.

The notion that an owner has a duty not to hinder the progress of the contractor, or that an owner doing so waives claims for delay is far from foreign to our modern construction law jurisprudence. Dozens of courts have held that in the public or private construction context there is an implicit duty not to hinder, regardless of the existence of strict contract language.¹⁶ What is unique is that this doctrine, which has become a bedrock of modern contract law principles, also led to the doctrine of concurrent delay, which itself impacts many situations where there is not an affirmative hindrance by the owner.

The early formation of concurrent delay doctrine was further influenced by the seminal decision of *Jefferson Hotel Co. v. Brumbaugh*.¹⁷ In this case, which involved the construction of the Jefferson Hotel in Richmond, Virginia, the contractor was bound to build the hotel by a date certain, "excepting delays caused by the [owner]."¹⁸ At the conclusion of the contractor's work, the owner asserted its delay claim based on its \$150 per diem contractual liquidated damages. In contrast, the contractor argued that its work was largely dependent upon the material suppliers and independent contractors of the owner, and that these parties were the cause of the delay. To this, the owner argued that the "contractor in this case, however, was responsible for a large number of the days of delay and the [owner] for only a few of the days thereof, and that the court, under such circumstances, should attempt to 'apportion' such delay between the two and hold the contractor liable in penalty for those days that it, in its judgment, deems he may be chargeable with."¹⁹ In essence, the owner sought segregation of the parties' liability for the delay and an apportionment of damages.

In direct response to the owner's request for apportionment, the *Jefferson Hotel* court stated that

This is just what the courts cannot, with any degree of certainty, do, and therefore refuse to do. It needs but a moment's practical consideration of common building operations to realize that a contractor may not complete the woodwork until the plastering is done; he may not in many instances complete the cement work until the plumbing is placed; he may not do the painting until the marble work is done. To perform his work, he is entitled to work upon an orderly and systematic plan. It could not be required of him to move his scaffolding, his tools and implements, and his workmen back and forth from one quarter to another just as the other contractors might complete in one quarter a part of the heating, in another part the plumbing, and in still another the tile and marble work, in order that he should be free from the charge of delay. Courts cannot know of these conditions as they actually existed at the time, and the evidence would be very unsatisfactory, taken months after, that would attempt to set forth all such conditions. Therefore the courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes thereof have been mutual, but will refuse under such circumstances to enforce the penalty.²⁰

This passage from the *Jefferson Hotel* decision is significant for two reasons. First, the court's explanation that a contractor should not be required to rush to work around owner interruptions in order to avoid delay damages is the first articulation of the contractor's "pacing" defense to delay damages, a defense that has become a keystone of delay, impact, and acceleration claims.²¹ Second, the passage highlights the court's reluctance to parse through competing delay claims as an evidentiary matter. That is, whether as a result of the failure of the litigants to prove the claims or simply a result of the court's unwillingness to resolve this complex dispute, the court views it as an impossible task to attempt to apportion concurrent delay, after the fact. This perspective, which is often belied by modern schedule analysis methods, cast a great shadow over subsequent courts

reviewing examples of concurrent delay. The decision's essence is that the parties failed to provide sufficient evidence to allow the court to apportion the competing delay claims, and, even if they could do so, the proper judicial policy is to not perform such an apportionment as a matter of law.

The judicial refusal to apportion damages relating to competing delay claims was carried through in the decision of *Caldwell & Drake v. Schmulbach*,²² which was heavily influenced by the *Jefferson Hotel* decision. In this case, the court's reluctance to "deal" with a very complicated record involving competing claims relating to delay is palpable. For example, the court takes the opportunity to state that the case's record weighs "over 100 pounds, consisting of over 3,200 typewritten pages of evidence (which counsel with commendable industry have sought to abstract within a limit of 800 pages), books of accounts, plans, specifications, drawings, correspondence, contracts, stipulations, and agreements, all of which must receive careful study and consideration, may possibly throw some light upon the vexed question of the law's delays and failure of the courts to expedite business."²³

Further, the court notes "how impossible it would be for a court to attempt to determine and apportion the cause of delay between the owner and contractor, both of whom are in default."²⁴ This holding represents the first true articulation of what is now understood as the concept of concurrent delay (i.e. that multiple parties contributed to an unsegregable delay). Further, it appears from the start of this case that based on the complexity and impenetrability of the record, the court is not going able to consider the detailed apportionment of complex delay claims.

In *Caldwell & Drake*, the owner claimed \$29,150 as a result of liquidated damages for delay. While not clear on the details, the court indicates that at least some of the delay to the completion of the project is the fault of the

owner. This finding is practically dispositive, as the court notes that the taxing of delay damages to the contractor is sound "where delays in execution of such a contract are wholly occasioned by the default of the contractor," indicating that an owner must operate under laboratory conditions or face a claim that the contractor's delay was not "wholly" its fault.²⁵ Accordingly, the court notes that the imposition of liquidated damages for delay should not be recoverable where "such delays have arisen from (a) the fault of the owner; or (b) that of his agents and independent contractors; or (c) by the joint and mutual default of owner and contractor."²⁶ As such, the *Caldwell & Drake* court seems to indicate that if there is any owner contribution to the delay, the owner's liquidated damages are off the table, regardless of any analysis that might segregate the factors of delay.

