

Chapter V

DELAY IN CONTRACT PERFORMANCE

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Introduction

Time is money. This truism is particularly appropriate in construction where the issue is: whose money? While the law attempts to allocate responsibility to the party who causes the delays, the factual inquiry can be very complex. There are certain defining principles that apply to any contract and provide some additional guidance in the context of the construction industry. Foreseeability, causation and reasonableness are terms that do not typically have a place in the daily parlance of construction, but those terms are critical in evaluating and pursuing a claim related to delays on a construction project. The issues and principles discussed on the next few pages are not intended as an exhaustive analysis of the developing law on delays and delay-type damages. Rather, this summary is intended to provide an overview of the major legal and factual concepts that have been recognized directly or indirectly in Michigan.

A. GENERAL PRINCIPLES

Even contracts that do not have fixed completion dates are expected to be finished within a reasonable time. *Turner v Muskegon Machine & Foundry Co.*, 97 Mich 166 (1883). When a contract does have a stated completion date or duration, the contractor is expected to have included a reasonable period of delay in planning the performance of the work. “In a complex, multi-party project..., a responsible contractor can and *should* take reasonable delays into consideration when preparing its bid, but should not bear the burden of lengthy or indefinite delays, *i.e.*, it is foreseeable that reasonable delays may occur.” *Walter Toebe & Co. v Dep’t of State Highways*, 144 Mich App 21, 30 (1985). Thus, a simple assertion by the contractor that contract performance took longer than had been planned is legally insufficient. With the appropriate argument and factual presentation, the court may consider whether any given delay is unreasonable and therefore justifying compensation to the contractor. *E.C. Nolan Co., Inc. v Michigan*, 58 Mich App 294, 303 (1975). However, delay damage claims that are supported only by a total time theory and are grounded upon a number of alleged incidents without a satisfactory showing of the extent of the actual delay caused by any of the incidents have been rejected by courts around the country. *Walter Toebe & Co. v Dept of State Highways*, 144 Mich App at 37 (1985). There are several schedule analysis techniques available for contractors to analyze and document the impact of delaying events, and the courts have specifically noted a preference for methods recognizing a critical path. *Toebe* at 20; *In re Yeager Bridge & Culvert Co.*, 150 Mich App 386, 403 (1986). “When a contract contained a [Critical Path Network], the [Critical Path Network] dates were expressly incorporated in the subcontract.” *Yeager* at 403. The method must satisfy the principle that a party to a contract who is injured by another’s breach of contract may only recover those damages which are the direct, natural and proximate result of the breach. The demonstration of delays using the critical path derives from the requirement that that party asserting a breach has the burden of proving its damages with reasonable certainty. *Toebe*, at 20; *Yeager*, at 401. While that does not require impossible precision, it does require the degree of certainty allowed by the nature of the case. “A damage award must not be based on ‘mere speculation, guess, or conjecture.’” *John E. Green Plbg & Htg Co., Inc. v Turner Const. Co.*, 742 F. 2d 965, 968 (6th Cir. 1984).

While there may not be a specific case providing particular guidance on how to fashion or prosecute a claim for delay in each instance, these principles provide the general framework on how to structure a legally supportable claim.

B. CONTRACTOR CLAIMS

Consistent with the general principles, there are several potential justifications for a claim of delay by the contractor against the owner. Some of the justifications relate to the plans, drawings and information supplied to bidders whether cast as a breach of an implied warranty or misrepresentation. Other justifications relate to the owner’s interference in the performance of the work by the contractor.

1. Information to Bidders

Hersey Gravel Co. v State Highway Dept, 305 Mich 333 (1943), involved the incorrect description of soil conditions that would be encountered at the project site. The state had test borings that were inconsistent with those described on the plans. The conditions were materially different and resulted in delays and increased costs. The state is required to make full disclosure of its findings so as to enable the contractors to submit informed bids; the state will be subject to liability for withholding information as to site conditions that affect the cost and time for performing work.

