AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

Fall 2024

COMMITTEE NEWS

Fidelity & Surety Law

Delay Claims- What Are They? What Are The Different Types?


Heather F. Shore and
Andrew G. Vicknair

I. What is a delay claim?

Like it or not, responsibility for delays is one of the most common causes of disputes on construction projects. Delays often lead to claims because they will almost always result in additional costs or time, or both, for contractors of all tiers. A delay on a construction project is broadly considered to be a stretching out of the time for completion of certain key milestone scopes of work that impact the project's completion date due to some circumstances or events that were not reasonably anticipated when the project began.[1] While delays can be caused by any number of events, the most common include: defective plans and specifications; design changes; severe weather and other, similar unforeseeable events; unforeseen or differing site conditions; unavailability of materials or labor; labor inefficiencies or stoppage; contractor negligence; and owner influences, including construction changes or outright interference. If the project schedule is not recovered following

1 2 Construction Law ¶ 6.01 (Matthew Bender ed., 2024).

Read more on page 15

In This Issue

Chair Message

From Deep in the Heart of Texas – the 2025 FSLC Midwinter Meetings and Conference

Blake Wilcox
Chair, Fidelity & Surety

Liberty Mutual Insurance Company

We are absolutely thrilled to invite you to attend our 2025 FSLC Midwinter Meetings and Conference on January 15 through 17, 2025 in the vibrant and eclectic city of Austin, Texas! Known for its lively music scene, innovative spirit, and delicious food, Austin provides the perfect backdrop for our 2025 FSLC Midwinter Conference. With its dynamic blend of culture and creativity, the city promises to inspire and energize all who attend. The Austin Marriott Downtown, only steps away from Lady Bird Lake and popular shops and restaurants, provides the ideal location to explore this exciting city.

Construction Program - Who will be our next President and how will her or his administration affect federal construction projects over the next four years? What do we need to know as practitioners about the business and law of federal contracts? How do we protect our clients and promote profitable business with the federal government? Panel Chairs Michele Killebrew of Liberty Mutual, and John Sebastian and Robert Niesley of Watt, Tieder, Hoffar & Fitzgerald, LLP have assembled an all star group of panelists for the January 16, 2025 program entitled: "Contracting With The Feds: A Survival Guide". The day starts with senior executives from SFAA, NASBP, AGC, Liberty Mutual and CHUBB talking about what their organizations view as the hot issues in federal construction for the next four years. Additionally, there will be expert panels talking about the laws affecting federal contractors; forums for dispute resolution with the federal government; updates on False Claims Act; doing business with the federal government internationally; takeover versus tender considerations; T4D and T4C considerations; and the federal debarment process, how it works and how to survive. We are very excited to put on this program in an important time when our nation's leadership is changing and we as lawyers need to do our best to guide our clients in changing times.

Fidelity Program - Co-chaired by Frank Marsico of Watt, Tieder, Hoffar & Fitzgerald, LLP, Ken West of Chubb, and Scott Schmookler of Gordon Rees, the Fidelity Program will consist of a day and a half of programing on Thursday and Friday morning under the theme of "Trial and Error? How Jurors Actually Perceive Common Fidelity Issues and Evidence". Professionals who are regularly involved and experienced with handling fidelity/commercial crime policy claims are obviously quite familiar with the typical legal and factual issues that accompany such claims, including but not limited to employee theft, direct causation, ownership of property, and termination of coverage. While such professionals *themselves* may have developed their own understanding of such issues, *how would jurors who have little or no background* in such issues actually understand, interpret and apply relevant policy provisions,

trial testimony and exhibits, and ultimately reach a verdict in favor of the insurer or insured for these common issues? This highly-interactive program will provide presentations from industry professionals and outside counsel for each of the four foregoing topics, followed by comparisons of related, polled questions from each of you in the audience, versus videotaped mock juror deliberations revealing how actual, mock jurors themselves discussed, analyzed and *actually decided* key issues for the insurer or the insured. This program will forever alter your "cost-benefit" assessment of the risks of going to trial versus settlement!

Surety Program – Amy Bentz of Bentz Law Firm, Dave Kotnik of Westfield Group and Matt Davis of Paskert Divers Thompson are co-chairing the surety portion of the program on January 17. 'A Deep Dive into Advanced Performance Bond Strategies' will cover the full spectrum of performance bond challenges. Distinguished panelists consisting of surety professionals, expert consultants and outside surety counsel will analyze issues such as the risks and rewards of pre-claim surety intervention, whether to finance the principal, claim investigation issues and strategies, and performance option selection issues. Additionally, the panelists will discuss legal and factual defenses to obligee claims and defraying costs through general liability or subcontractor default insurance policies. Finally, the program will include a state of the industry presentation analyzing the impacts on the surety industry resulting from the current economic conditions, including financing and construction cost escalations.

As is customary, our annual FSLC business meetings will take place on Thursday, January 15, 2025.

We are very excited and hope to see you at next year's FSLC Midwinter must attend event!

Connect with Fidelity & Surety Law

website

Stay Connected with TIPS

We encourage you to stay up-to-date on important Section news, TIPS meetings and events and important topics in your area of practice by following TIPS on **Twitter** @ABATIPS, joining our groups on **LinkedIn**, following us on **Instagram**, and visiting our **YouTube** page! In addition, you can easily connect with TIPS substantive committees on these various social media outlets by clicking on any of the links.

Member Roster

Chair
John Wilcox
Liberty Mutual Group
1001 Fourth Ave, FI38
Seattle, WA 98154
(206) 473-3264
blake.wilcox@libertymutual.com

Chair-Elect
Bruce Corriveau
Travelers
111 Schilling Rd
Hunt Valley, MD 21031-1119
(304) 2085324
bcorrive@travelers.com

Council Representative
Jeffrey Price
Manier & Herod
1201 Demonbreun St, Ste 900
Nashville, TN 37203-3140
(615) 742-9358
jprice@manierherod.com

Scope Liaison
Aaron Greenbaum
Pusateri Johnston Guillot & Greenbaum
1100 Poydras St, Ste 2250
New Orleans, LA 70163-2300
(504) 620-2500
aaron.greenbaum@pjgglaw.com

Immediate Past Chair
Christopher Ward
Clark Hill PLC
2600 Dallas Pkwy, Ste 600
Frisco, TX 75034-8698
(214) 651-4722
cward@clarkhill.com

ABA Staff
Jeane Dubose
American Bar Association
321 N Clark St, Fl 18
Chicago, IL 60654-4740
(312) 988-5631
Jeane.DuBose@americanbar.org

Technology Vice-Chairs
Jordan Connell
Clark Hill PLC
901 Main St, Ste 6000
Dallas, TX 75202-3748
(214) 651-2039
cconnell@clarkhill.com

Gretchen Eck
2105 S Bates Ave
Springfield, IL 62704-4363
(847) 3967101
Gretchen.Eck@LibertyMutual.com

Matthew Kalin
Travelers
24 Bridle Path
Walpole, MA 02081-2286
(617) 7216625
kato02467@yahoo.com

Melissa Lee
Manier & Herod
1201 Demonbreun St, Ste 900
Nashville, TN 37203-3140
(615) 742-9372
mlee@manierherod.com

Brian Rice
Riskscape Strategies, LLC
21551 Kings Bend Dr
Kingwood, TX 77339-5341
(917) 561-0171
brice@riskscapellc.com

Membership Vice-Chairs
Michael Cronin
Markel Surety
9500 Arboretum Blvd, Ste 400
Austin, TX 78759-6320
(512) 684-3449
Michael.Cronin@Markel.com

Amanda Marutzky
Watt Tieder Hoffar & Fitzgerald LLP
4 Park Plz Ste 1000,
Irvine, CA 92614-2552
(949) 852-6700
amarutzky@watttieder.com

Ty Thompson
Paskert Divers Thompson PA
100 N Tampa St, Ste 3700
Tampa, FL 33602-5835
(813) 229-3500
tthompson@pdtlegal.com

Grace Winkler Cranley
Dinsmore & Shohl LLP
222 W Adams St, Ste 3400
Chicago, IL 60606
(312) 775-1744
grace.cranley@dinsmore.com

Diversity Vice-Chairs
David Bresel
Zurich
92 E Via Plaza Nueva
Santa Fe, NM 87507-8069
(410) 559-8715
dbresel@gmail.com

Ryan Delaune
Clark Hill PLC
901 Main St, Ste 6000
Dallas, TX 75202-3748
(214) 683-9219
rdelaune@clarkhill.com

Morgan Fletcher
Chubb
202B Halls Mill Rd
Whitehouse Station, NJ 08889
(973) 651-8464
mfletcher112@gmail.com

Vice-Chairs
Christine Alexander
Arch Insurance Group Inc
1600 Cherry St, Ste 1500
Philadelphia, PA 19102
(215) 606-1596
calexander@archinsurance.com

Emory Allen
Clark Hill PLC
2600 Dallas Parkway, Ste 600
Frisco, TX 75034
eallen@clarkhill.com

Luis Aragon
Liberty Mutual Group
1001 4th Ave, Ste 3800
Seattle, WA 98154-1119
(206) 473-6812
luis.aragon@libertymutual.com

