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COMMENTS AT CONSTRUCTION
CPM CONFERENCE

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Thank you for the introduction and for the opportunity to speak with you all today. By way of brief introduction, I am a partner at Jones Day which is a large international law firm with over 37 offices around the world. I reside in the firm's Washington, D.C. office. For over 30 years my practice has focused on disputes arising out of construction projects. My experience has included all manner of disputes arising out of the design and construction of large infrastructure projects, such as energy projects, (including nuclear, fossil fueled and alternative energy projects) highways, bridges, tunnels, waste disposal and clean water projects, hospitals, stadiums and numerous other building structures. Over the course of this time and as to the breadth of these projects I have represented owners, contractors, equipment suppliers and design professionals. Everyone except the government. So I come here as an experienced construction litigator and, given that schedule issues are a consistent part of most construction disputes, I am a big consumer of construction scheduling services. So it is a pleasure to join you all at this great conference.

I bring special greetings from my colleagues in the construction law bar and more specifically the membership of the ABA Forum on Construction Law. The ABA Construction Forum is the largest organization of construction lawyers in the United States and, indeed, the world. It is comprised of 6,000 members and associates drawn from all types of construction practices including law firms, small firms, solo practitioners, in-house and government counsel and representing all segments of the Construction Industry. Its mission is to promote the education and professional development of construction lawyers. The Forum performs that

mission through its sponsorship of regular programs, publications in the form of books, a monthly magazine called the "Construction Lawyer" and a more periodic publication called "Under Construction" which addresses recent case reports and other construction law developments. The programs are presented at the Forum-wide Annual, Mid-winter and Fall meetings as well as at numerous regional meetings sprinkled in between. The meetings are well attended and highly substantive. This year the mid-winter meeting of the Forum was in San Francisco just a few days ago. As with all Forum meetings, the presentations were substantive with presenters from the construction bar as well as relevant experts such as cost and schedule consultants, insurance and surety representatives. The topics for the mid winter meeting included cyber security, protection of confidential information, current state of the economic loss rule, new issues in force majeure, contractor bankruptcy and cost and insurance issues relevant to construction. The Forum annual meeting will be April 28-30 in Nashville and its program is still in development. But it will be another large gathering of a broad group of construction industry participants that makes for great networking particularly for professionals like yourselves who provide services for the construction bar. For that reason, I would recommend that you consider opportunities to attend or speak at ABA Forum meetings.

And there are good reasons for greater collaboration between the scheduling community and the construction bar. First, as we all know, schedule issues tend to be a material part of the overwhelming majority of construction disputes. As such, for most cases, the schedule story is a significant part of the overall factual analysis that forms the backbone of case strategy. Second, where schedule issues are present, there is a substantial overlap in the pre-trial discovery and fact gathering activities conducted by the lawyer team and those responsible for the schedule analysis. Greater collaboration amount the schedule analysis and legal teams will serve to

improve opportunities to coordinate overlapping tasks that is essential in order to render an efficient effort on behalf of the client. (I think this is particularly true for legal counsel and the schedule expert who tend to be the most expensive parts of the construction disputes process).

Third and finally, it is important that the schedule expert community keep current on the case law that adopts and enforces delay allocation criteria. That case law and those criteria are articulated by judges who often lack sophistication on schedule issues. A number of schedule analysis concepts, such as concurrent delay, have been addressed by the courts using imprecise terminology leading to opportunities for confusion. I will discuss one aspect of this issue later in my talk but suffice it to say that it is important that the schedule expert community stay current on the case law treatment of criteria for allocating delay responsibility.

Each of these issues arose in a recent case in which I was engaged and it provides a useful vehicle to discuss my thoughts on few best practices and words of caution regarding ambiguities in case law that have been seized upon to advance what I consider to be improper criteria for delay allocation.

The background of the case was as follows:

- The dispute centered on claims in the hundreds of millions for compensable delay arising out of the construction of a power plant.
- The claims and the litigation concerning those claims were initiated while the project was half complete.
- As is typical, the relevant construction contract entitled the contractor to additional time for schedule delays beyond contractor's control.
- The provisions entitling the contractor to additional time, however, were not expressly tied to critical path delays.