W.H. Knapp Co. v State Highway Dept, 311 Mich 186 (1945), presented a similar situation where the state had superior knowledge of conditions based on studies and surveys that the state had performed; yet, the state did not explicitly disclose this information. Instead, the state included some vague references. Delays and increased costs resulted from the discovery of those conditions. Not only does the state need to disclose the information in its possession, but the information must be disclosed in a form and in a manner that would apprise the prospective bidders of the nature of the difficulties to be encountered and in terms that would readily be understood by the average contractor. *Id.* at 199-200.

Valentini v City of Adrian, 347 Mich 530 (1956), likewise involved the misrepresentation by the owner of known conditions such as quicksand and excessive water on the site intended for a sewer. Again, liability was based on the owner's superior knowledge of a condition and the owner's withholding or actively misrepresenting the facts of that condition. *Id.* at 540.

Holloway Const. Co. v State of Michigan, 44 Mich App 508 (1973), involved the inaccurate information supplied to bidders about the availability of a right-of-way and borrow pit. The bidders relied on this information that the State knew was not accurate. The contractor was forced to resequence its work after commencing in order to use other borrow pits which resulted in delays and increased costs not originally contemplated.

That failure of the state to disclose its lack of borrow pit 4 and the subsequent development created an entirely new contract nowhere within the concept of the parties at the time that the written instrument between them was executed. There was a clear breach of the contract on the part of the state highway department. All of the damages flowing from such breach were the natural and proximate consequence of the breach complained of. *Id.* at 526-527.

E.C. Nolan Co., Inc. v State of Michigan, 58 Mich App 294 (1975), was a slight variation on the earlier cases in that the misrepresentation related to the actions of a third party. The work involved lengthening a railroad bridge across Eight Mile Road. Necessarily, the existing railroad tracks were to be relocated prior to the work commencing. The dates for commencing the relocation work by the railroad were over nine months later than what was stated in the schedule provided to the bidders. The Court of Appeals found that there were material misrepresentations in the information supplied to the bidders. "As a result of this misrepresentation, not only was plaintiff misled, but its bid was lower than it would otherwise have been if it had had full knowledge of all the facts. It follows, therefore, that plaintiff is entitled to recover the additional expenses incurred by it because of these misrepresentations." *Id.* at 301.

The *Nolan* case also presents the analysis of contract language relating to claims arising from the actions of a third party. The contract contained the Standard Specifications which provided:

No additional compensation will be paid to the contractor for any reasonable delay or inconvenience due to material shortages of reasonable delays due to the operations of such other parties doing the work indicated or shown on the plans or in the proposal. *Id.* at 301-302.

This provision was viewed as being contrary to the "Coordinating Clause:"

No claims for extra compensation or adjustments in contract unit prices will be made on account of delay or failure of others to complete work units as scheduled. *Id.* at 302

The court reconciled those clauses by holding that the state was only relieved from liability for reasonable delays by third parties. *Id.*

A contemporaneous case involving a nearly identical “coordinating clause” reached the opposite result. In fact, *Cooke Contracting Co v. Dept of State Highways #2*, 55 Mich App 479 (1974), held that the prior cases relating to inaccuracies in the information supplied to bidders “all become inapplicable by reason of the coordinating clause.” *Id.* at 486. The *Cooke* court further distinguished the earlier cases by stating that the discovery of the erroneous information arose after the contract was executed while Cooke was well aware of the third party complications before bidding. “The prevailing rule is that a contractor on public work projects is not entitled to damages resulting from delay caused by other contractors.” *Id.* at 487. The court also viewed the “conflict” between the contractual provisions. Since the coordinating clause was particular to the contract involved in that case rather than applicable to contracts generally, “the coordinating clause controls over the standard specifications.” *Id.* at 490.

2. Active interference and disruption

Selden Breck Const. Co. v Regents of the Univ of Mich, 274 F. 982 (E.D. Mich. 1921), imposed liability on the owner for failure to provide timely site access so as to allow the contractor to commence work according to the schedule. As a result of the delayed access, the contractor experienced increased costs from its subcontractors and was able to recover those as consequential damages.

