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Concurrent Events and Other Breaking News Affecting the Recovery of Delay Damages

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Introduction

Uncertainty Regarding Concurrent Delay & the Critical Path

Concurrent Delay: Basic Definition

- “Two or more delays that take place or overlap during the same period, either of which occurring alone would have affected the ultimate completion date.”

-AACE Recommended Practice No. 10S-90 (“Cost Engineering Terminology”)
(October 10, 2019)

Concurrent Delay: Traditional Legal Consequences

- Time Extension Only (Excusable Delay)
- No Delay Damages for Contractor (Not Compensable)
- No Liquidated Damages for Owner
- Potential Impact on Propriety of Owner's Termination Decision in Default Termination Case

Concurrent Delay: Friend or Foe?

- Traditional Understanding:
 - Owner Pressing a Claim for Liquidated Damages
 - Owner Defending a Delay Claim
 - Owner Pressing a Termination Action
 - Owner Defending an Acceleration Claim



Concurrent Delay: AACE Recommended Practice

- Six Factors Influencing Concurrency Findings:
 1. Literal Concurrency v. Functional Concurrency
 2. Cause of Delay v. Effect of Delay
 3. Frequency, Duration, & Placement of Analysis Intervals
 4. Order of Insertion / Extraction in Stepped Implementation
 5. Hindsight v. Blindsight
 6. Critical Path: Least Float v. Negative Float

- Source: AACE 29R-03 (“Forensic Schedule Analysis”), § 4.2(D) (2011)

The Critical Path: Basic Definition

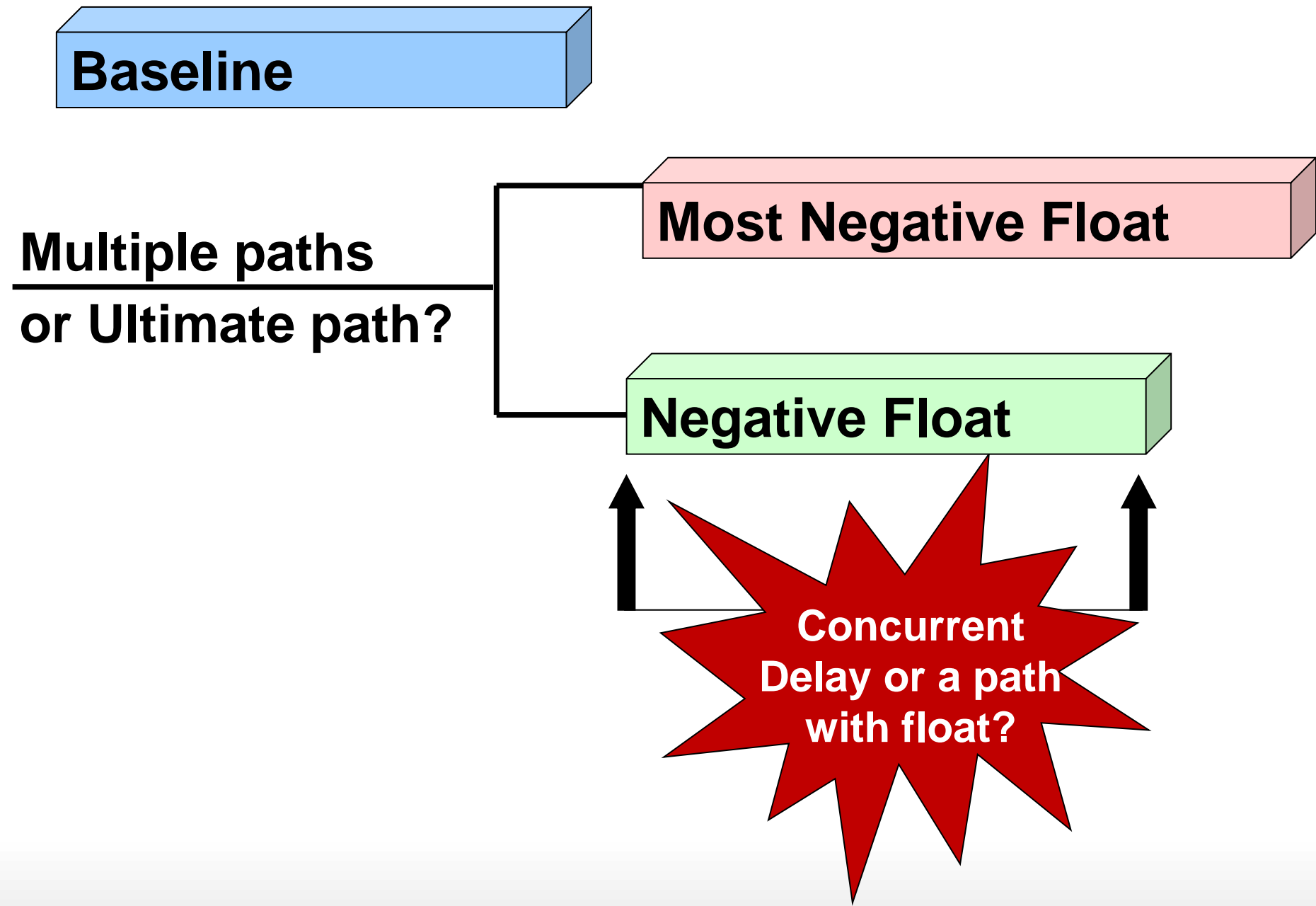
“The longest continuous chain of activities (may be more than one path) which establishes the minimum overall project duration.”