Richard Baudouin
1140 Louisiana Ave,
New Orleans, LA 70115-2409
(504) 420-8564
rbaudouin@skywardinsurance.com

Will Beasley
Merchants Bonding
5502 Vanderbilt Ave
Dallas, TX 75206-6026
wbeasley@merchantsbonding.com

Ashley Belleau
Lugenbuhl Wheaton Peck et al
601 Poydras St, Ste 2775
New Orleans, LA 70130
(504) 568-1990
abelleau@lawla.com

Amy Bentz
Bentz Law Firm PC
680 Washington Rd Ste 200,
Pittsburgh, PA 15228-1948
(412) 563-4500
aebentz@bentzlaw.com

Lisa Block
20 Cardinal Ct,
Kendall Park, NJ 08824-1401
(732) 690-0365
kcablock@gmail.com

Jonathan Bondy
Chiesa Shahinian & Giantomasi PC
105 Eisenhower Parkway
Roseland, NJ 07068
(973) 530-2052
jbondy@csglaw.com

Michael Bramhall
Intact Insurance
1004 Washington Ave
Cinnaminson, NJ 08077-2213
(856) 288-6594
mbramhall@yahoo.com

Lee Brewer
Lipson Neilson PC
6524 Portrait Cir
Columbus, OH 43081-7027
(614) 228-6131
lbrewer@lipsonneilson.com

Shannon Briglia
Smith Currie & Hancock LLP
1921 Gallows Road, Ste 850
Tysons, VA 22182
(703) 506-1990
sjbriglia@smithcurrie.com

Charles Brinkley
Berkley Financial Specialists
4031 Norwich Dr
Garland, TX 75043-7287
(214) 205-1061
abrinkley@berkleyfs.com

Connor Cantrell
The Hustead Law Firm
4643 S Ulster St, Ste 1250
Denver, CO 80237-4307
(303) 721-5000
clc@thlf.com

Ellen Cavallaro
Berkley Surety Group LLC
412 Mount Kemble Ave, Ste 310N
Morristown, NJ 07960-6669
(973) 7755041
ecavallaro@berkleysurety.com

Member Roster | continued

Christina Craddock
Liberty Mutual Group
3011 Sutton Gate Dr, Ste 300
Suwanee, GA 30024
(678) 4173913
Christina.Craddock@LibertyMutual.com

Kimberly Czap
Philadelphia Indemnity Insurance Company
PO Box 3636,
Bala Cynwyd, PA 19004-3636
(610) 227-1438
kimberly.czap@phly.com

Jessica Derenbecker
Arch Insurance Company
440 Beverly Garden Dr
Metairie, LA 70001-2108
(504) 4277794
jderenbecker@archinsurance.com

CharCretia Di Bartolo
Liberty Mutual Group
25 Sparhawk Ter
Marblehead, MA 01945-1522
(978) 539-3645
Charcretia.DiBartolo@libertymutual.com

Nathan Diehl
Paskert Divers Thompson PA
100 N Tampa St, Ste 3700
Tampa, FL 33602-5835
ndiehl@mpdlegal.com

Ryan Dry
Dry Law PLLC
909 18th St
Plano, TX 75074-5830
rdry@drylaw.com

Robert Duke
Markel Surety
8161 Maple Lawn Blvd, Ste 120
Fulton, MD 20759
(240) 709-3281
robert.duke@markel.com

Nina Durante
Liberty Mutual Group
PO Box 34526
Seattle, WA 98124-1526
(206) 4735237
nina.durante@libertymutual.com

Bruce Echigoshima
Liberty Mutual Group
23281 NE 17th St
Sammamish, WA 98074-4447
(206) 473-3349
bruce.echigoshima@libertymutual.com

Rebecca Farina
Zurich North America
770 Maine Ae SW, Apt 912
Washington, DC 20024-2599
(213) 952-6645
becky.farina@zurichna.com

John Fatino
Whitfield & Eddy PLC
699 Walnut St, Ste 2000
Des Moines, IA 50309-3948
(515) 288-6041
fatino@whitfieldlaw.com

Jennifer Fiore
Dunlap Fiore LLC
6700 Jefferson Hwy, Blg 2
Baton Rouge, LA 70806-8287
(225) 282-0652
jfiore@dunlapfiore.com

Robert Flowers
Travelers
1 Tower Sq, MN06
Hartford, CT 06183-0001
(860) 277-7150
rflowers@travelers.com

Katherine Freeman
CNA
15 Havercroft Ln
Greenville, SC 29615-5556
(864) 901-6899
katherine.freeman@cnasurety.com

Regina Gaebel
Allianz Trade
662 S Edgewood Ave
Elmhurst, IL 60126-4614
(630) 728-7342
regina.gaebel@allianz-trade.com

Drew Gentsch
Whitfield & Eddy PLC
699 Walnut St, Ste 2000
Des Moines, IA 50309-3948
(515) 246-5514
gentsch@whitfieldlaw.com

Jeffrey Goldberg
1811 Ridgelee Rd
Highland Park, IL 60035-4348
(847) 273-1268
jeff_goldberg@swissre.com

Daniel Gregerson
Gregerson Rosow Et Al
100 Washington Ave S, Ste 1550
Minneapolis, MN 55401-2110
(612) 338-0755
dangregerson@grjn.com

David Grycz
20087 N Park Hill Ct
Deer Park, IL 60010-3655
(312) 360-1566
david.grycz@rlicorp.com

Omar Harb
Lipson Neilson PC
3910 Telegraph Rd, Ste 200
Bloomfield Hills, MI 48302-1461
(248) 282-8100
oharb@lipsonneilson.com

David Harris
Bovis, Kyle, Burch & Medlin, LLC
200 Ashford Center North, Ste 500
Atlanta, GA 30338
(678) 3383931
dah@boviskyle.com

Stacy Hipsak Goetz
Liberty Mutual Group
2815 Forbs Ave, Ste 102
Hoffman Estates, IL 60192-3702
(847) 396-7140
stacy.hipsakgoetz@libertymutual.com

Michael Hurley
Berkley Surety
412 Mount Kemble Ave, Ste 310N
Morristown, NJ 07960-6669
(973) 775-5040
mhurley@berkleysurety.com

Patrick Hustead
The Hustead Law Firm
4643 S Ulster St, Ste 1250
Denver, CO 80237-4307
(303) 721-5000
pqh@thlf.com

Iman Hyder-Eliz
American Arbitration Association
2710 Club Meadow Dr
Garland, TX 75043-1104
(678) 686-6001
hyderelizI@adr.org

Heather Jonczak
Carlton Fields PA
700 NW 1st Ave, Ste 1200
Miami, FL 33136-4118
(305) 530-0050
hjonczak@carltonfields.com

Christopher Joseph
Adams and Reese LLP
450 Laurel St, Ste 1900
Baton Rouge, LA 70801-1820
(504) 390-5804
christopher.joseph@arlaw.com

Brian Kantar
Chiesa Shahinian & Giantomasi PC
105 Eisenhower Parkway
Roseland, NJ 07068
(973) 5302112
bkantar@csglaw.com

Patrick Kingsley
Stradley Ronon Stevens & Young LLP
2005 Market St, Ste 2600
Philadelphia, PA 19103-7018
(215) 564-8029
pkingsley@stradley.com

Christina Kocke
Zurich North America
215 Savanna Drive
Luling, LA 70070
(504) 258-8509
tina.kocke@zurichna.com

Todd Lerner
11030 Waycroft Way
N Bethesda, MD 20852-3215
tlerner@tlerner.com

Eric Levine
Crum & Forster
305 Madison Ave
Morristown, NJ 07960-6117
973) 4906732
eric.levine@cfins.com

Natalie Lewis
J.S. Held, LLC
55 Roswell St, Ste 300
Alpharetta, GA 30009-1979
(678) 530-7440
Natalie.Lewis@jsheld.com

Philip Lichtman
Mills Law Group
1397 Carroll Dr NW, Ste 100
Atlanta, GA 30318-3601
(813) 843-3131
klichtman@mills-legal.com

Gina Lockwood
Merchants Bonding Company
116 Northgate Rd
Riverside, IL 60546-1617
glockwood@merchantsbonding.com

Member Roster | continued

Megan Manogue
Berkley Financial Specialists
901 Dulaney Valley Rd, Ste 708
Towson, MD 21204-2683
(410) 372-6333
mmanogue@berkleyfinsecure.com

Rosa Martinez-Genzon
Anderson McPharlin & Conners LLP
707 Wilshire Blvd, Ste 4000
Los Angeles, CA 90017-3623
(213) 236-1653
rmg@amclaw.com

John McDevitt
Liberty Mutual Group
157 Berkeley St
Boston, MA 02116-5108
(617) 243-7918
john.mcdevitt@libertymutual.com

Christopher McKibbin
FCL LLP
439 University Ave, Ste 2300,
Toronto, ON M5G 1Y8
(416) 596-8331
cmckibbin@fcl-law.com

Shane Mecham
The Levy Craig Law Firm PC
4520 Main St, #1600
Kansas City, MO 64111
(816) 460-1810
smecham@levycraig.com

