Share the Pain—New Approaches to Allocating Damages Caused by Concurrent Delays

Delay disputes are a common risk of doing business in the construction industry. To reduce these risks, owners, contractors, subcontractors, and design professionals should be knowledgeable of the various claims and defenses that can be raised when responsibility for delay is disputed. One of the claims and defenses commonly raised is concurrent delay. As discussed in our January 5, 2017 edition, concurrent delays occur when two or more delays take place and overlap during the same period, either of which, occurring alone, would be sufficient to affect the critical path and completion date. Traditionally, concurrent delays were treated like offsetting penalties in a football game. But the traditional approach has been changing. This article compares the traditional offsetting penalties approach with the more modern apportionment of responsibility approach and considers how contracting parties can use the modern approach to lessen the risk of concurrent delays.

The Traditional Approach to Concurrent Delay

Historically, courts took the approach that where each party proximately contributes to the delay neither party was entitled to recover damages for delay. United Constructors, LLC v. United States, 95 Fed. Cl. 26 (2010). Courts did this because there were no reliable means to distinguish between the causes and effects of various delays. The traditional rule made sense – if you can’t determine with reasonable certainty who caused the delay and what effect the delay had on the project, no party should be entitled to damages.

This approach developed before the widespread use of CPM scheduling provided tools to allow parties to distinguish the causes and effects of various delays. Even with the tools provided by CPM scheduling, courts in many states continue to follow the traditional approach. See e.g., United Constructors, LLC v. United States, 95 Fed. Cl. 26 (2010); J.A. Jones Constr. Co. v. Greenbriar Shopping Center, 332 F. Supp. 1336 (N.D. Ga. 1971). The traditional rule continues to survive because many courts in many states have not yet had the opportunity to revisit prior rulings on the issue and overturn them. Additionally, courts continue to apply the traditional rule because of mere simplicity—it’s easier to deny damages where both parties appear to have contributed to the overall delay of the project.

The Modern Approach to Concurrent Delay

With the development of CPM scheduling and principles, courts have begun to apply a more modern approach to concurrent delays. The modern approach allows a party to recover, even though there are concurrent delays, if clear apportionment of the delay attributable to each party has been established. See Catel, Inc. v. United States, No. 05-1113 C, 2012 WL 3104366, at *33 (Fed. Cl. July 30, 2012); George Sollitt Constr. Co. v. U.S., 64 Fed. Cl. 229 (2005). If the delays are intertwined and cannot be separated, the court will revert to the traditional rule and deny recovery to either party. Essex Electro Engrs., Inc. v. Danzig
Both federal and other state courts, however, have been shifting away from the strict application of [non-apportionment]. "During the past 30 years, 'a strong majority' of courts have adopted the 'modern view and allow[ed] liquidated damages to be apportioned when faced with damages that are in fact divisible.' "  

Great American Ins. Co. v. E.L. Bailey & Co., Inc., 641 F.3d 439, 448 (6th Cir. 2016) (citing Hutton Contracting Co., Inc. v. City of Coffeyville, 487 F.3d 772, 785 (10th Cir. 2007)).

The modern rule is not without confusion though. Courts are inconsistent on whether “apportionment” refers to apportioning time, apportioning fault, or apportioning damages, actual or liquidated. In the absence of a contractual provision governing the issue, courts most commonly apportion time. Courts will consider expert testimony and evidence and determine whether the responsibility for each day of delay can be allocated between the parties. This analysis is fact intensive and highly dependent on competent expert testimony. If the court cannot apportion the delay because it is truly concurrent or the evidence is insufficient, the court will apply the traditional rule and preclude recovery.

Another method of apportionment that courts have employed in the past is apportioning fault. Courts will analyze the delay or damages and assign a proportion of fault for the delay or damages. For instance, in Tyger Constr. Co. v. United States, 31 Fed. Cl. 177, 260 (1994), the court allocated the responsibility of fault for the delay at 60% to the owner and 40% to the contractor. This determination was based upon evidence showing the extent to which each party contributed to the overall delay.

The last method is to apportion damages. Courts will analyze the actual or liquidated damages incurred by the parties due to the alleged concurrent delays and apportion the “net cost of each party’s delay.” U. S. for Use and Benefit of Heller Elec. Co., Inc. v. William F. Klingensmith, Inc., 670 F.2d 1227, 1231 (D.C. Cir. 1982). In this scenario, the court is, in essence, just applying the concept of set-off, where one party may recover for the damages it proves it incurred minus the amount of damages the opposing party proves it incurred as a result of the delay.

Reducing the Uncertainty Surrounding Concurrent Delay

The courts’ various approaches to concurrent delay necessarily result in uncertainty as to how concurrent delay will be treated on a particular project. Because the courts have not provided consistent answers on concurrent delay and apportionment, contracting parties are always at risk when concurrent delay is an issue on a particular project. These risks can be reduced by implementing contract language that specifies the treatment of concurrent delays and any procedures for apportioning concurrent delays.

For example, if an owner and contractor want to use the traditional no damage for concurrent delays rule they should instruct their attorneys to incorporate the traditional rule into the terms of their contract. A different owner and contractor might want to use the modern rule of apportionment. In such a case, the contractor and owner can instruct their lawyers to specify how the apportionment of concurrent delays will be decided—whether the apportionment will be based on time or will be determined based on fault, or allocated based on damages.
If a contractual provision does not govern, contracting parties should take steps to document who is responsible for any project delay. Each party should endeavor to record and maintain daily records that will allow a scheduling expert to analyze each day of delay and apportion time, fault or damages. The importance of thorough documentation cannot be overemphasized. Additionally, the parties should carefully research and interview potential consultants or experts to determine whether they are familiar with concurrent delay and apportionment and can credibly analyze the delays based upon the different methods of apportionment. In many cases, the ultimate award of damages will come down to which party to the dispute has the more competent consultant.

Conclusion

Courts have been moving away from the traditional offsetting penalties approach to concurrent delay in favor of apportioning responsibility. Unfortunately, the courts have not reached a common consensus on the best method of apportionment. Since the courts have not decided, contracting parties can reduce their risk by specifying in their contract how concurrent delay will be treated, and, if it is to be apportioned, how it will be apportioned. In the absence of such mutual agreement, the parties can reduce the risks of concurrent delay by keeping thorough project documentation and by employing competent consultants. The advice of a knowledgeable construction lawyer can be of help in achieving these goals.