-AACE Recommended Practice No. 10S-90 (“Cost Engineering Terminology”) (October 10, 2019)

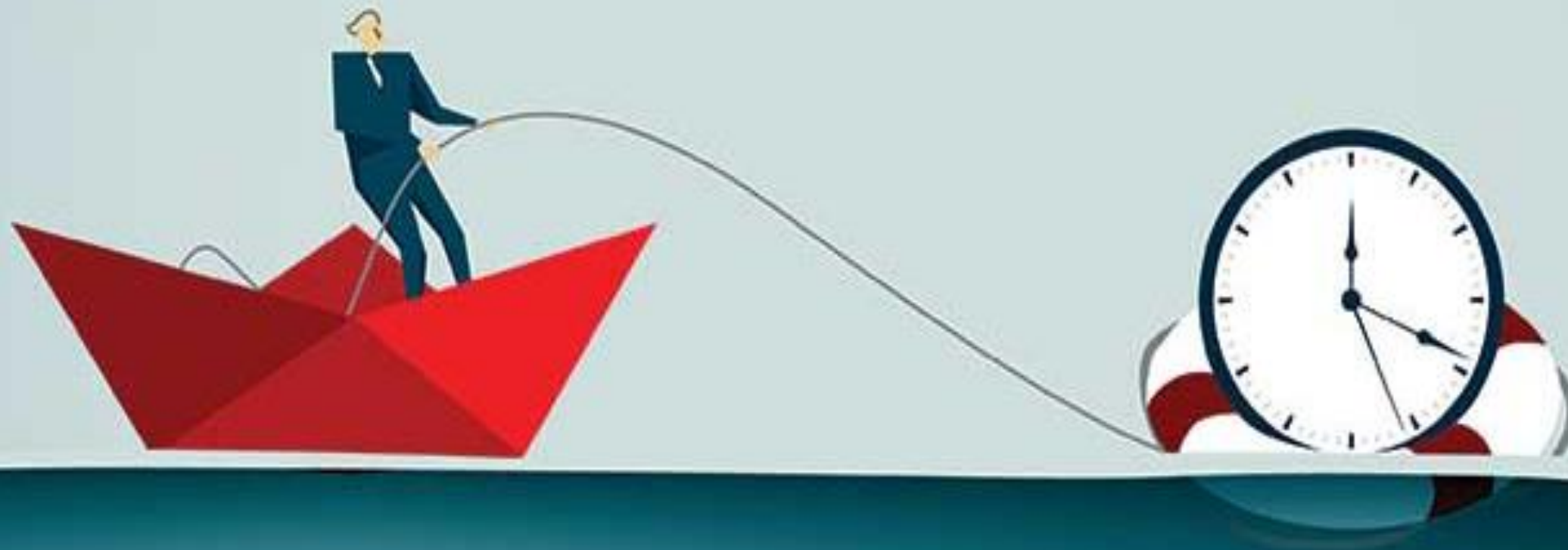
The Critical Path: When is it Evaluated?