Stephani Miller
Liberty Mutual Group
PO Box 34526
Seattle, WA 98124-1526
(206) 473-3576
stephani.miller@libertymutual.com

Michael Morano
McElroy Deutsch Et Al
1300 Mount Kemble Ave
Morristown, NJ 07960-8009
(973) 425-4174
mmorano@mdmc-law.com

Kyle Murphy
IAT Insurance
11350 McCormick EP 2 RD, Ste 904
Hunt Valley, MD 21031-1077
(443) 660-7377
kyle.murphy@iatinsurance.com

Steven Nelson
Markel Surety
7943 Caruth Ct
Dallas, TX 75225-8125
(512) 330-1850
snelson@constructiondr.com

Robert Niesley
Watt Tieder Hoffar & Fitzgerald LLP
4 Park Plz, Ste 1000
Irvine, CA 92614-2552
(949) 852-6700
rniesley@watttieder.com

Robert O'Brien
Liberty Mutual Group
273 Palm Springs Dr
Fairfield, OH 45014-8636
(513) 867-3718
robert.obrien@libertymutual.com

Mark Oertel
Lewis Brisbois Bisgaard & Smith LLP
633 W 5th St, Ste 4000
Los Angeles, CA 90071
(213) 250-1800
mark.oertel@lewisbrisbois.com

Scott Olson
Nicholson Professional Consulting, Inc.
15511 State Highway 71 W, Ste 110-284
Bee Cave, TX 78738-2824
(512) 9139903
scott.olson@npcius.com

Dolores Parr
SDC CPAS LLC
5 Pepperdine Cir
Catonsville, MD 21228-5372
(410) 227-2794
parrsherin@gmail.com

Kelly Perry
Berkshire Hathaway Specialty Insurance
500 Northpark Town Center, 1100 Abernathy Road NE
Atlanta, GA 30328
(404) 302-7439
kelly.perry@bhspecialty.com

Mary Jean Pethick
Zurich North America
600 Red Brook Blvd, Ste 600
Owings Mills, MD 21117
(610) 209-9794
mary.jean.pethick@zurichna.com

Loren Podwill
Bullivant Houser Bailey PC
1 SW Columbia St, Ste 800
Portland, OR 97204-4022
(503) 499-4620
loren.podwill@bullivant.com

Derek Popeil
Chubb
202 Halls Mill Rd
Whitehouse Station, NJ 08889-3454
(908) 605-3009
dpopeil@chubb.com

Alana Porrazzo
Jennings Haug Keleher McLeod LLP
2800 N Central Ave, Ste 1800
Phoenix, AZ 85004
(602) 234-7800
alp@jhkmlaw.com

Denise Puente
Simon Peragine Smith & Redfearn LLP
1100 Poydras St, Ste 3000
New Orleans, LA 70163-3000
(504) 569-2983
denisep@spsr-law.com

Lauren Rankins
Watt Tieder Hoffar & Fitzgerald LLP
10 S Wacker Dr, Ste 1100
Chicago, IL 60606-7485
(313) 2196900
lrankins@watttieder.com

Edward Reilly
20 Overhill Road,
Summit, NJ 07901
(908) 432-9109
ereilly0523@gmail.com

Fred Rettig
State Farm Insurance
One State Farm Plaza, A-3
Bloomington, IL 61710-0001
(309) 766-5051
fred.rettig.c8f1@statefarm.com

Steven Rittmaster
Torre Lentz Gamell Gary & Rittmaster LLP
100 Jericho Quadrangle, Ste 309
Jericho, NY 11753-2702
(516) 240-8914
srittmaster@tlggr.com

Kenneth Rockenbach
Liberty Mutual Group
1001 4th Ave, # 38
Seattle, WA 98154-1119
(206) 4733350
kenneth.rockenbach@libertymutual.com

Cynthia Rodgers-Waire
Wright Constable & Skeen LLP
1 Olympic PL, Ste 800
Towson, MD 21204-4114
(410) 659-1310
crodgers-waire@wcslaw.com

Beth Rotenberg
23 Canterbury Rd
Denville, NJ 07834-9630
(973) 490-6574
beth.rotenberg@cfins.com

Chad Schexnayder
Jennings Haug & Cunningham LLP
2800 N Central Ave, Ste 1800
Phoenix, AZ 85004-1049
(602) 234-7830
CLS@JHC.Law

Ryan Springer
Emc Insurance
717 Mulberry St, Fl 10
Des Moines, IA 50309-3810
(515) 345-7506
ryan.j.springer@emcins.com

Jarrod Stone
Manier & Herod
1201 Demonbreun St, Ste 900
Nashville, TN 37203-3140
(615) 244-0030
jstone@manierherod.com

Shashauna Szczechowicz
Philadelphia Insurance Companies
PO Box 363
Bala Cynwyd, PA 19004-3636
(445) 236-7547
shauna.szczechowicz@phly.com

Rodney Tompkins
RJT Construction Inc Cons. Service
1 Park Plaza, Ste 600
Irvine, CA 92614
(949) 419-3840
rodneyjr@rjtconstruction.com

Patricia Wager
Torre Lentz Gamell Gary & Rittmaster LLP
100 Jericho Quadrangle, Ste 309
Jericho, NY 11753-2702
(516) 240-8969
pwager@tlggr.com

Taylor Ward
Manier & Herod
1201 Demonbreun St, Ste 900
Nashville, TN 37203-5078
(615) 509-3053
tward@manierherod.com

Member Roster | continued

Justin Wear
Manier & Herod
1201 Demonbreun St, Ste 900
Nashville, TN 37203
(615) 244-0030
jwear@manierherod.com

Ryan Weeks
Paskert Divers Thompson
100 North Tampa St, Ste 3700
Tampa, FL 33602
(813) 229-3500
rweeks@pdtlegal.com

Dominick Weinkam
Watt Tieder Hoffar & Fitzgerald LLP
1765 Greensboro Station Pl
Ste 1000
McLean, VA 22102
(703) 749-1056
dweinkam@watttieder.com

Gregory Weinstein
Weinstein Radcliff Pipkin LLP
8350 North Central Expy, Ste 1550
Dallas, TX 75206
(214) 865-6126
gweinstein@weinrad.com

Jennifer Whritenour
Intact Insurance Surety Group
One State Street Plaza, 31st Fl
New York, NY 10004
(973) 9535946
jwhritenour@intactinsurance.com

Scott Williams
Manier & Herod
1201 Demonbreun St, Ste 900
Nashville, TN 37203-3140
(615) 742-9370
swilliams@manierherod.com

Douglas Wills
Chubb
436 Walnut Street, WA10A
Philadelphia, PA 19106
(215) 6401835
dwills@chubb.com

Douglass Wynne
Simon Peragine Smith & Redfearn LLP
1100 Poydras St, 3000
New Orleans, LA 70163
(504) 569-2030
dougw@spsr-law.com

John Yi
Tokio Marine - HCC
801 S Figueroa St, Ste 700
Los Angeles, CA 90017-2523
(310) 957-3173
jyi@tmhcc.com

Frederick Zauderer
3801 Hudson Manor Ter, Apt 5R
Bronx, NY 10463-1107
(917) 301-3199
fmz3801@aol.com

Issues Presented In Check Fraud Recovery

Jeffrey S. Price
Manier & Herod, P.C.

jprice@manierherod.com
www.manierherod.com

The ultimate liability for forged, altered, and counterfeit checks is generally governed by Articles 3 and 4 of the Uniform Commercial Code ("UCC"). Checks are negotiable instruments, and the UCC outlines specific responsibilities and liabilities for banks in the check collection and payment process. Article 3 more generally governs the rules related to checks and other negotiable instruments. Article 4 focuses on the banks' rights and liabilities.

1. Customer Reporting Duties

Under the UCC § 4-406, banks are required to send account statements to their customers, who must then promptly examine these statements to identify any unauthorized signatures or alterations. Customers have a duty to notify the bank promptly after discovering any discrepancies. Typically, under the statute, customers have thirty (30) days. Failure to do so within the stipulated time frame can preclude the customer from asserting claims against the bank related to unauthorized signatures or alterations of similar nature occurring after the notice period.[1]

A customer must exercise "reasonable promptness" in examining his or her statement and "promptly notify" the bank of an unauthorized signature or alteration. Failure to do so precludes customer from asserting an unauthorized signature or alteration claim against the bank.[2] If the customer fails to report the first unauthorized signature or alteration within "a reasonable period of time, not exceeding 30 days," then the customer is precluded from asserting all subsequent unauthorized signatures or alterations "by the same wrongdoer" already paid by the bank.[3] There is absolute preclusion for one-year delays in a customer reporting an unauthorized signature or alteration.[4] These deadlines can be, and frequently are, shortened by contract between the drawee bank and drawer customer.[5]

2. Counterfeit Versus Altered Check

The distinction between counterfeit and altered checks is significant and well-defined. A counterfeit check is one that is created entirely from scratch and is designed to look like an actual, genuine check. It is a fraudulent imitation of an

1 *Bank of Nova Scotia v. HSBC Bank USA*, No. 04 CIV. 1662 (DC), 2005 WL 1423362 (S.D.N.Y. June 16, 2005).
2 UCC § 4-406(c), (d)(1) (Am. L. Inst. & Unif. L. Comm'n 2022).
3 UCC § 4-406(d)(2) (Am. L. Inst. & Unif. L. Comm'n 2022).
4 UCC § 4-406(f) (Am. L. Inst. & Unif. L. Comm'n 2022).
5 UCC § 4-103(a) (Am. L. Inst. & Unif. L. Comm'n 2022).