Phoenix Contractors, Inc. v General Motors Corp., 135 Mich App 787 (1984), presented a situation where the facts conflicted with the interpretation and enforcement of the contractual provisions. The project involved the expansion of an automotive production plant. The owner had instructed another contractor to continue work despite the fact that Phoenix would not be able to progress its work as planned. The completion date for the project was immovable, so when Phoenix started experiencing delays due to the other contractor, Phoenix was forced to accelerate the completion of the work. When Phoenix filed its claim for compensation, the owner asserted its “no damage for delay” provision as a complete defense. The clause provided:

If the contractor is delayed in the completion of the several portions or the whole of the work comprehended in the contract due to acts of the owner, acts of the other contractors in performing a contract with the owner, fire, floods, strikes, or other casualties beyond the control and without the fault or negligence of the contractor, the time for completion shall be extended for a period determined by the owner to be equivalent to the time of such delay. The contractor will not be entitled to recover the actual damages he sustains by reason of such delays. (Contingency items in the contractor's bid are assumed to provide for continuing costs while the job is delayed.) *Id.* at 792

While the court found the clause to be valid, it also found that there were specific exemptions to the enforceability of the clause. “The exceptions include situations where the delay (1) was of a kind not contemplated by the parties; (2) amounted to an abandonment of the contract, and (3) was caused by bad faith on the part of the contracting authority; or (4) was caused by the active interference of the other contracting party.” *Id.* The court found that Phoenix was entitled to have a jury determine if there was active interference or bad faith by the owner.

To find “active interference” the jury must find that defendant committed some affirmative willful act in bad faith which unreasonably interfered with plaintiff’s compliance with the contract....

The bad faith required implies knowledge on the defendant’s part, which the jury could have found to be present on the basis that its conduct would interfere with plaintiff’s ability to perform its contract on time. *Id.* at 794

Precisely because the end date of this project could not be extended, this case is considered as an example of compensable acceleration. Although not explicitly recognized by the *Phoenix* case, the elements are generally recognized as:

- a. Delay not caused by the contractor;
- b. Contractor notice to owner of delay and request for extension
- c. Owner failure to grant an extension
- d. Express or implied acceleration
- e. Accelerated performance by the contractor.

Again, the notion of acceleration is subject to the principles stated at the outset relating to causation and foreseeability.

C. OWNER CLAIMS

The principles of causation and foreseeability also apply to any claim by the owner against the contractor for delays.

1. Consequential damages

Consequential damages are allowed for damages that were within the contemplation of the parties at the time that the contract was formed. *Lawrence v Will Darrah & Assoc, Inc.*, 445 Mich 1, 13 (1994).

2. Liquidated Damages

With respect to delay damages, this technique is frequently used in construction contracts when work or services are not completed on time. *Moore v St. Clair County*, 120 Mich App 335, 341 (1982). Generally speaking, liquidated damages clauses are enforceable if the damages stated do not constitute penalties.

It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at the time that that contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation....In the event they are not unconscionable or excessive, courts will not disturb it. Just compensation for the injuries sustained is the principle at which the law attempts to arrive. Courts will not permit parties to stipulate unreasonable sums as damages, and where such an attempt is made have held them penalties and therefore void and unenforceable. *E.F. Solomon v Department of State Highways and Transportation*, 131 Mich App 479, 483-484(1984).

There is a basis to argue that liquidated damages by definition adequately compensate the owner for delay-related damages. However, that may not be the only type of damage asserted against a contractor. Further, simply because the contract contains a liquidated damages clause does not entitle to owner to recover or withhold liquidated damages without an examination of the reason for the delay.

3. Owner delay

Board of Education of Sault Ste. Marie v Chausee, 211 Mich 61 (1920), involved a project for the construction of a high school that was delayed at the outset by the discovery of unsuitable soils requiring a redesign of the foundations. The completion date was extended, but the contractor went beyond the extended date. Initially, the court noted that “when performance is prevented by the owner, liquidated damages cannot be recovered, and, where the delay is due to the fault of both parties, the court will not attempt to apportion such damages.” *Id.* at 68. However, the court noted that the soil condition was properly contemplated by the parties at the time of contracting and did result in an approved and reasonable extension of time. “Although delay in completion of a contract has been caused by [owner] through a requirement of extra work, a provision for liquidated damages may be enforced where a reasonable time has elapsed for defendant to

complete the increased work, and by its own default it has failed to do so.” *Id.* at 69.