In fact, the *Caldwell & Drake* court came to the conclusion that competing delay claims were simply "too much" for the court to try to sift through despite of a contract clause in the parties' agreement that specifically called for the apportionment of delays in such a concurrent delay situation (a clause that was absent in *Jefferson Hotel*). Even in light of a clause in the parties' contract calling for the apportionment of delays, the court found that this "cannot change the situation" because of the "very uncertainty, the impossibility to fairly and justly determine the causes of such mutual delays and their effects will not attempt to apportion."²⁷

This judicial policy, of avoiding the untangling of the delay "knot," even where the parties have agreed to such, clearly influences the modern view on concurrent delay and effectively creates an incentive for a delaying party to put forth a delay claim of its own, in the hopes of avoiding judicial scrutiny of the delays in question. As such, this case firmly highlights the evolution of concurrent delay as a product, at least in part, of the court's inability, based on the state of the record, to "deal" with complex claims. When viewed in such a

light, it is important to remember that "courts can only review what is presented to them via records, briefs, and the oral arguments about the records and briefs."²⁸ Given this fact, while it is easy to cast the courts' early unwillingness to resolve concurrent delays as "judicial laziness," such opinions arguably reflect more on the litigants' failure to appropriately frame and argue their cases.

In addition, notable is the *Caldwell & Drake* court's general tone toward the taxing of liquidated damages to the contractor. In many instances, the court refers to such damages as a "penalty."²⁹ The use of this language in cases from the early 20th century reflect a "hostility to liquidated damages that arose from an outdated view that while parties could determine their own contractual obligations, damages were the province of the courts."³⁰ This hostility toward liquidated damages is now disfavored itself, as modern decisions embrace the application of such privately-determined damages to the extent they are a reasonable pre-contract approximation of the party's damages.³¹ As such, it appears that the court's formulation of the early concurrent delay doctrine is a direct product of the now-disfavored judicial hostility toward liquidated damages.

Another decision that further reflects the chronology of concurrent delay jurisprudence is *Greenfield Tap & Die Corp. v. U.S.*³² There, the contractor was hired, under separate contracts, to fabricate rifle gauges and artillery for the government. The contractor claimed that it suffered delay damages as a result of the government's "officers in being too exacting and capricious as to the details and quality of the gauges, and also due to changes in drawings by the [government's] officers."³³ There was also evidence of contractor caused delays in performance.

In review, the *Greenfield Tap* court held that "[t]he claim for losses by reason of the delays, even if satisfactorily proven, would not be recoverable, for the reason that there is evidence of delays through the action of the plaintiff as

well as through the action of the defendant, and this court has held that where both parties to a contract are responsible for delay in its performance the court will not undertake to apportion the responsibility for the delays."³⁴ While not stated, it is presumed that the court rejects not only performing its own analysis of the competing delay claims, but also the jury's ability to do so—effectively leaving the parties without a remedy for these breaches. Important here is the court's proclamation that it "will not undertake to apportion the responsibility for the delays." This statement reflects a transition from the *Caldwell & Drake* decision's inability to allocate delay to a near-prohibition on such allocation. As such, the transformation of the concurrent delay doctrine from a failure of the litigants to prove their claims into a "rule" barring such proof is apparent. The *Greenfield Tap* court, like the *Jefferson Hotel* and *Caldwell & Drake* courts, appears to be unwilling to address the competing claims for money in lieu of the "no harm, no foul" approach of this early form of the doctrine of concurrent delay.

Over the next few decades, the concurrent delay doctrine became cemented into the law of construction contracts as a legal doctrine, even though the genesis of the concept was based on complex factual situations involving claims that could not be, or were not, adequately proven by the claimants. For example, in *Newport News Shipbuilding & Dry Dock Co. v. U.S.*,³⁵ we see a more polished, but not necessarily different version of concurrent delay than seen in the cases above. This case involved the construction of an armored cruiser for the Navy. In review of the facts, the Court found that 396 days of delay were caused: "(1) by delay arising from numerous changes in plans and specifications, (2) by delay of the [contractor] in preparing and furnishing for approval drawings and plans which it was required to furnish, (3) by the inability of the [contractor] to obtain structural material from the manufacturers, (4) by bad weather, and (5) by the temporary suspension of work

by certain of the [contractor's] employees during the Christmas holidays in 1902."³⁶ The court noted that these "causes of delay operated more or less concurrently during the period in which the work was performed."³⁷