- As is typical, the contract entitled contractor to additional compensation for increased costs due to specified owner caused delays.
- The contractor predicated its claims in the hundreds of millions on delays for which the owner was responsible; the owners asserted that the entire delay period was independently caused by contractor's own deficient performance.
- It was my view that the facts establishing contractor performance deficiencies and their responsibility for extended project duration were compelling.
- Accordingly, the owner argued that regardless of owner caused delay events, the contractor was responsible for concurrent delay which was an independent cause of the entire claimed delay period.
- On that basis the owner argued that, while the contractor was entitled to time, the contractor was not entitled to damages for extended project duration.
- So the entirety of contractor's claims – hundreds of millions in total – depended upon the concept of concurrent delay and the degree to which the court would follow the traditional rule that concurrent delay is excusable, not compensable.

The contractor asserted that, given the extent of owner caused delays and the dollar value of damages associated with extensive project delay, the treatment of concurrent delay as merely excusable, not compensable, would be harsh and unfair.

Given that background the contractor advanced arguments designed to undermine the traditional treatment of concurrent delay and thereby get the court to adopt more relaxed approaches for recovering damages even in the context of concurrent delay.

First, the contractor argued that the lack of reference to critical path in the contracts provisions for time extension relief meant that the contractor could be entitled to compensable delay for even non critical delay.

Second, the contractor argued that, under the applicable state case law (in this case a state court of appeal decision entitled *CRS Sirrine v. Dravo Corp*), a court is entitled to allocate concurrent delay liability based on a percentage fault basis akin to comparative fault analysis employed in negligence cases. To advance this argument, the contractor relied on ambiguous case language addressing the manner in which the court allocated fault as the basis for this theory. Specifically, the contractor relied on statements in the *Sirrine* decision that called for the allocation of delay responsibility with respect to concurrent delay in ways that suggested that a court would simply assess percentage responsibility without regard to current methods of schedule analysis. The contractor drew heavily from the *Sirrine* court's rejection of the proposition that "a defendant whose conduct has caused a delay is not liable if the plaintiff's own conduct also partially caused or contributed to the delay." If red literally, a rejection of the traditional rule that concurrent delay results in time but no money. The contractor drew further support from the *Sirrine* court's statement that for damages recovery "all that is required is evidence from which damages can be estimated with reasonable certainty, and difficulty in fixing the exact amount should not preclude recovery." Fueled with these statements, the contractor asserted that the fact that delay may be concurrent does not preclude compensability and that a court has within its discretion the ability to allocate project delay based on a general approximation of percentage fault.

Our response to the contractor/claimant's theories was twofold:

First, as to the lack of reference to critical path in the contract's provisions for time extension – our response was simple. The lack of reference to critical path delay means only that the contractor may be entitled to a schedule adjustment to delayed activities regardless of whether they are critical delays. But that does not mean that a contractor claimant is entitled to extended duration damages without regard to criticality. For to allow compensable damages without regard to criticality would be contrary to fundamental notions of causation. It is axiomatic that damages are recoverable only if they flow from the alleged wrong. Allowance of recovery of damages for delays that do not extend the project would be contrary to fundamental notions of causation. This argument prevailed.

Second, as to the argument that the court can allocate concurrent delay based simply on a general assessment of relative responsibility, it was our position that the contractor's position was a misreading of *Sirrine* and contrary to the modern approach to concurrent delays. As to the *Sirrine* decision, the court's rejection of the notion that there can be no damages recovery wherever there is both owner and contractor delays – was not a ruling on the disposition of concurrent delay. Rather, it was simply a recognition that the mere occurrence of both owner and contractor caused delays does not render the delays concurrent so as to preclude damages. The court recognized that where there is proof sufficient to separate the impact of the owner and contractor delays so as to no longer be concurrent such segregation can result in the award of damages. Accordingly, the *Sirrine* court was addressing damages in the context of non-concurrent, not concurrent delay. Accordingly, in our case, the contractor was improperly attempting to graft a court's discussion on proof that allows for the segregation of independent causes of delay to instead constitute a rule for how concurrent delay is to be addressed. That was

clearly a mis-reading of *Sirrine* and an improper attempt to circumvent the rules pertaining to the lack of compensability for concurrent delay. The bottom line is the *Sirrine* court was addressing allocation of non-concurrent delay and said nothing about how true concurrent delay – two independent delays for the same delay period – is to be addressed.