Read more on page 26

Chair Message

St. Paul Guardian Insurance Company v. Walsh Construction Company

John F. Fatino
Whitfield & Eddy, P.L.C.

***John F. Fatino**, Member, Des Moines, Iowa. 515-288-6041 or fatino@whitfieldlaw.com.*

Jasmine F. Carbin

***Jasmine F. Carbin,** J.D. Candidate, Drake University Law School, Whitfield & Eddy, P.L.C. assisted in the preparation of these materials.*

On April 29, 2024, the United States Court of Appeals for the Seventh Circuit issued a split 2-1 decision in *St. Paul Guardian Insurance Company v. Walsh Construction Company* that centered upon the question of whether, under Illinois law, a second-tier subcontractor's defective welds constituted "property damage" under its commercial general liability policies — which the Court answered in the negative.[1] The question arose under Illinois law in the context of the insurers' alleged duty to defend and indemnify the general contractor, who was named as an additional insured under the second-tier subcontractor's CGL policies, in relation to the owner's claims arising from the defective welds.[2] The Court affirmed the district court's ruling that there was no duty for the second-tier subcontractor's insurers to defend or indemnify the general contractor where the alleged "property damage" at issue was limited to the second-tier subcontractor's own work and, therefore, the underlying claims did not implicate potential coverage under the second-tier subcontractor's insurance policies.[3] The factual background and the Court's legal analysis are discussed below.

Background

In 2003, the City of Chicago contracted with Walsh Construction Company ("Walsh") to manage the construction of a canopy and curtain wall system at O'Hare International Airport (the "Project").[4] Walsh entered into a subcontract with Carlo Steel Corporation ("Carlo") to manufacture the canopy and curtain wall.[5] Carlo, in turn, entered into a second-tier subcontract with LB Steel, LLC ("LB Steel") to manufacture and install the steel columns to support the wall and canopy.[6] Per the second-tier subcontract, LB Steel added Walsh as an additional insured under its three commercial general liability insurance policies (collectively, the "CGL Policies"). The second-tier subcontract also included an indemnity provision that "required LB Steel to indemnify Carlo and Walsh for any property damage resulting from LB Steel's negligent performance."[7]

Read more on page 34

1 *St. Paul Guardian Ins. Co. v. Walsh Constr. Co.*, 99 F.4th 1035 (7th Cir.), *reh'g denied*, 2024 WL 2745117 (7th Cir. 2024).

2 *Id.* at 1038-39.

3 *Id.* at 1038.

4 *Id.* at 1037.

5 *Id.*

6 *Id.*

7 *Id.* at 1038.

Connection and Risk: Relationship Building In Underwriting

David Harris

Scott Williams

Establishing a Connection in Surety – Why Does it Matter?

We begin this article with a story that may be familiar to many professionals. We all want to feel a connection to others in our personal and professional lives. In business, the strength of that connection (which also requires excellent work) may be the difference when it comes to choosing a business or trade partner and/or choosing whether to continue or end such a relationship.

For example, in the fall of 2001, a newly licensed lawyer walked into a local bank on the corner of Fourth and Church Street in Anytown, U.S.A. at the special invitation of the bank's manager. The young lawyer purposefully strode past the teller windows to the "back of the bank" where offices with doors are located. The bank's manager greeted the new lawyer with a firm handshake and a broad smile, then quickly invited him into a large office and closed the door.

After exchanging pleasantries and congratulating the new lawyer on his achievements and new job with the law firm just down the block, the bank's manager offered the new lawyer a higher-than-typical interest rate on a checking account, along with a pre-approved "new professional" mortgage with a low interest rate. The bank's manager then introduced the new lawyer to his own "personal banker," who would be "on call" to address all of the new lawyer's banking needs.

The new lawyer left the bank beaming with pride, along with a new checking account and a loan commitment, the latter of which he would use to hit the housing market that weekend. No red tape. No prequalification. Perhaps more importantly, no more waiting in line to see a teller like mere mortals. This young lawyer had arrived.

The young lawyer's relationship with the bank blossomed as the lawyer's career blossomed. As the lawyer's professional and personal goals evolved, the bank was there in-step, offering products and benefits that helped the lawyer reach those goals.

Just five short years later, the bank that had become the new lawyer's trusted advisor and partner was sold to a much larger bank. The larger bank then discontinued the private banking arrangement with the young lawyer, reserving those services to high net worth individuals. Within the year, the young lawyer moved to a new bank to find better connections and service, and never returned to the original bank. While the new bank did not offer a "private banking suite" to the lawyer, it was attentive to the lawyer's needs and made an effort to connect with the lawyer on a more personal level. Twenty or so years later, the now much older and grayer lawyer is still

with the second bank. Even in an age in which the "brick and mortar" branches are becoming a thing-of-the-past, the second bank continues to reach out and provide personal service, cultivating loyalty that remains to this day. In fact, the lawyer's ten-year old daughter now has a savings account at the bank.

The universal importance of connections/relationships holds true in the surety underwriting context. An account that is looking for a surety partner to help develop its business may look at a number of sureties that are willing to provide similar levels of bonding commitments. The surety that matches best may invariably be the one that provides the best connection and understanding of the account's business and its operations. The surety that makes the effort to "know" its account should have an advantage over the one that relies solely on paper metrics.

Going beyond paper metrics also has its advantages when it comes to mitigating risk and managing change. It is often said: "The only constant in life is change." For a surety, this means that an account's bonding needs may differ from year-to-year as its business grows (or slows). Its management, corporate structure, and capital structure may also change. Market conditions can also affect the account's business in a way that no one expects. While some of these changes may show up on paper, the truth is that most of them do not. Thus, a surety would do well to utilize all the tools available to monitor and manage its accounts. Those include, among other things, the right to information.

The request for information starts at the beginning of the relationship and should continue throughout the business relationship with the account. Requesting information and actively using that information to build the connection with an account is both good for business and good for managing risk. A well-informed underwriter may see risks in the construction market before they are seen by the contractor. The underwriter can alert the account to those risk trends, while also showing an interest in the account and its well-being and success on a more personal level. The result should be an account that is more connected with the surety and views the surety as a trusted partner and advisor rather than simply a bond vending machine.

Embrace the Indemnity Agreement

The title "General Indemnity Agreement" or "General Agreement of Indemnity," if you prefer, may connote an adversarial relationship. An underwriter may feel reluctant to "lead" with this document as the basis for establishing a connection with an account. But this "account agreement" is the foundational document to the surety/account relationship, and the underwriter should embrace what it provides – not what it is called. There are five common provisions in the indemnity agreement that not only

help secure indemnity in the event of a loss, but also serve as the backbone of the surety/account relationship through which information is freely shared.

1. Access to Books and Records.

In the initial underwriting process, as well as on an ongoing basis, a surety should insist on full access to financial information, financials (including audited financials), and other company records. Most indemnity agreements further require the account and any indemnitors to furnish the surety free access to their respective books, records, accounts, etc. upon request until the surety's bonded obligations are discharged.[1] Accounts and indemnitors are generally more willing to furnish such access to sureties who, like the personal banker of yesteryear, actively use that information to help their accounts achieve their evolving goals.

2. Collateral Demands.

Many surety relationships require collateral to secure the risk. Collateral may be required at the commencement of the surety relationship to provide security for all bonds, may be taken in relationship to a particular bond or obligation, or may be requested after a claim is made.[2] The collateral at the commencement of the relationship should be documented in a collateral agreement governing the terms and conditions pursuant to which the collateral may be held, used, and/or returned.[3]

3. Examination of the Management Team.

Looking beyond financial metrics, a surety should "know its customer." Unlike traditional credit transactions, surety credit not only underwrites the financial strength of the account, but also the ability of the account to perform the bonded obligations. The experience and integrity of the management team often impacts the business's ultimate success.[4] A surety can assess the strength of management's character by examining the account's relationships within its industry–particularly its banking arrangements–and any legal actions taken against it.[5] With respect to the experience of the account's management, the surety should investigate the account's previous work, not only in the industry generally but also with particular projects.[6] Even if the account has effectively completed similar work, the surety should examine whether

1 Adam P. Friedman & Patrick Kingsley, *Creation of the Relationship Among the Surety, the Principal, and the Indemnitors – Who and How, in* The Surety's Indemnity Agreement: Law and Practice 35 (Mike F. Pipkin et al. eds., 2023) at 67–68.

2 *See* Cynthia E. Rodgers-Waire & Matthew M. Horowitz, *Documents and Agreements Related to the Indemnity Agreement*, *in* The Surety's Indemnity Agreement: Law and Practice 112 (Mike F. Pipkin et al. eds., 2023); Shannon J. Briglia et al., *The Surety's Enforcement of its Rights to Collateral From the Principal and the Indemnitors, in* The Surety's Indemnity Agreement: Law and Practice 303 (Mike F. Pipkin et al. eds., 2023).