As such, in *Newport News*, the court appears much more sophisticated in outlining the cause of the mutual delays and how those delays should be treated (as "concurrently"); however, there again appears to be little effort by the court to actually analyze and parse the delays between the contractor and the owner. This is evident in the court's holding that the contractor simply cannot recover on its delay claims from the government, as it contributed to the delays itself. The *Newport News* decision reads as the opposite to *Caldwell & Drake*—there, if the owner had any contribution to the delay, it could not recover liquidated damages; in *Newport News*, the contractor's contribution to the delay has the effect of barring its delay claims. Such an outcome is indicative of both the contractor's burden of recovering delay damages from the government and the "no harm, no foul" decision-making approach seen in the earlier cases discussed above.

To bring the chronology of the doctrine of concurrent delay full circle, it is helpful to look at a case from the modern era, especially from a point in that era when the formation of the doctrine of concurrent delay as we now know it was in full swing. In *Commerce Intern. Co. v. U. S.*,³⁸ the contractor was hired to rebuild and refurbish 500 US Army tanks for use in the Korean War. In performing its work, the contractor claimed it was subject to "unreasonable delay in supplying parts and drawings, and in failing to permit the prompt commercial purchase of parts when none were available in Government stores."³⁹ However, it appeared that the contractor itself was behind in mobilizing the needed forces for the task. The court noted, reminiscent of the hindrance rationale of the *Stewart* case, that the evidence before it did not prove "that these delays breached the Government's

implicit obligations under the contract or that the delays actually hobbled performance.”⁴⁰ After restating the difficult burden borne by the contractor in recovering for government delays, the court concluded that

The case suffers from more than the absence of specific proof of causation. There is an affirmative showing that other causes, for which the defendant was not responsible, contributed most materially to the delay in production. Plaintiff has not separated these delays from that charged to the defendant, and, on this record, the Commissioner has been unable to do so. Since, as we will show, we cannot say that he was wrong, we must apply the rule that there can be no recovery where the defendant’s delay is concurrent or intertwined with other delays.⁴¹

Importantly, in *Commerce Intern. Co.* the court frames the issue of concurrent delay as a matter of proof—not necessarily a matter of law. Presumably, such a view leaves open the issue of recovery to the extent that the claimant can “prove” the independence and/or segregability of the delays. However, the *Commerce Intern. Co.* court, faced with a complicated set of facts reflecting delay and relying on the precedential history set forth above, declines to apportion the delays in favor of the “no harm, no foul” approach.

In reviewing this chronology of decisions, several points are apparent. First, the concept of concurrent delay appears to have been confused or conflated over time with the owner’s implicit obligation not to hinder its contractor. Certainly, such an implicit duty exists, but the question remains how such a duty relates to concurrent delay and whether and how the two concepts should be married. If the government or owner hinders its contractor, it may have breached a contractual duty to the contractor for which the contractor is entitled to relief. However, it does not follow that hindrance of the owner (or lack thereof) should be a controlling factor in how competing delay claims are resolved. One such joining of the two concepts would be a rule restricting the application of concurrent delay to those situations where the owner has

breached its implicit duty not to hinder. However, the decisions do not marry those concepts as such, and in effect create an inconsistent and muddled policy.

Second, historically speaking, the concurrent delay rule appears to be grounded, at least in part, on the court’s hostility toward the concept of liquidated damages for delay. This fact cannot be overlooked given the language and tone of the *Jefferson Hotel* and *Caldwell & Drake* decisions which view liquidated damages as a “penal” measure that should be given limited effect. Given that judicial hostility toward liquidated damages, and related concepts like arbitration, is now disfavored, why perpetuate a corollary doctrine (concurrent delay) that is rooted in this hostility?

Third, based on the above examination of cases, it can be positively said that the doctrine of concurrent delay stems in large part from the court’s unwillingness to apportion delay where the facts are complex and there is at least some liability on both sides. This unwillingness is itself based on the litigants’ failure to adequately prove their claims in the early concurrent delay cases. This early unwillingness to unravel such disputes has, in effect, bound later courts into a similar reluctance. This policy creates an incentive for delaying parties to frame the dispute as one of concurrent delay so as to avoid judicial scrutiny of the actual facts involved. Further, such a policy works an unfairness on the contracting parties as they are often precluded from attempting to partially resolve disputes through concepts such as liquidated damages while also being precluded from having the court perform the job of apportioning delay, even where the contract dictates such, as it did in *Caldwell & Drake*. Courts, arbitration panels, and boards of contract appeals of today are certainly able to parse through complex and detailed claims, such as competing delay claims, which are better explained today via CPM analysis and other methods of apportioning and explaining construction delays. Given this ability, the

continued application of the concurrent delay doctrine (which itself is based on the courts' inability to properly analyze delays) is suspect.