4. Waiver

Grand Rapids Asphalt Paving Co v City of Wyoming, 29 Mich App 474 (1971), involved a contract to perform certain paving the was modified orally several times to increase the work and alter the sequence of the locations to be paved contrary to the terms of the contract. Yet, when the contract was completed late, the city withheld liquidated damages. The contractor argued that the liquidated damages were not recoverable due to a waiver. While there was no explicit waiver of the liquidated damages, the court did find “declarations, acts and conduct of defendant which are inconsistent with the purpose to exact strict performance which constitutes a waiver.” *Id.* at 483.

5. Limitations of Actions

Over time, there has been some confusion about which limitation period applies to actions against contractors and design professionals. *O’Brien v Hazelet & Erdahl*, 410 Mich 1, 15 (1980), discussed the application of MCLA 600.5839 as being both a statute of limitations and repose. The language of that section provides:

No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Based on the case of *Witherspoon v Guilford*, 203 Mich App 240 (1994), the courts were applying the limitation periods of 600.5085 within the six year period described in MCLA 600.5839. Recently, the Michigan Court of Appeals in *Ostroth v Warren Regency Limited Partnership*, ____ Mich App ____ (Court of Appeals No. 245934, July 8, 2004), held that “the special six-year statute of limitation in § 5839(1) applies to all negligence actions against architects, contractors, and engineers.” The *Ostroth* case is currently pending before the Michigan Supreme Court.

D. CONCURRENT DELAYS

Along the lines of a waiver, there is the issue of concurrent delays and whether anyone is liable for the losses that may be suffered as a result.

Giffels & Vallet, Inc. v Edw. C. Levy Co., 337 Mich 177 (1953) involved claims of delay against a designer by an owner. The designer was to provide plans, but no specific date was set. Therefore, the court presumed the performance was to be within a reasonable time. Yet, various delays occurred attributable to both parties. “Where both contracting parties contribute to a delay, neither can recover damages unless there is clear proof as to the apportionment of the delay and the expenses attributable to each party.” *Id.* at 186. The party asserting the delay bears the burden of proving sole responsibility for that delay. *Id.* at 187.

Minkus v Sarge, 348 Mich 415 (1957) had claims of added work causing some or all of the delay. The court found that the delay was fairly attributable to both parties, and no damages were recoverable. *Id.* at 424.

E. NOTICE AND WAIVER

Depending on the particular contract language, notice of a claim for time or money related to time must be submitted within a specific period. Alternatively, the owner must receive sufficient notice in both time and substance so as to allow a consideration of a contract modification. *Greenfield Const. Co., Inc. v City of Detroit*, 66 Mich App 177, 184 (1975).

Some unpublished cases on public projects find that the construction contract required written notice of a claim be filed timely, and failure to comply constitutes a waiver of the claim. *PCL Constructors, Inc. v Dept of Transportation*, Unpublished Court of Appeals No. 237184 (November 18, 2003); *Walter Toebe Const. Co. v Dept of Transportation*, Unpublished Court of Appeals No. 244356 (March 9, 2004).

Again, strict compliance with the notice provision can be waived through the actions and omissions of the parties. *Phoenix Contractors, Inc. v GMC*, 135 Mich App at 794.

Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances or by a course of action and conduct which amounts to an estoppel. *Cascade Electric Co. v Rice*, 70 Mich App 420, 242-425 (1976).