3 *See* Rodgers-Waire & Horowitz, *supra* note 2.

4 4A Philip L. Bruner & Patrick J. O'Connor, On Construction Law § 12:11 Westlaw (database updated August 2023).

5 Douglas K. Nickerson, *Construction Company Underwriting and Bonding Recommendations and Best Practices*, 2019 WL 3936753, Sept.–Oct. 2019.

6 *See* Bruner & O'Connor, *supra* note 4.

the account has the capacity to continue its success by assessing whether its team has "the necessary technical skills, knowledge, equipment, [and] workforce" to fulfill its obligations.[7]

4. Change in Control Provisions.

Many indemnity agreements contain provisions that require the indemnitors to notify the surety if there is a change of ownership or control of the account and/or designates such to be an event of default.[8] These provisions emphasize the importance of the account maintaining consistent ownership or control (or demonstrating to the surety that the change does not negatively impact the surety's risk). A change in ownership is more likely to hinder, at least temporarily, the profitability of the account's business and, by extension, the account's ability to complete its bonded obligations when the account's ownership or management is generational.[9] Thus, bonding these accounts can increase the surety's risk of exposure to bond claims. At a minimum, a change in control is a material event that creates risk (and potentially a positive impact) to the operation of the account's business.

5. Increase in Risk Provisions.

Indemnity agreements normally require the account and any indemnitors to inform the surety of conditions that could increase its risk of liability on a bond (or bonds) so that the surety can takes steps to prevent or mitigate loss. Two common notice obligations imposed by indemnity agreements are the duty to provide notice of changes to the principal's business structure and the duty to provide notice of potential claims under a bond.[10]

Conclusion: Establish Regular Touch Points with an Account

Surety underwriting is an exercise in risk management, but it should be more than that. Surety underwriting is really about getting to know the account, its people, its credit and other business processes, its strengths, ***and its weaknesses***. A surety's underwriting team should establish regular contacts, or "touch points," with an account and its management team if for no other purpose than building and strengthening the connection with the account. A surety's underwriting team should ask about anticipated management changes, anticipated changes in the business model, and anticipated changes in market conditions. A surety's underwriting team can often strengthen its connection with an account by actively

7 Nickerson, *supra* note 5.

8 Todd R. Braggins & Ryan B. DeLaune, *Complementary Provisions of the Indemnity Agreement, in* The Surety's Indemnity Agreement: Law and Practice 405–06 (Mike F. Pipkin et al. eds., 2023).

9 *See generally* Phil W. Pemberton, *Key Indicators of Success: The Psychology in Financing a Principal*, DRI for the Defense, Oct. 2018 (discussing the risks posed by general ownership with respect to financing principals).

10 *See* Braggins & DeLaune, *supra* note 8, at 405–06, 413.

helping the account prepare for unanticipated management changes, unanticipated changes in the business model, and unanticipated changes in market conditions. Showing interest in the account and its success can engender loyalty and candor in communication, particularly in connection with bond requests that an underwriter believes may accentuate an account's weakness and lead to financial uncertainty. The surety that truly knows its account and its business not only helps mitigate risk, but also adds value to both the account and the surety in the form of an enduring relationship. The question the surety should ask itself is whether it wants a teller-window relationship with an account or one that is more meaningful and in-step with the account and its business.

Delay Claims... continued from page 1

any one of such delays, then the project schedule will likely be extended, resulting in increased performance costs. Some of these costs include: added labor, equipment or material costs; increased subcontractor costs; additional jobsite or home office overhead expenses; unnecessary workforce and equipment charges incurred during idle time; and additional insurance and bonding premiums.

A delay claim is one way a contractor can recover costs or time resulting from delays that are not the fault of the contractor or its subcontractors, but rather are the result of a force majeure event or due to actions or fault of the owner or its design team.

II. What are the types of delay claims?

To fully understand delays and how to approach and submit a delay claim, it is important to understand the different types of delay claims. Delay claims can be broken down into different categories, including the following:

- **Critical v. Non-Critical**
- **Excusable v. Non-Excusable**
- **Compensable v. Non-Compensable**
- **Concurrent Delays**

A. Critical v. Non-Critical Delays.

When considering a delay claim, critical delays must be distinguished from non-critical delays. A critical delay affects the project completion date and delays the entire project. In essence, a critical delay will necessarily extend the critical path of a project. In general, the critical path is "the longest path through the network of identified and logically sequenced construction activities that establishes the minimum overall project duration."[2] The United States Court of Claims has also defined the critical path as the path of certain items of work that must be performed on schedule or the entire project will be delayed.[3]

A non-critical delay has no effect on the project's critical path. Courts have recognized that delays to work not on the critical path will generally not delay the completion of a project.[4] Such a non-critical delay may affect the completion of certain activities but does not affect the completion date of the entire project. A non-critical path activity on a project has more flexibility than a critical path activity, and non-critical path activities can be delayed without affecting the project's completion date.[5]

2 5 Philip L. Bruner & Patrick J. O'Connor, On Construction Law § 15:5 Westlaw (database updated August 2023).

3 *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982).

4 *G.M. Shupe, Inc. v U.S.*, 5 Cl. Ct. 662, 728 (1984).

5 5 Philip L. Bruner & Patrick J. O'Connor, On Construction Law § 15:5 Westlaw (database updated August 2023).

As a general rule, in order for a delay to provide the basis for a claim for additional time or money, the delay must impact critical path activities on the project schedule. If only non-critical activities are delayed, then the total time of the project will not be extended.[6] Determining whether a delay is critical or non-critical is an important task, as it will determine whether a claim for additional time should be granted. To address the importance of critical versus non-critical delays, most construction contracts address the critical path concept with detailed terms and specific language on how to deal with time and compensation for critical delays that are material to the timely completion of the project.

B. Non-Excusable Delays v. Excusable Delays.

In addition to determining if a delay is a critical or non-critical delay, non-excusable delays must be distinguished from excusable delays. A project delay can have a severe economic impact on the contractor by way of extended general conditions and home office overhead, overtime, idle labor and equipment costs, escalated labor and material costs, and other related impacts. "Delays generally fall into one of three categories: (1) excusable and compensable; (2) excusable but not compensable; and (3) not excusable."[7]

In general, excusable delays are unforeseeable and beyond the contractor's control and often entitle a contractor to recover an extension of time, an increase in the contract sum, or both. Conversely, non-excusable delays are foreseeable or within the contractor's control. Obviously, the distinction between these two is significant in that it determines which party is liable for the delay and dictates whether a contractor is entitled to a time extension and possibly compensation or exposed to paying the owner compensation for the delay. The determination of whether a delay is excusable or non-excusable is also generally governed by the terms of the contract between an owner and contractor. While the law of the jurisdiction where the project is located may provide some guidance on whether a delay is excusable or non-excusable, one should always analyze all applicable contracts because they will often address whether a delay is excusable or non-excusable.

To prove its entitlement to delay damages, the contractor is typically required to maintain some form of reliable schedules if the parties desire to hold one another accountable for delays and ultimately determine the party responsible for the delays.

---

6 *Otis Elevator Co. v. W.G. Yates & Sons Constr. Co.*, 2016 U.S. Dist. LEXIS 26748, at *31 (N.D. Ala. Mar. 3, 2016) (citing *U.S. Fid. & Guar. Co. v Orlando Utilities Comm'n*, 564 F. Supp. 962, 968 (M.D. Fla. 1983)).

7 W. Stephen Dale & Kathryn T. Muldoon, *A Government Windfall: ASBCA's Attack on Concurrent Delays as a Basis for Construction Acceleration,* Procurement Law, Summer 2009, at 4.

1. Non-Excusable Delays.

Non-excusable or inexcusable delays are caused by or are within the control of the contractor or its subcontractors. Contractor-caused delays typically entitle the owner to recover damages, such as any liquidated damages, and could entitle the owner to terminate the contract if the non-excusable delays constitute a material breach or default. Likewise, because the contractor is responsible for the delay, the contractor will not be entitled to either additional time or additional compensation for its own costs or damages associated with the delay. Because the owner's actual damages are oftentimes difficult to calculate for delays, most construction contracts contain a liquidated damages clause that is designed to compensate the owner a sum certain for each day the project is not timely completed. Typically, liquidated damages are in place to account for loss of rent, loss of income, additional storage or rental costs or fees, financing costs, etc. Examples of non-excusable delays include: delayed mobilization; late performance by subcontractors or suppliers; delayed submission of submittals; late performance due to the poor supervision of subcontractors; delays caused by equipment problems or lack of proper equipment; delays caused by inadequately staffed work force; repairs and rework due to subcontractors' faulty workmanship resulting in delay; and labor strikes caused by the contractor's unwillingness to negotiate or unfair job practices.

A contractor's non-excusable delays are commonly caused by subcontractors and suppliers. Generally, courts have held that a contractor assumes the risk of delays its subcontractors and suppliers may cause.[8]

2. Excusable Delays

Excusable delays are usually caused by conditions that are reasonably unforeseen and not within the contractor's control. In other words, an excusable delay is usually one not due to the contractor's negligence. The most common examples of excusable delays usually fall under a force majeure clause. Some common examples of excusable delays include: fire; floods; earthquakes; other natural disasters; owner changes; errors or omission in the plans and specifications; differing or unforeseen site conditions; and acts of governmental bodies.