IV. Potential Alternatives to the Concurrent Delay Doctrine

A. Causing a Second Look at Old Rules Through Better Use of Technology and Fact Marshalling

As highlighted above, the foundations of the modern doctrine of concurrent delay stem, in part, from the failure of the early litigants to prove their complex delay claims. As further noted above, this failure was acknowledged by the early courts' unwillingness to apportion such complex claims. However, instead of hinging our current legal doctrines on the failures of past litigants, it surely makes more sense to give present litigants the opportunity to actually prove their delay claims rather than having them "swept under the rug" out of convenience and reliance on old case law.

Prior to the advent of modern construction scheduling techniques and analyses, old methods of construction scheduling "suffered from their lack of integration of the time, spatial, and resource relationships between separate activities."⁴² These primitive scheduling techniques, to the extent they were applied at all in the early cases discussed above, did not provide the litigants or the court with an efficient or trustworthy scheme to apportion and resolve construction delays.

In contrast, on most large or complex construction projects of today, the "critical path method" (or "CPM") of schedule analysis reigns supreme. CPM scheduling is "a graphic presentation of the planned sequence of activities that shows the interrelationships and interdependencies of the elements composing a project."⁴³ Its network of activities that enables analysis in schedule-related claims is the most frequently

used method for planning and managing construction and for the proof and assessment of schedule-related claims.⁴⁴ Specifically, CPM establishes a planned sequence of activities, their durations, and their interrelationships and defines the "critical path;" the minimum duration that will be required to complete a project.⁴⁵ A delay to any of the critical path activities will extend day-for-day the planned completion date of the project unless other adjustments or changes are made to the relationships between activities or the resources brought to bear to perform the affected activities.⁴⁶

While the use of CPM schedule analysis in construction disputes is far from "new," its increasing use (and acceptance by the courts) in concurrent delay scenarios highlights a legitimate alternative to the strict doctrinal "time but no money" approach. Two fairly recent concurrent delay-related decisions highlight this trend: *Essex Electro Engineers v. Danzig*,⁴⁷ and *R.P. Wallace, Inc. v. U.S.*⁴⁸

The decision of *Essex Electro* involved the contractor's challenge to an ASBCA decision finding that it was entitled to "time but no money" for certain periods of concurrent delay. In the case below, the ASBCA refused to apportion fault for the concurrent delays based on the strong precedent of the concurrent delay doctrine. At issue was whether government delays in approving changes should be negated by the delays caused by the contractor actions in suspending work. In taking its case before the Federal Circuit, the contractor argued that a review of the facts and schedule activity of the project did allow for a true apportionment of the delay damages at issue and that the application of the concurrent delay doctrine ignored these facts.

In making its case, the *Essex Electro* contractor laid out the facts of the delays in a clear and efficient manner and used CPM scheduling analysis to highlight the errors in the application of the concurrent delay doctrine. In effect, the contractor was able to show that the delays it caused were not truly "overlapping" with the

government's delays. In review, the Federal Circuit found that this proof "may affect the Board's conclusion that most government-caused delays were concurrent with Essex-caused delays."⁴⁹ Further, the Federal Circuit noted that "[t]he sequential nature of Essex's submissions and the government's responses renders each party's delays inherently apportionable" and that "a more definite attribution of [certain] delays may also affect the Board's overall conclusion of concurrency."⁵⁰ Specifically, the Federal Circuit noted that concurrency would be applied when the contractor failed to show a "causal link" between the government's delay and the resulting delay to the project. Here, the *Essex Electro* contractor, through CPM schedule analyses and documentation, was able to show that "causal link" and avoid the application of the concurrent delay doctrine.

The message of the *Essex Electro* decision appears to be that the rote, doctrinarian application of concurrent delay rules can be overcome with proof based on modern scheduling technology and strong record-keeping. Of course, this result can only happen if the claimant is fully prepared to put in the time, money and effort toward proving the non-concurrency of delays. For example, when looking at a month or week-long schedule "window," concurrencies are more likely to occur. However, when schedule windows are broken down on a daily, or even hourly basis the ability to disprove concurrency becomes much stronger. Further, detailed record-keeping during the project work will better allow a forensic scheduling analyst to parse through delays that may seem "concurrent" with less information.

The *Essex Electro* decision represents a true example of the fairly-recent notion that a claimant can overcome the application of the concurrent delay concurrent delay doctrine. That is, unlike the claimant in *Jefferson Hotel*, the contractor here was able to prove its claim and was accordingly not bound by the doctrine of concurrent delay. However, the law still generally holds

that the claimant bears the burden of "dis-proving" concurrency.⁵¹ As such, a claimant seeking to work around the concurrent delay doctrine must overcome a presumption of concurrency. It is this presumption of concurrency, founded on questionable precedent that should be revisited by courts going forward.