- The Critical Path specified on the Baseline?
- The Critical Path specified on a Schedule Update?
 - If so, which update?
- The As-Built Critical Path?
 - Schedulers often refer to the as-built critical path as the controlling path throughout the project

What is Critical?



Project Risk Shift Float Consumption



Float: Definitions

- **Float**

- **Total Float:**

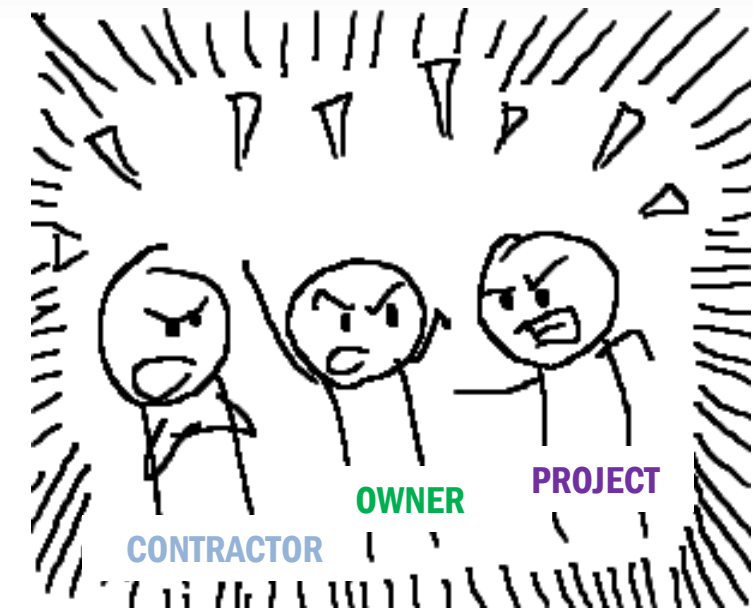
- The number of days that an activity can be delayed without causing a delay to Project Completion
 - **Defines the Project's Critical Path**

- **Free Float:**

- The number of days an activity can be delayed without causing a delay to its successor activity
 - **Defines Subnetwork criticality and near-critical paths**

Traditional Perspectives: Ownership of the Float

- Who Owns the Float?
 - Contractor Argument: Contractor controls means & method, set the schedule, and created the float.
 - Owner Argument: Owner bought the project, contracted for scheduling services, and owns the resulting benefits (i.e. float).
 - Argument for Project: The project is the shared objective and float is a shared resource consumed on a first come, first serve basis.



Ownership of the Float: AACE

- “In the absence of contrary contractual language, network float, as opposed to project float, is a shared commodity between the owner and the contractor. In such a case float must be shared in the interest of the project rather than to the sole benefit of one of the parties to the contract.”

-AACE, Recommended Practice No. 29R-03, § 1.5(B) (2011)

Float Sequestration: Owners By Contract

- Methods and examples by which Owners sequester float for themselves:
 - Contract Order of Precedence for Float Consumption
 - Contract mandated “not to exceed” activity durations/float values
 - Contract mandated Review/Approval Durations
 - Contract Required Weather Day Restrictions (Calendar or Placeholder Activities)



Float Sequestration: Contractors When Preparing Schedule

- Methods and examples by which Contractors sequester float for themselves:
 - Inflation of activity durations
 - “Weather Days” not utilized
 - Alternative Working Day Calendars
 - Lags & Constraints (Activity and Float Constraints)
 - Summary Activities (Finish-to-Start versus Start-to-Start)