To contractually qualify as an excusable delay, it normally has to fall within one or both of the following categories: "(1) the delay resulted from interference with the contractor's performance by the owner or those for whom the owner is responsible; or (2) the risk of the delay was not expressly or impliedly assumed by either party to the contract."[9] The Court of Federal Claims has found that, for a delay to be classified as an excusable delay, the cause of delay must delay the overall contract

8 *J. J. Brown Co. v. J. L. Simmons Co.*, 118 N.E.2d 781, 785 (Ill. App. Ct. 1954).

9 2 Construction Law ¶ 6.09 (Matthew Bender ed., 2024).

completion or it must affect the critical path of performance.[10] To prove that an owner delay is excusable, the contractor may have to establish that the delay was caused by the intentional inaction or action of an owner or its agents.

Typical examples of owner-driven causes of delays include: material changes to or errors in the plans and specifications discovered during the course of the project's construction; failing to timely or completely respond to submittals; requests for information or shop drawings; delaying the process of utility hookup or access; or restricting physical access to the jobsite.[11]

Courts have taken different approaches to determining whether a delay is legally excusable or not. The Federal Court of Claims has held that in order to establish excusable delay, contractors must demonstrate that their untimely performance was attributable to unforeseeable causes beyond their control and without their fault or negligence.[12] Thus, to carry its burden, a contractor must present sufficient evidence to demonstrate that the contractor would have completed the project but for the excusable delay in consideration of all material factors.[13]

The Federal Acquisition Regulations ("FAR") governing most federal contracts prohibit the government from assessing damages against a contractor for failing to timely complete the work if "the delay in completing the work arises from unforeseeable causes," such as acts of the government or delays of third-party subcontractors and suppliers that are "beyond the control and without the fault or negligence of the Contractor."[14] To prove an excusable delay, the contractor must show that the unforeseeable event "delay[ed] the overall contract completion; *i.e.,* it must affect the critical path of performance."[15] Moreover, if the contractor seeks the remission of liquidated damages based on excusable delay, then the contractor bears the burden of proving "the extent of the excusable delay to which it is entitled."[16] However, these FAR clauses, like most remedy-granting contract provisions, do not provide automatic relief without proper notice and sufficient documentation.

---

10 *LCC-MZT Team IV v. United States*, 155 Fed. Cl. 387, 457 (2021) (citing *K-Con Bldg. Sys. v. United States*, 131 Fed. Cl. 275, 321 (2017)).

11 *See, e.g., Roof-Techs Intern., Inc., v. State*, 57 P.3d 538 (Kan. Ct. App. 2002); *Statler Mfg., Inc. v. Brown*, 691 S.W.2d 445, 450-52 (Mo. App. 1985); *Artcraft Cabinet, Inc. v. Watajo, Inc.,* 540 S.W. 2d 918 (Mo. App. 1976); *Ark Constr. Co. v. City of Florissant, Mo.,* 558 S.W. 2d 418 (Mo. App. 1977); *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772 (10th Cir. 2007) (analyzing delay damages for contractor and owner under Kansas law).

12 *E&I Glob. Energy Servs. v. United States*, 168 Fed. Cl. 206, 212 (2023).

13 *Id. (*citing *Marine Indus. Constr., LLC v. United States*, 158 Fed. Cl. 158, 205 (2022)).

14 48 C.F.R. 52.249-10(b)(1).

15 *Sauer, Inc. v. Danzig,* 224 F.3d 1340, 1345 (Fed. Cir. 2000).

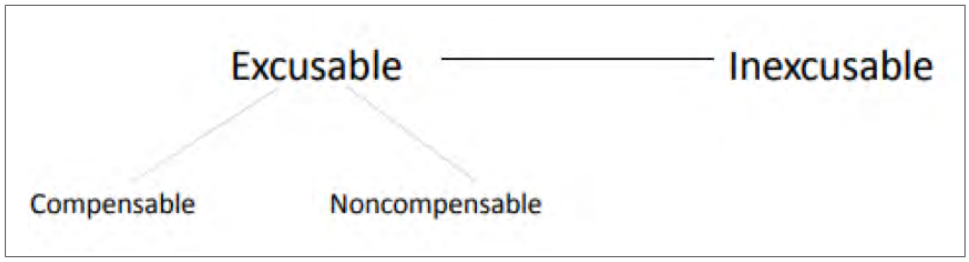
16 *Id.* at 1347; s*ee also* 48 C.F.R. 52.249-14 (Excusable Delays) (stating, "a Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor," and setting out eight examples of these causes including acts of God, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, and others).

Courts have also classified a number of events as excusable delays. For instance, delays associated with weather events can be an excusable delay. However, courts have ruled that unusual weather conditions must have an adverse effect on the construction for the delay to be considered an excusable delay that would entitle a contractor to an extension of the contract time.[17] The additional time granted for an excusable weather delay should include both the time of the weather event itself and any time spent repairing or addressing any damage caused by the weather event.

Certain governmental acts, such as wartime restrictions, supervening legislation, and other restrictions and regulations are excusable when performance becomes impossible.[18] Likewise, a court order that prevents timely performance has also been deemed a governmental act that excuses any resulting delays.[19]

As detailed below, an excusable delay will entitle the contractor to only a time extension. However, to establish an excusable and compensable delay, the contractor must generally prove that (1) the owner or its agent proximately caused the delay and (2) the contractor was not delayed for any other reason. (*See* Figure 1 below).

Figure 1



C. Compensable v. Non-Compensable Delays

If an excusable delay exists, one must further determine if it is a non-compensable or compensable delay. One place to start such an analysis is the contract between the parties, as it will likely govern whether a delay is compensable or non-compensable.

1. Non-Compensable Delays.

Non-compensable delays, commonly referred to as excusable and non-compensable, are delays for which the contractor is entitled to a time extension but not entitled to additional monetary compensation. When a non-compensable delay exists, neither party is responsible for the other party's damages. In such cases,

17 *Fortec Constructors v. United States*, 8 Cl. Ct. 490, 492 (1985).

18 *United States for Use & Benefit of Caldwell Foundry & Mach. Co. v. Texas Const. Co.*, 224 F.2d 289, 292 (5th Cir. 1955).

19 *Austin Square, Inc. v. City Prods. Corp.*, 265 N.E.2d 322, 323 (Ohio Ct. App. 1970) (injunction regarding construction of shopping center excused lessor's obligations to lessee).

both parties absorb their own additional costs arising out of the delay. For example, the contractor absorbs its delay costs for being on the project longer, and the owner absorbs its costs associated with the delay. In this case, the owner would grant an excusable/non-compensable time extension to complete the contracted work. These delays are typically addressed in the context of force majeure events and encompass such things as strikes, acts of God, and other delays that are not reasonably foreseeable.[20]

a. Application of a Force Majeure Clause

A force majeure clause's primary purpose is to relieve a party from certain duties when performance was prevented by some force beyond its control or when the purpose of the contract was frustrated.[21] Force majeure clauses are typically construed in strict accordance with their terms and usually only excuse a party's performance if the event causing the delay or nonperformance is identified in the clause.[22] Courts typically interpret force majeure clauses in strict accordance with their terms, or at the very least, in strict accordance with what the courts determine to be the intent of the parties in drafting such clauses.

"To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determine the parties' intent, rather than resorting to any traditional definition of the term."[23] "In other words, when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure."[24]

Courts also generally consider the parties' reasonable expectations and whether those expectations and the overall contract performance have been frustrated by a circumstance beyond either party's control. In the construction context, courts specifically consider whether the contractor contributed to or caused the delay or non-performance. If the force majeure clause may be invoked, courts then look to that clause to determine the appropriate relief to be awarded to the parties.

b. COVID-19

Since 2020, courts have been forced to determine whether and to what extent the COVID-19 Pandemic and other epidemics/pandemics may qualify as a force

20 *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772, 778 (10th Circuit 2007) (applying Kansas law).

21 *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

22 *Lampo Grp., LLC v. Marriott Hotel Servs.*, 2021 U.S. Dist. LEXIS 148824, at *21-22 (M.D. Tenn. Aug. 9, 2021) (*citing Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1341 (S.D. Fla. 2020)).

23 *R&B Falcon Drilling Co. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001).