Another decision supporting the trend toward apportionment of damages instead of the application of doctrinarian principles that would ignore modern evidence is the decision of *R.P. Wallace, Inc. v. U.S.*⁵² In this case, a contractor on a Navy project sought return of liquidated damages it paid for delays as well as compensation for its own delay damages. The contractor argued that defective window specifications provided by the government were a concurrent source of delay that required remission of the entire liquidated damages assessment.

In review, the Court of Claims performed a detailed review of the authorities on apportionment of liquidated damages where delays occur intermittently. The cases underlying the former doctrine of "no apportionment" of liquidated damages in situations involving intermittent delays are synonymous with the cases cited above that refuse to apportion concurrent delays. That is, in those cases, the courts appear unwilling to apportion such damages in complex factual scenarios where both parties delayed the overall project. After performing its review of the relevant cases, the Federal Circuit rejected a blanket rule against assessing liquidated damages where the government caused some delay and accepted the clear apportionment rule to allow assessment of liquidated damages for the periods of delay not caused by the Government.

In performing its review of the "no apportionment rule," the Court of Claims noted the historical relation between this rule and other principles surrounding the doctrine of concurrent delay. The court notes that "several decisions that use the terms "concurrent" and "sequential" interchangeably and often erroneously."⁵³ In rejecting this confusion, the court

made it clear that where liquidated damages could be apportioned to periods of non-governmental delay, they should be taxed against the contractor. In the case before it, the Court of Claims found that the facts, based on detailed CPM schedules, supported apportionment of at least some of the liquidated damages at issue and structured its ruling accordingly.

While *R.P. Wallace* deals with the taxation of liquidated damages in cases of intermittent (and not concurrent) delay, the principles underlying the decision, like *Essex Electro*, point toward a trend of apportionment rather than the application of blanket “rules” that do not look past the actual facts of the dispute. To the extent that more detailed facts and scheduling data can allow the *R.P. Wallace* court to disregard the old rules of “non-apportionment” in cases of intermittent delays, they should also have the same effect on cases involving what appear to be concurrent delays.

In sum, despite the nagging presumption of concurrency that remains in the government contract case law, both the *Essex Electro* and *R.P. Wallace* decisions highlight that such presumptions can be overcome through strong and persuasive CPM analyses and thorough fact marshalling. These decisions highlight the point, discussed above, that the early cases dealing with concurrent delay primarily arise from a failure of proof, or an inadequate showing of causation. These decisions further highlight that certain courts can and will look past such precedent-based analyses and will render awards in situations that may have been previously couched as “concurrent delay cases” without the detailed proof and analysis urged by the claimant. Given this fact, it appears that one potential alternative to the often inequitable results imposed by the concurrent delay doctrine is to simply look past it and present detailed and competent evidence to the court that effectively rebuts any presumption that fault cannot be apportioned.

B. “Netting Out” Apportion Methods

As noted above, an inequity associated with the application of the concurrent delay doctrine to complex, multi-party disputes is that the rule serves to potentially relieve the contractor of liability for liquidated damages during periods of designer/contractor concurrent delay even where the owner itself has not caused any delay, effectively leaving the owner without a remedy. This inequity is rooted in concurrent delay’s offset of competing delay periods using the “day of delay” as a unit of calculation. The understanding, of course, is that the number of days each party delayed the project is offset against the days of delay caused by the other party. However, it is clear that a day of delay may be worth more to one party than the other. Further, setting off the claims based on the number of days delayed ignores the actual damages each party may have as to those days of delay. As such, in order to “fix” the doctrine of concurrent delay, it is helpful to examine other ways in which competing delay claims can be apportioned.

In finding a different, and perhaps more efficient method of resolving competing delay claims, certain older key cases provide great insight. The decision of *U.S. for Use and Benefit of Heller Elec. Co., Inc. v. William F. Klingensmith, Inc.*,⁵⁴ involved competing claims between a general contractor and its subcontractor. The court found that the general contractor had delayed its subcontractor’s work as to the completion of a parking garage.⁵⁵ In addition, the court also found that the subcontractor had contributed to the delays on the parking garage and caused delays on another aspect of the project.⁵⁶ With these facts, and with damages claims by the parties reaching a near set off, the trial court (mis)applied the concurrent delay dogma to reach the result that neither should recover, as each party independently caused delay to the project.