Project Risk Shift

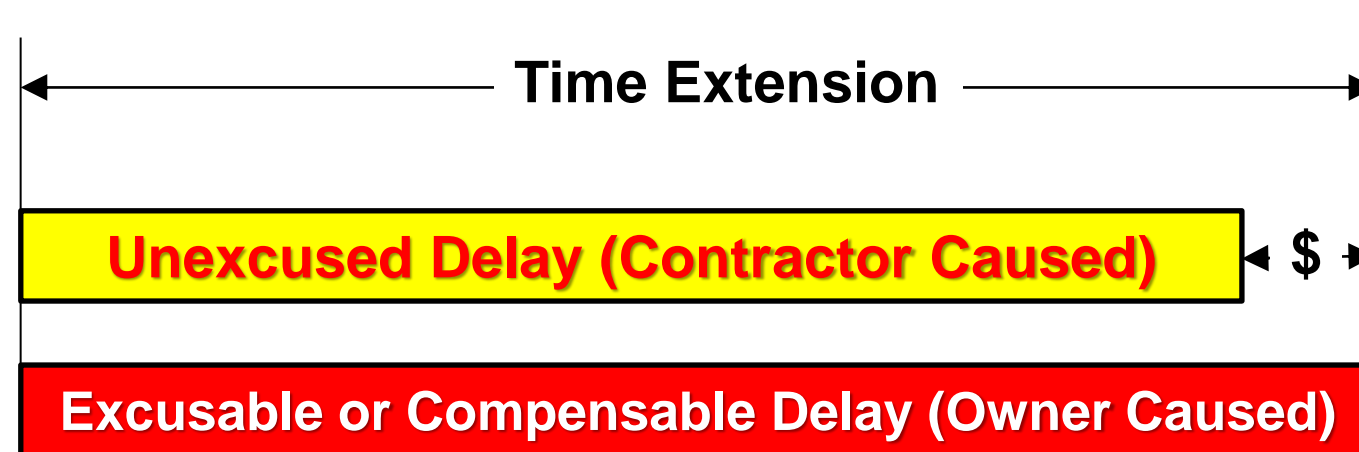
Contractually Re-defining Concurrency

Defining Effect of Concurrency Via Contract

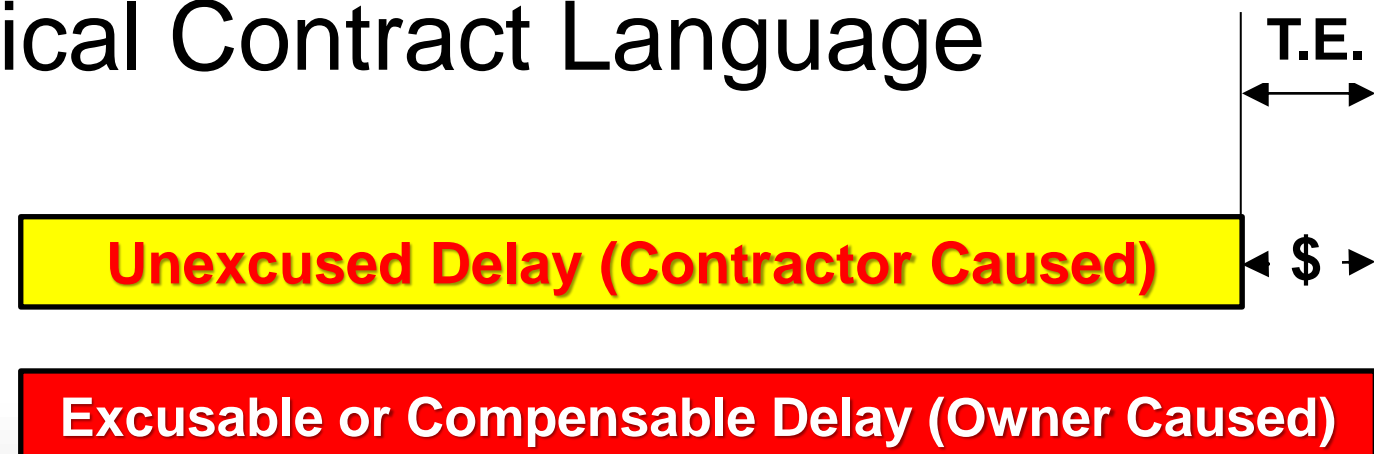
- **Contract Provision Example:**
 - “If an Unexcused Delay occurs concurrently with either an Excusable Delay or a Compensable Delay, the maximum extension of the Contract Time shall be the number of Days, if any, by which such Excusable Delay or Compensable Delay exceeds the number of Days of such Unexcused Delay.”