24 *Id.* (quoting *Sun Operating Ltd. v. Holt*, 984 S.W.2d 277, 283 (Tex. App. 1998)).

majeure event. Many courts interpreting force majeure clauses including the words "pandemic," "epidemic," or "natural disaster" have recognized that the COVID-19 Pandemic constituted a force majeure event as an unanticipated "act of God" that was clearly not caused by anyone working on the jobsite and could not have been reasonably anticipated. These courts reasoned that the contractors that were unable to perform their work as a direct result of the pandemic were entitled to excusable and oftentimes compensable delays.[25]

However, some courts concluded that claims of delay resulting from the hardships brought on by the COVID-19 Pandemic could not be relied upon to excuse performance under the parties' contract.[26]

Merely because an event is unforeseeable or is a triggering event listed in or reasonably contemplated by a force majeure provision does not automatically excuse a party from performing. Rather, the party seeking to excuse its performance based on force majeure must prove that the unanticipated triggering event was the direct cause of the parties' inability to complete their contractual obligations. Some courts require proof that the triggering event rendered performance impossible, not just financially difficult or a hardship.[27] Similarly, some courts have held that when a contract can be performed in either of two alternative ways, the impracticability of one alternative does not excuse the promisor of performance if the other alternative is still practicable.[28]

In the future, delays caused by the COVID-19 Pandemic and other pandemics/epidemics may be deemed excusable but could be deemed non-compensable given that all contractors arguably should now anticipate that the emergence of another virus or similar force majeure event could delay a project. Contractors might have better results in focusing their arguments on changes in the law or other governmental action, such as temporary orders to stop all work for extended periods of time to slow the spread, that make the entirety of their work impossible in seeking to excuse their performance.

---

25 *LLC v. Phillips Auctioneers LLC,* 29 F.4th 118 (2d Cir. 2022) (excusing auctioneer's performance to auction a work of art based on executive orders which shut down all such nonessential businesses).

26 *See, e.g., American Medical Equip. Inc. v. United States*, 160 Fed. Cl. 344 (Fed. Cl. June 30, 2022) (finding contractor's non-performance was not caused by excusable delay due to COVID-19 pandemic); *Regal Cinemas, Inc. v. Town of Culpeper,* No. 3:21-cv-4, 2021 WL 2953679 (W.D. Va. July 14, 2021); *Lantino v. Clay LLC,* No. 1:18 CV-12247 (SDA), 2020 WL 2239957, at *3 (S.D.N.Y. May 8, 2020) (refusing to excuse a party's performance under a settlement agreement based on arguments of economic hardship due to COVID-19 pandemic).

27 30 Williston on Contracts § 77:31 (4th ed); *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314 (S.D.N.Y. 1985); *see also Kyocera Corp. v. Hemlock Semiconductor, LLC*, 886 N.W. 2d 445, 453 (Mich. App. 2015) (declining to invoke the force majeure clause because performance was not found to be impossible, but merely unprofitable due to governmental market manipulation); *Napier v. Trace Fork Mining Co.,* 235 S.W. 766, 766-67 (Ken. 1921) (finding that the influenza epidemic made it extremely difficult for the contractor to complete grading work but did not render the entirety of the work impossible).

28 *Int'l Minerals & Chemical Corp. v. Llano, Inc.*, 770 F.2D 879 (10th Cir. 1985).

c. Weather Events

Weather related delays are also typically excusable but not compensable. To obtain compensation for weather related delays, the contractor must generally prove the weather was unusually severe and delayed the critical path. Unusually severe weather is typically demonstrated through historical weather data that shows the contractor could not have reasonably foreseen the nature and extent of the weather event at issue.

Nonetheless, the occurrence of unusually severe weather will not necessarily warrant a time extension. Indeed, even if the weather is proven to be severe, unusual, and/or unforeseeable, the contractor will likely not be entitled to compensation for weather related delays if it cannot prove the event delayed the critical path. For example, if the building is enclosed and the unusually severe weather had no effect on the contractor's ability to perform its interior work, then there would be no critical path delay and a time extension would not be warranted.

Some federal agencies, particularly the United States Army Corps of Engineers, have contractually specified the precipitation that is anticipated in a particular area. Like most commercial construction contracts, the Corps of Engineers' contracts will identify the number of days a specified amount of rain is expected each month for each year in that part of the country. The contractor is expected to account for the "expected" number of rain days in its project schedule. Oftentimes, the excusable/compensable days of delay are limited to only the number of rain days that occur over and beyond the contractually agreed upon number of rain days. For example, the Corps of Engineers will consider unusually severe weather only if the contractor can prove that the amount of rain over a certain number of days exceeded the amount of rain and the number of days specified in the contract. However, a careful reading of the contract is required to ensure what is exactly specified concerning weather and if the contractor could be entitled to compensation.

In short, even if the contractor can successfully prove that it was delayed by an unanticipated, unforeseeable, or uncontrollable event such as a flood, weather, or a strike, the delay may warrant a time extension but typically the contractor is not entitled to compensation for the delay; but neither is the owner. Concurrent delays, discussed in detail below, are another example of excusable/non-compensable delays.

2. Compensable Delays

Compensable delays are unforeseeable delays to the critical path that are beyond the contractor's control or fault and entitle the contractor to both a time extension and additional compensation. Determination of the critical path is necessary for

determining if a delay is compensable because only work on the critical path has an impact upon the time in which the project is to be completed.[29]

Courts have held that a critical path delay is compensable if it was entirely caused by events within the other party's control.[30] However, if a contractor is unable to prove that the owner was responsible for the event(s) that caused the delay, then the delay is excusable but non-compensable.[31] Normally, a compensable delay is caused by the owner or its agent, but one could also be caused by "no fault" events such as acts of God and the like. Common causes of compensable delays include: material changes in the design or the contract terms; suspensions of work; the owner's refusal or inability to provide site access; untimely review of submittals, shop drawings, or responses to requests for information by the owner's design team; delayed issuance of the notice to proceed; defective plans and specifications; and differing site conditions.

There are many instances where various courts have found that certain actions of a party, such as that of an owner, have resulted in compensable delays. Examples include: (1) directing the contractor to perform its operations in sequences that differ from those set forth in the contract documents;[32] (2) requiring the contractor to meet stricter tolerances than those set forth in the specifications;[33] (3) providing a contractor with defective plans and specifications;[34] and (4) failing to timely issue written change orders for changes or additional work.[35]

A contractor may also seek compensation for delays from downstream subcontractors resulting from late delivery of materials, lack of labor, and other issues arising from the subcontractors' failures to timely commence or complete their own work. In such cases, courts have required the contractor to prove that its subcontractor was the sole or primary cause for the delay period for which the contractor seeks damages.[36]

---

29 *LCC-MZT Team IV v. United States*, 155 Fed. Cl. 387, 458 (2021) (citing *Ultimate Concrete, LLC v. United States*, 141 Fed. Cl. 463, 480 (2019)).

30 *Cobb Mech. Contrs., Inc. v. Morganti Grp. Inc.*, 2007 U.S. Dist. LEXIS 108103, at *11 (S.D. Texas, Aug. 4, 2007).

31 *Id.* (citing *Houston v. R. F. Ball Constr. Co.,* 570 S.W.2d 75, 77 (Tex. Civ. App. – Houston [14th Dist.] 1978, writ ref'd n.r.e.)).

32 *Turnbull, Inc. v. United States*, 389 F. 2d 1007 (Ct. Cl.1967); *Wolff & Munier, Inc. v. Whiting-Turner Contracting*, 946 F.2d 1003 (2d Cir. 1991).

33 *Kenneth Reed Constr. Corp. v. United States*, 475 F.2d 583 (Ct. Cl. 1973).

34 *United States v. Spearin*, 248 U.S. 132 (1918).

35 *Appeal of DeMauro Constr. Corp.* , 1972 ASBCA LEXIS 118 (A.S.B.C.A. December 11, 1972).

36 *See, e.g.*, *Newell Machinery Co. v. Pro Circuit, Inc.*, 596 S.W.3d 635 (Mo. Ct. App. W.D. 2020) (affirming the district court's denial of the contractor's delay claim on the basis that the contractor failed to prove, by a preponderance of the evidence, that its subcontractor's delay in delivering parts was not the sole cause of the project shutdown).

D. Concurrent Delays.

In analyzing delays, it is also important to determine whether a concurrent delay exists. In general, a concurrent delay refers to the situation when the critical path of a construction project is delayed by two or more events at the same time, for only one of which the contractor bears responsibility. Usually, the two or more independent delay events may overlap and delay the critical path for a similar or the same period of time. This results in concurrent or sequential delays to the project's critical path. Concurrent delays occur "where both parties are responsible for the same period of delay."[37] Concurrent delays have been defined by some courts as delays to the critical path caused concurrently by multiple events not exclusively within the "control of one party."[38] When concurrent delays exist, neither party may benefit monetarily from the delay.[39] Thus, concurrent delays are typically excusable/non-compensable delays from the contractor's perspective.[40]

To establish concurrency, the delay must be involuntary and the delayed work must be substantial and not readily curable. The party claiming concurrency must also establish two major functional requirements relating to the relationship between the delays: (1) the delays occurred during or impacted the same time analysis period; and (2) each event/condition would have independently delayed the critical path absent the other event/condition.[41]

Project schedules, which are typically presented in some form of network, are intended to identify both project activities and their interdependencies. A project network functions as a basis and an essential input to the process of assessing concurrent delays. For example, a concurrent delay can arise from the concurrence of both a non-excusable and excusable delay or a compensable and non-excusable delay. Generally, a concurrent delay is treated as an "excusable delay" entitling a contractor to an extension of contract time, but not entitling the contractor to additional costs or exposing the contractor to liability for liquidated damages or the owner's delay damages. Thus, an owner's compensable delay that concurs with a contractor's inexcusable delay would offset each other; neither party would be entitled to monetary compensation, and the only remedy available would be an extension of the contract time.[42]

37 *Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV, LLC v. Dormitory Auth. of New York*, 89 A.D.3d 819, 826 (App. Div. 2nd Dept. 2011).