In opposing the contractor's position we also undertook a comprehensive review of the law with respect to concurrent delay to resolve the ambiguity in the case law. That effort allowed for the case law to be categorized in ways to better understand the terms used by the courts.

Under the traditional approach, prior to the application of CPM scheduling principles to delay disputes, there was no reliable means by which to distinguish between the effects of two different independent delays events in the same time frame. It was the concept of the critical path that first opened the possibility for finding that Delay 1 was on the critical path and so affected project duration and Delay 2 was not and thus had no impact on project duration. Older, pre-CPM cases accordingly took the general position that courts had no means to distinguish between the effects of different causes of delay, and reasoned that if both parties contributed to the delay, there would be no recovery by either, on the blanket basis that there could be "no apportionment" as between multiple causes of delay. In many states, this older rule carried forward well into the CPM era and it is often unclear in decisions even in the CPM era if there was any attempt to allocate delay impact among concurrent delays utilizing CPM methods. The pre-CPM cases utilizing the traditional approach adopted a bright line rule. If both parties contribute to any significant portion of project delay, unless the delays are readily segregated due to being sequential in nature, then neither party can be compensated for associated damages.

The view was that it was effectively impossible to allocate concurrent delay and it is therefore appropriate to deny compensation to both parties who contribute to the concurrent delay.

This approach has now yielded to a modern line of cases that reflect the more sophisticated tools of proof for allocating concurrent delays. In recognition of the more sophisticated tools for identifying those delays that affect project duration, the modern line of cases have backed away from the perceived harshness of the traditional approach and has recognized an ability to recover delay damages where there are multiple causes of delay, but only "when clear apportionment of the delay attributable to each party has been established."

However, confusion has arisen in the case law (as it did in our case) on this issue largely due to the court's use of the term "apportion" and more particularly the ambiguity it introduces in terms of exactly what is being apportioned – responsibility, damages or time.

Multiple commentators have pointed out that what the courts actually do is apportion time – they determine the days of delay that are the responsibility of each party. Responsibility, however, is not apportioned, as some suggest, in that for instance a particular jobsite problem is not determined to be 40% contractor and 60% owner responsibility. That is proper given that under the construction contract, only one party or the other is allocated responsibility for each risk; there are generally no shared risks as such. For example, only one party (usually the owner) bears responsibility for cost and schedule impacts due to change in law. Similarly, the contractor is usually solely responsible for cost and schedule impacts due to defective work. Accordingly, the allocation of damages follows not from an allocation of a general concept of responsibility but, instead, from an allocation of <u>time</u> – namely the relative delay impact that flows from a delay for which each party is responsible.

In sum, under the modern approach, the courts are open to the potential to segregate the effects of intertwined delays by segregating specific delay periods as between parties using sophisticated proofs such as CPM. However, even under the modern approach it is often found that the claiming party has not met its burden to demonstrate a clear means of segregation, and the delays are inextricably intertwined. In that case they are true concurrent delays. In those cases, the rule remains that neither party can recover damages for a period caused by multiple independent delays that cannot be reasonably segregated.

But in entertaining a process for allocating concurrent delay as to causation of project delay, the courts are not adopting a more lenient and imprecise percentage fault analysis that has been recently argued by some – particularly those for whom a CPM methodology does not yield the desired result. Nevertheless, we can expect claimants to seize upon loose language in the case decisions (largely from the traditional era) and misuse it to advocate such an approach. I think that argument neither reflects a close reading of the case law nor is in keeping with fundamental notions of causation. A percentage allocation based on some general concept of relative fault would have the effect of awarding delay damages where a party is unable to show that, but for the other party's delay, the overall delay in completion would not have occurred. Instead, basic causation principles indicate that a party cannot be found to have caused the other party's delays damages when the party is independently responsible for at least the same amount of delay.