Hypothetical Contract Language

Conventional Resolution



Hypothetical Contract Language



Defining Meaning of Concurrency Via Contract

“Concurrency analyses should always be consistent with the contract’s definition of criticality. While it is beyond the scope of this document to catalogue the variations in contractual specifications, one relatively common definition is worth mentioning. Namely, some contracts include in the definition of concurrent delay that it cause a critical path delay. The requirement that the concurrent delay be critical, in effect, excludes other delay events with float values greater than the critical path from being evaluated for offsets against compensable delays. This view comports with the Literal Theory. It can be argued that absent such contract definition, non-critical delays can be used to offset compensable delay on a day-for-day basis after the expenditure of relative float against the critical path. This view comports with the Functional Theory.” -ACE 29R-03, § 4.2(D)(2) (2011)



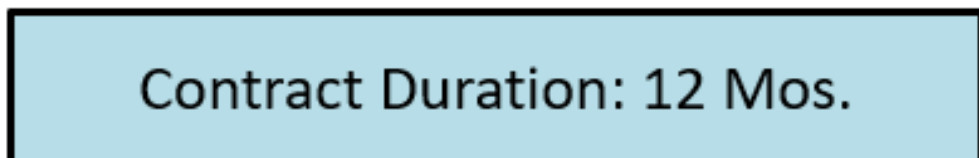
**Project Risk Shift
Concurrency As A Defense To
Liquidated Damages**



Hypothetical Circumstances

Scenario No. 1 (Concurrent Delay)

NTP



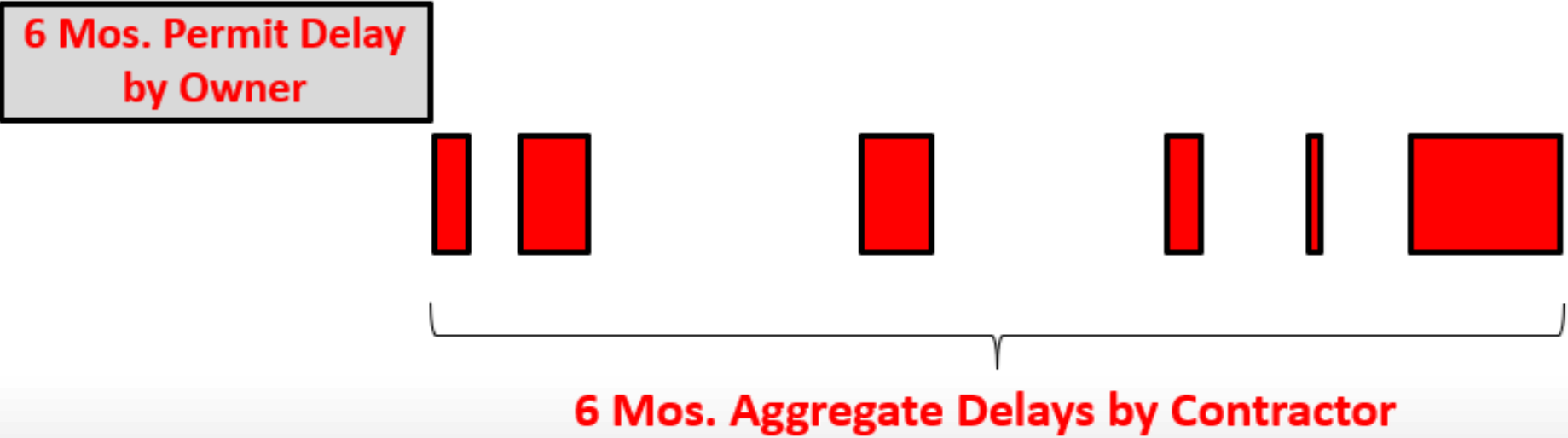
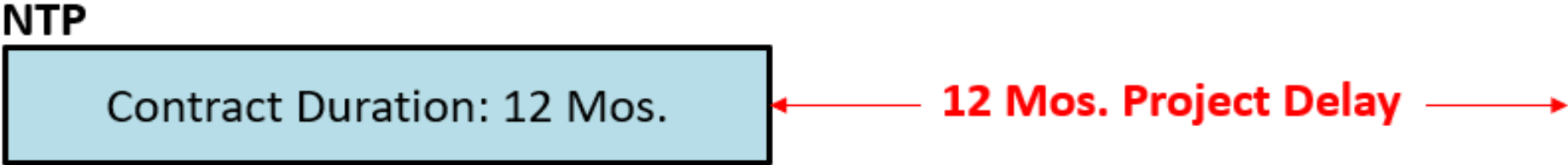
← 12 Mos. Project Delay →

NTP



Hypothetical Circumstances

Scenario No. 2 (Owner-Caused Delay)



CDR-3260

Damages Without a Cause: Liquidated Damages Are a Penalty When Owners Recover Damages for Their Own Delay