In review, the DC Circuit rejected the trial court's "no harm, no foul" approach. In doing so, the DC Circuit noted that

There is no doubt that if only one party had delayed, that party would have been liable to the other for damages. In a case like this, where each party delays the other, it follows that each should be able to recover to the extent of the injury caused by the other's delay. Such a rule protects each party from losses due to the delay of the other throughout the period of performance. It also induces each party to avoid imposing such losses on the other at any time during the period of performance. In contrast, a rule precluding a party from recovering damages for delay, once the party itself delays, would leave the parties to a contract unnecessarily vulnerable to delay by the other. We see no wisdom in, nor authority for, such a rule of preclusion. Therefore, when both parties to a contract breach their contractual obligations by delaying performance, a court must assess the losses attributable to each party's delay and apportion damages accordingly (internal citations omitted).⁵⁷

In reaching this holding, the DC Circuit advised that the damages would be determined by calculating the "net cost of each party's delay."⁵⁸

While largely ignored by subsequent courts, the *Heller* decision contains language that would essentially gut the doctrine of concurrent delay and would resolve many of the inequities inherent in that rule. In essence, the case rejects the "day of delay" set off imposed by the traditional cases on concurrent delay in favor of a "dollar for dollar" netting out of delay damages. In effect, this rule would allow for the judicial resolution of delay claims, including the award of delay damages, even where the competing delays were truly concurrent. For example, where an owner suffers actual or liquidated damages in the amount of \$500.00 for each day of delay, and the contractor suffers \$1000.00 in actual damages for each day of delay, a complete netting out of a 30 day concurrent delay between the two would leave the contractor with an award of \$15,000.00, as opposed to \$0 and a schedule extension under the current framework.

Of course, under the *Heller* framework the results could differ based on differing damages rates of the respective parties. However, in any event, under the *Heller* framework, the parties are getting the actual benefit of their bargains and no party who is at fault is relieved from liability simply because another party was concurrently at fault. While the concurrent delay doctrine has myriad cases supporting its application over the years, it simply cannot compete with the elegant and sensible result of the *Heller* scheme for apportioning delay damages.

V. Conclusion

As highlighted herein, the doctrine of concurrent delay is inadequate for many reasons. First, the doctrine is based on a faulty foundation of litigants' failure to prove their cases and the court's resulting unwillingness to rule on shaky evidence. However, given modern litigants' ability to prove complex claims through scheduling analyses, the courts should hear such evidence and apportion delay claims where possible. Second, the doctrine is premised on older courts' hostility toward liquidated damages. Yet, given modern courts' widespread acceptance of liquidated damages as a contract tool, the continued application of this doctrine should be questioned. Finally, when applied to complex, multi-party disputes, the doctrine of concurrent delay can leave damaged parties without a remedy and does not accurately reflect the economic reality of the underlying contractual relationships. For this reason especially, the continued use of concurrent delay as a method to resolve competing delay claims should be avoided.

Looking past the current concurrent delay "dogma," it is clear that there is at least some willingness on the part of courts to utilize modern technology, such as CPM, in efforts to look at alleged concurrent delays more closely and apportion damages where at all possible. Litigants should view these decisions as an instruction manual on how to avoid or mitigate

the application of the concurrent delay doctrine by presenting more reliable and detailed evidence as to the delay periods. In addition, other apportionment methods, including the dollar-for-dollar “netting out” method, as discussed herein, provide a wholly new framework in which courts can fully resolve competing delay claims without artificial or arbitrary set offs that do not reflect the economic realities of the project relationships.

VI. Checklist

- The doctrine of concurrent delay is primarily built on a failure of the parties to prove their case, and does not frequently lead to just or fair results in application. Because the doctrine—rightly or wrongly—has gained so much currency in courts, parties should be prepared to present meticulously documented apportionment of delay to avoid the potentially unjust results of the doctrine. Such claims require, more often than not, substantial contemporaneous documentation. Don’t accept the “time but no money” response as gospel. There are exceptions to the rule, and while not always successful, a compelling claim may be rewarded in a jurisdiction in which the law is not so as to preclude money damages for delay settled (or where clear exceptions apply).
- Detailed CPM analyses and other forms of proof can take your case out of the “concurrent delay” category. Because “concurrent delay” is often a convenient resolution of claims in the absence of satisfactory proof, a claimant must be prepared to present clear and persuasive evidence to apportion delays. Such evidence ordinarily cannot be merely anecdotal, but instead requires accepted, detailed analysis.
- When faced with a delay claim, consider the “netting out” of delay damages in addition to more traditional approaches.