F. NO DAMAGE FOR DELAY

Although the *Phoenix* case involved a No Damage For Delay exculpatory clause, the scope and impact of the clause was not discussed at length. *John E. Green Plbg & Htg Co., Inc. v Turner Const Co.*, 742 F.2d 965 (6th Cir. 1984), did provide more analysis. The court acknowledged that the clauses are commonly used in the construction industry and are generally enforceable, but because of their harsh effects, the clauses are strictly construed. *Id.* at 966. The scope of the clause depends on the specific language used. In the *Green* case, the clause only related to “delay” damages; as a result, the plaintiff was arguing that its damages resulted from the hindrances or obstructions. However, recognizing the scope of the clause still did not create a right of recovery since the plaintiff is always required to demonstrate the causation of the damages. Where there was no basis for allocation of the amount claimed as damages between the causes that were actionable and those that were not, the entire claim can be rejected. *Id.* at 968. Similarly, an unpublished decision affirmed the application of a No Damage for Delay provision in the absence of active interference by the owner or other contractors. *Goyette Mechanical Co., Inc. v Washtenaw Community College*, Unpublished Court of Appeals No. 238627 (November 18, 2003).

G. PARTICULAR CLAIMS AND DAMAGES

Time-related claims can involve several different types of claims for compensation, but again, those claims must be the “natural and proximate consequences of the breach.” *Holloway Const. Co. v State of Michigan*, 44 Mich App at 527. Some of the shortfalls in proofs are described by the Court of Appeals at *In re Yeager Bridge*, 150 Mich App 386 (1986).

1. Labor Productivity. This claim can be difficult to quantify and prove, and it includes such elements as overtime, stacking of trades and winter conditions. Without some measure of reliable proof, the court may reject the claim. *Walter Toebe & Co. v State of Michigan Department of State Highways*, 144 Mich App at 37-38 (“Plaintiff failed to present specific evidence of damage based on its claim of inefficiencies due to winter work and work performed out of sequence”).

2. Home Office Overhead. The recovery of damages for home office overhead (not including field office overhead) is likewise challenging to calculate and recover. Michigan has allowed a per diem calculation of “lost contribution to overhead,” but did not discuss how the per diem rate was calculated. *Walter Toebe & Co. v State of Michigan Department of State Highways*, 144 Mich App at 37. One method that has been allowed in other courts principally relating to federal projects is the Eichleay Formula:

$$\frac{\text{Contract Billings}}{\text{Total Billings For Contract Period}} \times \frac{\text{Total Overhead}}{\text{For Contract Period}} = \frac{\text{Overhead}}{\text{Allocable To Contract}}$$

$$\frac{\text{Allocable Overhead}}{\text{Days of Performance}} = \frac{\text{Daily Contract Overhead}}$$

$$\text{Daily Contract Overhead} \times \frac{\text{Number of Delay Days}}{\text{Number of Days Claimed}} = \text{Amount}$$

However, the Eichleay formula has been limited to instances where the owner-caused delay is not concurrent with any other delay, the original time for completion must be extended, and the contractor is forced into a “standby” position. The Standby position requires the contractor show that the government-caused delay was both substantial and indefinite, the contractor was required to remain ready to resume the work immediately during the entire period of the delay, and work on the contract was effectively suspended. *P.J. Dick, Inc. v Principi*, 324 F.3d 1364 (Fed. Cir. 2003). The contractor must be both idle and unable to demobilize from the site. *Charles G. Williams Const., Inc. v White*, 326 F.3d 1376 (Fed. Cir. 2003). As a result of these restrictions, the application of the Eichleay formula has been severely limited.

3. Extended Field Office Overhead. These direct costs should be relatively easily calculated and then allocated on the basis of being related to compensable delays. *John E. Green Plbg & Htg Co., Inc. v Turner Const Co.*, 742 F.2d at 968.

CONCLUSION

When and if a contractor experiences a delay attributed to the owner, the contractor should be prepared to preserve that claim by providing any notice required under the contract and to demonstrate that any claimed damages are the direct, natural and proximate result of the breach. While the proof of the amount does not need to be exact, the law requires a reasonable degree of certainty that is more than mere speculation, guess or conjecture. There are several recognized methodologies that can provide at least some level of certainty, but the preferred method necessarily involves an analysis of the critical path that allocates delays and costs between items that are actionable and those that are not.