**Christopher J. Brasco; Kathleen O. Barnes;
James G. Zack, Jr. CFCC FAACE Hon. Life;
Kenji P. Hoshino, CFCC PSP; and Matthew D. Baker**

Abstract—An owner's delay has traditionally been recognized as either an absolute or partial contractor defense against an assessment of liquidated damages. However, owners are increasingly employing contractual provisions and arguments that seek to prevent contractors from raising owner-caused or an owner's concurrent delay as a defense to the assessment of liquidated damages. The law has long declined to enforce liquidated damages provisions which function as penalties. However, attempts to preclude contractors from raising owner-caused delay as a defense can render the assessment of liquidated damages a penalty.

The paper will discuss the fundamental legal principles related to the enforcement of liquidated damages provisions including the law's evolving approach to apportioning liquidated damages assessments in the face of the owner's delay, concurrent or otherwise. In addition, a legal framework for contractors to challenge assertions that they have waived their ability to raise the owner's concurrent delay as a defense to an assessment of liquidated damages will be presented. The paper also will provide recommendations for how contractors can best position themselves to defeat an assessment of liquidated damages.

CDR-3260.1

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Damages Without a Cause: Exemplar Case

Greg Opinski Constr., Inc. v. City of Oakdale, 199 Cal. App. 4th 1107 (Ct. App. 2011)

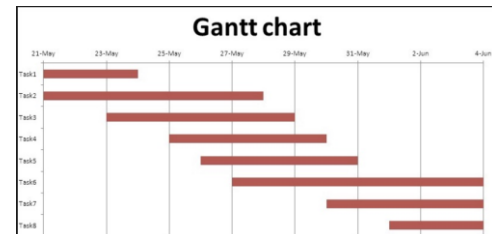
“If the contractor wished to claim it needed an extension of time because of delays caused by the city, the contractor was required to obtain a written change order by mutual consent or submit a claim in writing requesting a formal decision by the engineer. It did neither. The court was correct to rely on its failure and enforce the terms of the contract. It makes no difference whether Opinski's timely performance was possible or impossible under these circumstances.”

Centrality of Causation

- “Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”

-Restatement (Second) of Contracts § 356 (1981) (emphasis added)

Evolution of the Enforcement of LDs



1931
Gantt Chart
used for the Hoover Dam Project

1957
DuPont successfully implements **CPM** with Remington Rand Univac on a chemical plant project

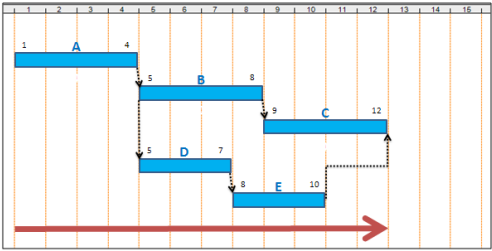
1983
Primavera's (P3) first release on MS-DOS platform

Evolution of Scheduling Technology

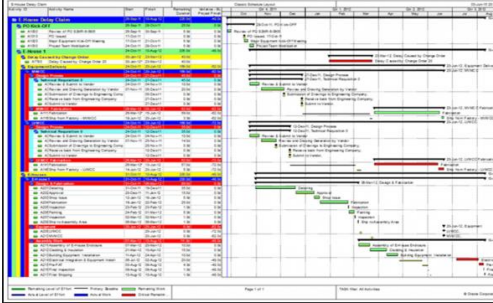
Evolution of Law on LDs

1907
LDs Generally Recognized in the U.S.
(*United States v. Bethlehem Steel Co.*, 205 U.S. 105, 119 (1907))

1914
Rule Against Apportionment
(*United States v. United Eng'g & Constr. Co.*, 234 U.S. 236, 242 (1914))



2000
Federal Circuit adopts **Rule of Clear Apportionment**
(*Sauer Inc. v. Danzig*, 224 F.3d 1340 (Fed. Cir. 2000))



2011
"Rule" Abandoning Apportionment applied (*Greg Opinski Constr., Inc. v. City of Oakdale*, 199 Cal. App. 4th 1107, 1112 & 1121 (Ct. App. 2011))

Arguments Against Damages Without a Cause

- Departure from historic evolution of apportionment of liquidated damages rooted in causation
- Allowance of liquidated damages regardless of cause constitutes an unenforceable penalty
- Sword v. Shield Distinction – Waiver of affirmative recovery doesn't justify a windfall
- Estoppel / Waiver – Both parties complicit in contemporaneous failure to press claims

What Can Contractors Do?