VII. References

1. Webster’s New 20th Century Dictionary of the English Language, Unabridged, p. 379 (1983).
2. Black’s Law Dictionary, p. 309 (8th ed. 2004).
3. See David W. James, *Concurrency and Apportioning Liability and Damages in Public Contract Adjudications*, 20 PUB. CONT. L.J. 490, 491-93 (1991) (discussing inconsistencies in the public contract concurrent delay case law as to whether “concurrency” relates to the causes or effects of the delay).
4. James, 20 PUB. CONT. L.J. at 493.
5. James, 20 PUB. CONT. L.J. at 493.
6. 2 Bruner & O’Connor Construction Law § 7:195 (May 2007).
7. 5 Bruner & O’Connor Construction Law § 15:67 (May 2007).
8. See *CCM Corp. v. U.S.*, 20 Cl.Ct. 649, 659 (1990).
9. *PCL Const. Services, Inc. v. U.S.*, 47 Fed. Cl. 745 (2000).
10. See *Singleton Contracting Corp. v. Harvey*, 395 F.3d 1353, 1355 (Fed. Cir. 2005).
11. See Dan B. Dobbs, *THE LAW OF TORTS*, 504 (2000) (“By the 1980s, only four states—Alabama, Maryland, North Carolina, and Virginia—had failed to adopt comparative negligence rules. The overwhelming majority of American states thus now follow the general system adopted in other common law and in the major civil law countries.”) (citations omitted); see also *Momand v. Universal Film Exchange*, 72 F. Supp. 469 (D. Mass. 1947), judgment aff’d, 172 F.2d 37 (1st Cir. 1948) (disapproved of by, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795, 1971 Trade Cas. (CCH) & para; 73484, 14 Fed. R. Serv. 2d 1169 (1971)) (discussing the issue of multiple party fault in tort vs. contract contexts); 5 CORBIN ON CONTRACTS § 999 (1964) (discussing apportionment of liability among various contracting parties); see also *R.P. Wallace, Inc. v. U.S.*, 63 Fed. Cl. 402, 403 (2004) (stating that “[a]t least since the shock of exploding fireworks caused the scales to fall on poor Helen Palsgraf, courts have applied temporal and spatial limitations on the availability of tort damages, invoking familiar doctrines such as proximate cause and foreseeability. . . . Similar principia have evolved in contract cases and, not surprisingly, have wended their way into the regulatory and decisional fabric of Federal procurement law, particularly in assessing responsibility for delays in the completion of a contract, and especially in considering the validity of liquidated damages assessed for delay).
12. See 13 AM.JUR.2D BUILDING AND CONSTRUCTION CONTRACTS, § 51 (describing common law delay cases holding “that the contractor is only entitled to a credit, against the period of default, of such number of days as are attributable to the [owner’s] act or omission”).
13. *Stewart v. Keteltas*, 36 N.Y. 388, 1867 WL 6457 (1867), 2 Transc.App. 288 (1867).