OTHER OBSERVATIONS

I would like to offer a few other observations for schedule experts involved in the disputes process based on my recent experience:

1. General Thoughts On Effective Schedule Analysis

The key to an effective schedule analysis is to construct an understandable narrative of the project that is based on an even-handed analysis of the provable facts associated with the as-built construction. What does that mean?

(a) Understandable Narrative

It means providing an analysis that is stated in simple terms, without schedule jargon. The analysis should identify the key delay events and weave a narrative to address how those delays (the good and the bad) drove the project schedule. The narrative should address the project facts in a way that indicates that faithfulness to the facts was the guiding principle. The facts drive the power of the analysis not advocacy by the expert. In most cases the schedule expert should stay within the borders of schedule analysis and not venture into advocacy.

(b) Even Handed Analysis

The schedule analysis should employ a method of analysis that is expressly explained and justified. The justification should explain why a certain method of analysis was used and why it was a reasonable approach under the circumstance. For example, if a windows analysis is employed, explain why and explain why the specific windows of time were chosen as the basis for analysis. Failure to do so will create gaps in the analysis and possible doubts in the mind of the court or arbiter as to the reasonableness of the analysis.

(c) Provable Facts

The schedule analysis must be based on a detailed understanding of the project events. The method used by the expert to obtain that detailed understanding must be explained early in the presentation and the explanation should convey thoroughness and a commitment to accuracy based on proof. In terms of the type of proof, there is a hierarchy that should be considered. In

general, contemporaneous records tend to be more reliable (less tainted by litigation posturing) than say periodic reports. Where possible, use the opposing party's records as the basis for important proof. Those records are less susceptible to impeachment. Conflicts in records should be reconciled if possible with use of alternative third party sources such as inspection reports.

(d) Rock Solid Factual Basis

Build the analysis with painstaking fidelity to provable facts. Explain and demonstrate that the factual statements are backed up with solid demonstrable proof. Be fair with the facts and do not ignore any bad facts. Note them, explain them and demonstrate why they are consistent with your conclusions. Remember, the analysis is only as good as the factual basis.

2. Schedule Analysis Where The Project Is Ongoing

Needless to say this presents a significant additional challenge. Given that project duration is based, in part, on a projection of events to come, it is susceptible to challenge based on the reasonableness of to those projections. Those challenges are best defeated where the schedule analysis is predicated on a thorough and accurate assessment of the project record. The degree to which the projected schedule component is consistent with the project written record, the prior schedule performance record and the work plan for completion, the more credible are its conclusions. Again, to achieve that level of consistency it is vital that the schedule analysis be built upon a detailed review and understanding of the project documents – the contemporaneous record before the litigation positions were established. For that reason, I believe it is most helpful to engage the schedule expert in the discovery process, both document and deposition discovery.

3. Expert Report

The purpose of the report is to summarize all opinions upon which the expert will testify as well as a summary of the qualifications and basis for those opinions.

While construction scheduling is a well recognized topic for expert testimony, it is important that the expert and report not gloss over or give short shift to the qualifications and basis for opinions. Ultimately, they are the foundation for the opinions and are a critical component of the overall opinion testimony.

The report itself should be the work product of the expert though with collaboration with counsel. Discoverability of drafts of the report is an evolving area of the law. Under federal rules drafts of expert reports are protected from disclosure. However, the applicable state rules on discoverability of draft reports vary, some in significant ways. Accordingly, if there is a question about discoverability, a single document file should be edited and written over to prevent the creation of independent drafts.

4. Testimony

Remember to be a teacher. Explain each judgment call or choice of approach. The failure to explain and justify those choices can needlessly create questions or suspicions about the expert's approach or possible bias.

Conclusion

I hope these comments are helpful and I again encourage the scheduling community to take advantage of more opportunities to collaborate with construction counsel. The more that is done the better each is able to perform their services on behalf of their mutual clients.

I want to congratulate all on a great program and thank you Fred for including me in it. I hope you enjoy the rest of the conference and look forward to the informal gathering it offers.

Thank you.