- Review the Contract
 - LD provision
 - Procedural requirement for asserting claim/time extension
 - Definition of concurrency?
- Follow all contractual requirements for obtaining a time extension
- Educate the project / claims team on principles of timely claim resolution
 - Concurrency is not a cure-all

An illustration of a city street during a storm. A lightning bolt strikes a traffic light, causing a bright explosion. A red car is in the foreground, and a train is on an elevated track in the background. Rain is falling, and there are trees and buildings in the scene.

Project Risk Shift

Force Majeure: The Art of Handling the Unexpected

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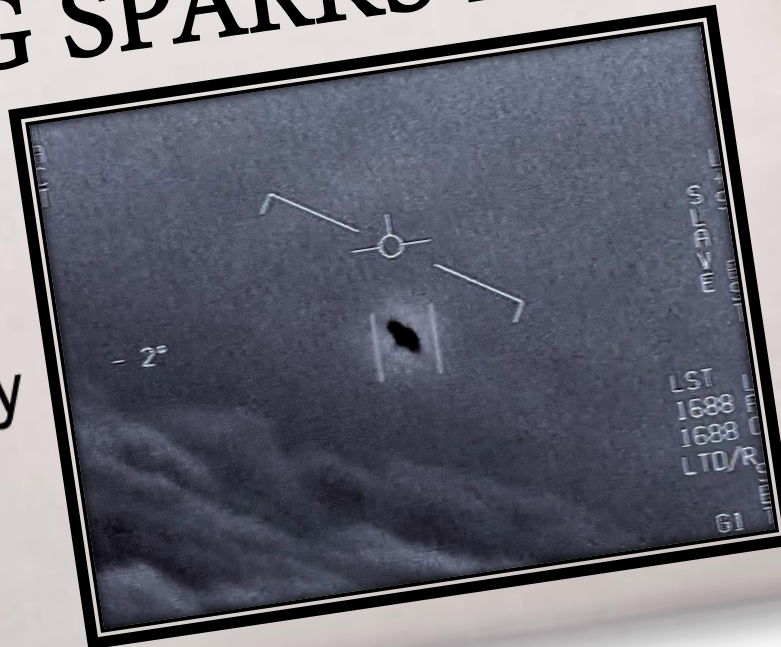
Monday 5th June

Issue: 240104

First Edition

UFO SIGHTING SPARKS NEW QUESTIONS

How UFO Sightings Went From Conspiracy Theory To A Serious Government Inquiry



Force Majeure Clause Overview

- Force Majeure = French for “superior force”
- Defined by Contract
- Normally “[1] unforeseen events [2] beyond the control of both parties that [3] either make contract performance impracticable or frustrate the purpose of such performance”
 - 2A Bruner & O'Connor Construction Law § 7:229 (“Project risks – Force majeure risks”) (quotation omitted)
- Burden of Proof: Party Asserting Performance Excused
- Effect: Excuses Contractual Performance