14. Stewart v. Keteltas, 36 N.Y. 388, 1867 WL 6457 (1867), 2 Trans.App. 288 (1867). In effect, the contractor's argument here can be seen as an early notion of "critical path" delays.
15. Stewart v. Keteltas, 36 N.Y. 388, 1867 WL 6457 (1867), 2 Trans.App. 288 (1867).
16. See e.g., J. D. Hedin Const. Co. v. U. S., 171 Ct. Cl. 70, 347 F.2d 235 (1965); Champagne-Webber, Inc. v. City of Ft. Lauderdale, 519 So.2d 696 (Fla. Dist. Ct. App. 4th Dist. 1988); Bates & Rogers Const. Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 47 Ill. Dec. 158, 414 N.E.2d 1274 (2d Dist. 1980); City of Seattle v. Dyad Const., Inc., 17 Wash. App. 501, 565 P.2d 423 (Div. 1 1977).
17. Shook v. Dozier, 168 F. 867 (C.C.A. 6th Cir. 1909).
18. Shook v. Dozier, 168 F. 867, 869-870 (C.C.A. 6th Cir. 1909).
19. Shook v. Dozier, 168 F. 867, 869-874 (C.C.A. 6th Cir. 1909).
20. Shook v. Dozier, 168 F. 867, 874-875 (C.C.A. 6th Cir. 1909).
21. See Appeal of MCI Constructors, Inc., D.C.C.A.B. No. D-924, 1996 WL 331212 (1996) ("We agree with MCI that the delays attributed to MCI by the District were not critical path delays and generally come within the category of 'why hurry up and wait.'").
22. Caldwell & Drake v. Schmulbach, 175 F. 429 (C.C. N.D. W. Va. 1909).
23. Caldwell & Drake v. Schmulbach, 175 F. 429, 433 (C.C. N.D. W. Va. 1909).
24. Caldwell & Drake v. Schmulbach, 175 F. 429, 434 (C.C. N.D. W. Va. 1909).
25. Caldwell & Drake v. Schmulbach, 175 F. 429, 434 (C.C. N.D. W. Va. 1909).
26. Caldwell & Drake v. Schmulbach, 175 F. 429, 434 (C.C. N.D. W. Va. 1909).
27. Caldwell & Drake v. Schmulbach, 175 F. 429, 434 (C.C. N.D. W. Va. 1909). As such, *Caldwell & Drake* represents an extension and expansion of the rule of *Jefferson Hotel*, holding that the court's will not apportion concurrent delay even where the parties have agreed to such an apportionment.
28. See Khiara M. Bridges, *An Anthropological Meditation on Ex Parte Anonymous*, 94 CAL L. REV. 215, 242 (2006).
29. The owner's imposition of liquidated damages is also referred to as a "penalty" in *Jefferson Hotel*.
30. See Hutton Contracting Co., Inc. v. City of Coffeyville, 487 F.3d 772, 783 (10th Cir. 2007); E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 551 F.2d 1026, 1038-39, 21 U.C.C. Rep. Serv. 1061 (5th Cir. 1977), opinion modified on reh'g, 559 F.2d 268 (5th Cir. 1977) (noting "early judicial hostility to the use of privately agreed upon contract damage remedies").
31. See Priebe & Sons v. U.S., 332 U.S. 407, 411, 68 S. Ct. 123 (1947) (stating that liquidated damages clauses in government contracts are not disfavored so long as they constitute "fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract").
32. Greenfield Tap & Die Corporation v. U.S., 68 Ct. Cl. 61, 1929 WL 2484 (1929).
33. Greenfield Tap & Die Corporation v. U.S., 68 Ct. Cl. 61, 1929 WL 2484 (1929).
34. Greenfield Tap & Die Corporation v. U.S., 68 Ct. Cl. 61, 1929 WL 2484 (1929).
35. Newport News Shipbuilding & Dry Dock Co. v. U.S., 79 Ct. Cl. 25, 1934 WL 2021 (1934). As an aside, the long duration between the time of the contractor's bid (1900) and the time this matter was decided by the Court of Claims (1934) is notable given the likely difficulty of preserving the relevant evidence for such a long duration.
36. Newport News Shipbuilding & Dry Dock Co. v. U.S., 79 Ct. Cl. 25, 1934 WL 2021 (1934).
37. Newport News Shipbuilding & Dry Dock Co. v. U.S., 79 Ct. Cl. 25, 1934 WL 2021 (1934). Here, juxtaposition of the *Newport News* court's understanding of concurrent delay and the Bruner & O'Connor definition of that concept—the "delay to the project's critical path caused concurrently by multiple events not exclusively within the 'control' of one party"—highlights the less than rigorous understanding of concurrent delay seen in these early cases. As discussed herein, the courts' definition of concurrent delay appears to have sharpened coextensively with the use of advanced scheduling analysis, such as the Critical Path Method, *inter alia*.
38. Commerce Intern. Co. v. U. S., 167 Ct. Cl. 529, 338 F.2d 81 (1964).
39. Commerce Intern. Co. v. U. S., 167 Ct. Cl. 529, 338 F.2d 81, 83 (1964).
40. Commerce Intern. Co. v. U. S., 167 Ct. Cl. 529, 338 F.2d 81, 87, 83 (1964).
41. Commerce Intern. Co. v. U. S., 167 Ct. Cl. 529, 338 F.2d 81, 89, 83 (1964).
42. Mark E. Hanson, *Aspects of Construction Scheduling*, 42 PROCUREMENT LAW. 3 (2006).
43. Hanson, 42 PROCUREMENT LAW. 3 (2006).
44. Hubert J. Bell, Jr. and Gene J. Heady, *Expertise That Is "Fausse" and Science That Is Junky: Challenging a Scheduling Expert*, 35 PROCUREMENT LAW. 1, 7 (1999).
45. Hanson, 42 PROCUREMENT LAW. at 3.
46. Hanson, 42 PROCUREMENT LAW. at 3.
47. Essex Electro Engineers, Inc. v. Danzig, 224 F.3d 1283 (Fed. Cir. 2000).
48. R.P. Wallace, Inc. v. U.S., 63 Fed. Cl. 402 (2004).
49. Essex Electro Engineers, Inc. v. Danzig, 224 F.3d 1283, 1292 (Fed. Cir. 2000).
50. Essex Electro Engineers, Inc. v. Danzig, 224 F.3d 1283, 1292 (Fed. Cir. 2000).
51. See P.J. Dick Inc. v. Principi, 324 F.3d 1364, 1374-75 (Fed. Cir. 2003); CEMS, Inc. v. U.S., 59 Fed. Cl. 168, 230 (2003).
52. R.P. Wallace, Inc. v. U.S., 63 Fed. Cl. 402 (2004).
53. R.P. Wallace, Inc. v. U.S., 63 Fed. Cl. 402, 421 n.16 (2004).
54. U. S. for Use and Benefit of Heller Elec. Co., Inc. v. William F. Klingensmith, Inc., 670 F.2d 1227, 29 Cont. Cas. Fed. (CCH) P 82194 (D.C. Cir. 1982).
55. U. S. for Use and Benefit of Heller Elec. Co., Inc. v. William F. Klingensmith, Inc., 670 F.2d 1227, 1230, 29 Cont. Cas. Fed. (CCH) P 82194 (D.C. Cir. 1982).

56. U. S. for Use and Benefit of Heller Elec. Co., Inc. v. William F. Klingensmith, Inc., 670 F.2d 1227, 1230, 29 Cont. Cas. Fed. (CCH) P 82194 (D.C. Cir. 1982).
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