Common Force Majeure Clause Structures

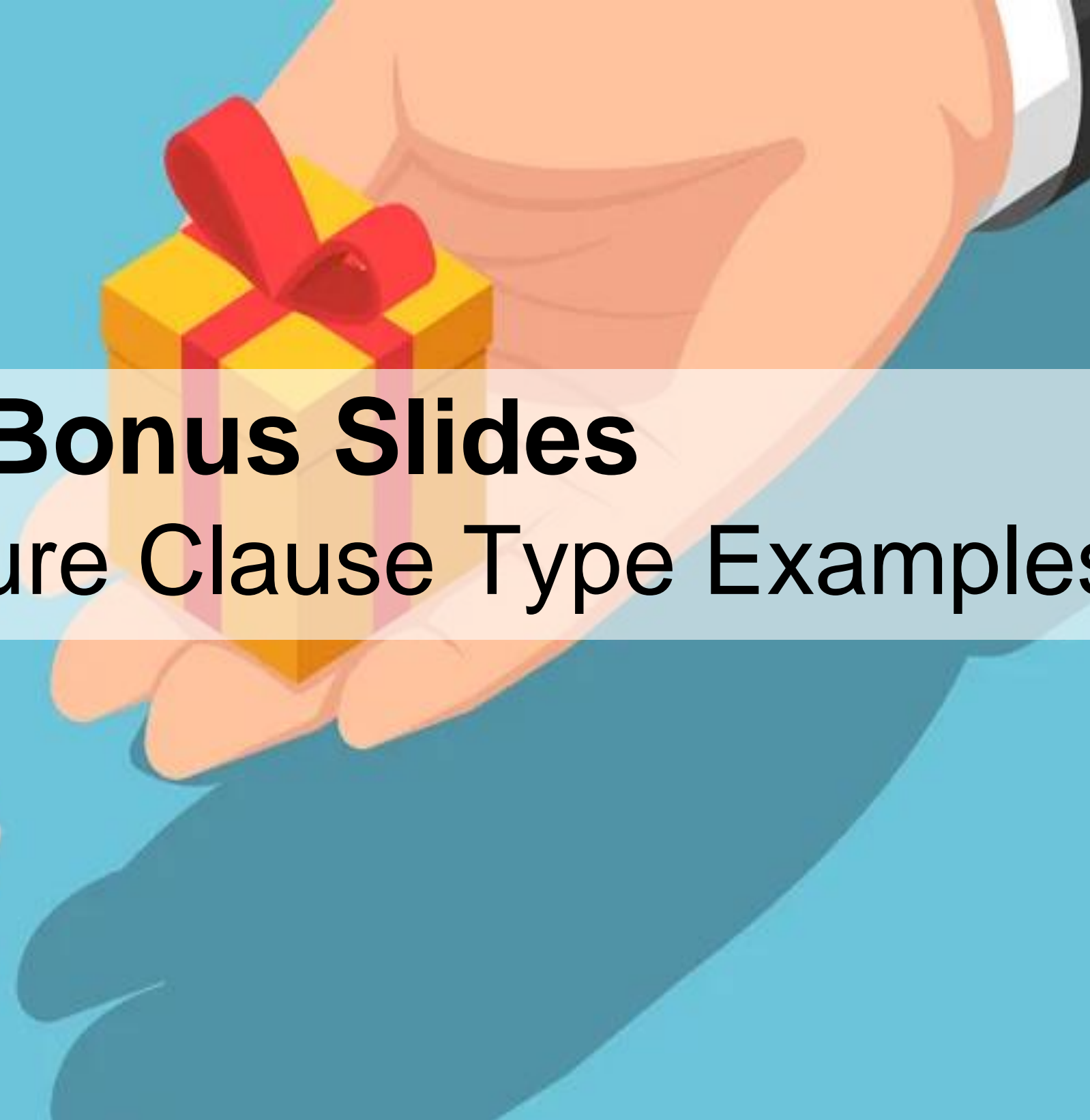
- Broad Clause: No List of Triggering Events
- Specific Clause: List of Triggering Events
- Hybrid: List of Triggering Events & Catchall



Specific Clause: Strict Interpretation

- “Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.”

-Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902–03, 519 N.E.2d 295, 296 (1987)

A large, stylized illustration of a hand holding a small yellow gift box with a red ribbon. The hand is positioned in the upper right quadrant of the slide. The background is a light blue gradient.

Bonus Slides

Force Majeure Clause Type Examples



Broad Clause: Example

- “If the performance of any part of this contract by [either party] is prevented, hindered or delayed by reason of any cause or causes beyond the control of [either party], as the case may be, and which cannot be overcome by due diligence, the party affected shall be excused from such performance ...”

- Source: West's McKinney's Forms Uniform Commercial Code § 2-301,
Form 13

Specific Clause: Example

- “9. Force Majeure. [The Performing Party] shall not be deemed to have failed to meet any obligation under this agreement if [it’s] performance or failure to perform or delay in performance has been caused by any Act of God, war, strike ... electrical outage, fire, explosion, flood, blockade, governmental action, or other catastrophe (hereafter, “force majeure”).”

- Source: Kleberg Cty. v. URI, Inc., 540 S.W.3d 597, 604 (Tex. App. 2016), rev'd, 543 S.W.3d 755 (Tex. 2018)

Hybrid Clause: Example

- “If either party to this [contract] shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.”

- Source: Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902, 519 N.E.2d 295 (1987)



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