38 *Otis Elevator Co. v. W.G. Yates & Sons Constr. Co.*, 2016 U.S. Dist. LEXIS 26748, at *30 (N.D. Ala. Mar. 3, 2016) (citing 5 Philip L. Bruner & Patrick J. O'Connor, On Construction Law § 15:67 Westlaw (database updated August 2023)).

39 *Id.*

40 *Cobb Mech. Contrs., Inc. v. Morganti Grp. Inc.*, 2007 U.S. Dist. LEXIS 108103, at *12 (S.D. Texas, Aug. 4, 2007).

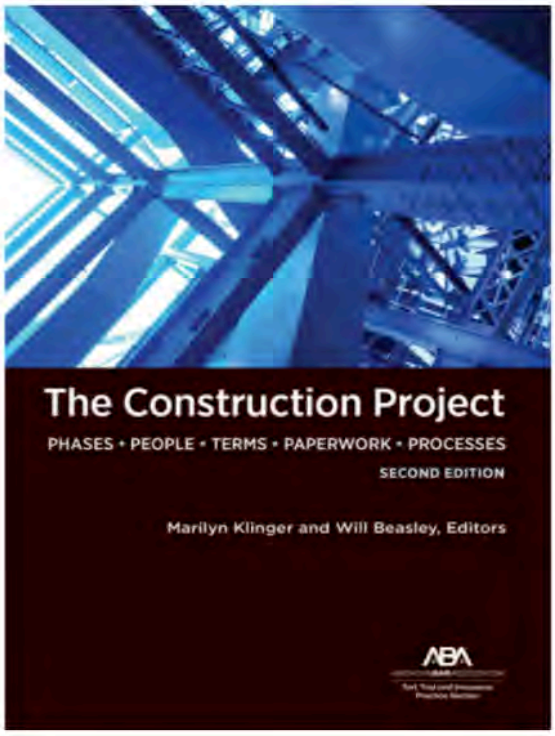
41 *See id.*

42 5 Philip L. Bruner & Patrick J. O'Connor, On Construction Law § 15:67 Westlaw (database updated August 2023).

AMERICANBARASSOCIATION
ABA Publishing

The Construction Project, Second Edition

From the Tort Trial and Insurance Practice Section



This book provides a clear understanding of the people and paperwork involved in a bonded construction project, which can serve as a handy resource for anyone approaching a construction project for the first time.

2023| 6x9 |508 pages | Paperback and eBook
Product Code: 5190584
List Price: $129.95 ABA Members: $116.95
TIPS Members: $103.95

ORDER TODAY
ShopABA.org (800) 285-2221

GET SOCIAL WITH ABA PUBLISHING
@ABAPublishing @ShopABA @ABAPublishing @ABAPublishing

Issues... continued from page 8

actual check and involves creating a new document that mimics the appearance of a legitimate check, often using sophisticated technology to replicate the details of a genuine (often stolen) check.[6] On the other hand, an altered check refers to a genuine check that has been modified in some way after it was originally issued. This could involve changing the amount, the payee's name, or other details on the check to fraudulently redirect the funds or increase the amount.[7]

Courts have held that a counterfeit check, being a complete fabrication, does not fall under the same category as an altered check.[8] The UCC and judicial interpretations of the UCC differentiate between these two types of fraudulent checks in allocation of ultimate liability for the fraudulent item. The depository bank warrants to the drawee bank (the bank on which the check is drawn) that a check has not been altered but does not guarantee against counterfeiting under the UCC.[9] This distinction becomes material when evaluating the application of a presentment warranty under the UCC (discussed below).

3. Forgery By Maker/Drawer Versus Forgery By Payee/Endorser

Forgery is distinct from counterfeits or alterations in some respects. Forgery is the signing of the name of the someone without authority. That can be on the face of the check (the signature of the drawer of the check) or on the back of the check (the signature or endorsement by the payee or subsequent transferee/holder). A counterfeit is often deemed a forged instrument as the signature of the drawer is not a valid, authorized signature. It is usually an electronic or other reproduction of a valid signature. The legal flaw in a counterfeit check is typically the unauthorized and/or forged signature by the drawer of the check.

In contrast, an alteration does not involve changed signatures, but alterations in the name of the payer or amount of the check. An otherwise valid check with a valid signature actually affixed by the drawer becomes legally flawed because of the unauthorized alteration **after** the drawer's signing of the instrument. The intended payee is changed to a fraudster or the amount is changed from the amount authorized and intended by the drawer to a larger sum.

In the context of check forgery, the legal implications differ depending on whether the forgery is the signature of the maker/drawer or the payee/endorser. When the maker/drawer's signature is forged, it generally means that the entire instrument is

6 *Provident Sav. Bank, F.S.B. v. Focus Bank*, 548 F. Supp. 3d 862 (E.D. Mo. 2021); *see also United States v. Lewis*, 560 F.2d 901 (8th Cir. 1977).

7 *Provident Sav. Bank*, 548 F. Supp. 3d at 868.

8 *Provident Sav. Bank*, 548 F. Supp. 3d at 868-69.

9 *Provident Sav. Bank*, 548 F. Supp. 3d at 867.

invalid from the outset. This is because the drawer's signature, which authorizes the transaction, is forged, indicating that no valid transaction was ever authorized by the supposed drawer. In such cases, the drawee bank may face liability for honoring a check with a forged drawer's signature, as there was never any legitimate instruction to pay.[10]

Conversely, when the forgery involves the payee or subsequent endorser, the situation can be more complex. If the payee's endorsement is forged, the UCC often protects the drawee bank that pays the check in good faith, shifting the liability to the depository bank.

4. Presentment Warranty Versus Transfer Warranty

Presentment warranties and transfer warranties serve distinct purposes in the context of checks. Transfer warranties are made to the transferee of an instrument and any subsequent collecting bank by a customer or collecting bank that transfers an item and receives a settlement or other consideration. The UCC states:

> a customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that: (1) the warrantor is a person entitled to enforce the item; (2) all signatures on the item are authentic and authorized; (3) the item has not been altered; (4) the item is not subject to a defense or claim in recoupment (Section 3-305(a)) of any party that can be asserted against the warrantor; and (5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and (6) with respect to any remotely-created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.[11]

Essentially, any person or bank that receives a check for settlement warrants that the check is valid and enforceable to any transferee (except the final drawee bank). It is, practically, strict liability of the transferor to the transferee if the instrument is not enforceable.

---

10 *Bank Of Glen Burnie v. Loyola Fed. Sav. Bank*, 648 A.2d 453 (1994); *CDG Acquisition LLC v. Dollar Bank*, No. 1:19CV1198, 2020 WL 2213870 (N.D. Ohio May 7, 2020).

11 UCC § 4-207(a) (Am. L. Inst. & Unif. L. Comm'n 2022); *see also* UCC § 3-416(a) (Am. L. Inst. & Unif. L. Comm'n 2022).

Presentment warranties are made at the time of presentment to a drawee bank (the bank on which the check was drawn) by a party obtaining payment. The UCC states:

> if an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that: (1) the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft; (2) the draft has not been altered; and [sic] (3) the warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized; and (4) with respect to any remotely-created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.[12]

Presentment warranties primarily protect the drawee bank, ensuring that the draft presented for payment or acceptance is properly endorsed. However, with respect to other defects (*i.e.*, the forgery of the drawer), the presenter only warrants that it is not aware of any such defects.

5. Entrusted Individual Defense By Bank and Negligence by a Customer

In cases where the check is defective in some way due to the wrongful actions by individuals entrusted with certain responsibilities by the bank customer/drawer of the check, section 3-405 of the UCC may be implicated. Similarly, under 3-406 of the UCC, the customer/drawer's own negligence can give rise to a defense for banks who pay the instrument in good faith. Both of these allow a drawer bank to enforce a check that otherwise would be unenforceable against a customer.

Under UCC § 3-405, a bank can shift the loss to the employer/customer if it can demonstrate that the employer entrusted the employee with the responsibility for the instrument in question and that the bank acted in good faith in paying the instrument. This defense is based on the rationale that the employer is in a better position to prevent losses by carefully selecting and supervising employees.[13] Often referred to

12 UCC § 4-208(a) (Am. L. Inst. & Unif. L. Comm'n 2022); *see also* UCC § 3-417(a) (Am. L. Inst. & Unif. L. Comm'n 2022).

13 *Concord Servicing Corp. v. JPMorgan Chase Bank, N.A.*, No. CV-12-00438-PHX-JAT, 2014 WL 2865557 (D. Ariz. June 24, 2014); *Contour Indus. v. U.S. Bank, N.A.*, 437 Fed. App'x 408 (6th Cir. 2011); *Severin Mobile Towing, Inc. v. JPMorgan Chase Bank, N.A.*, 279 Cal. Rptr. 3d 854 (2021).

as the "bookkeeper exception," this defense requires that the employee actually be entrusted with responsibility. Responsibility is defined as:

> "**Responsibility**" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.[14]

Additionally, UCC § 3-406 provides a defense for banks when an employer's negligence substantially contributes to a forgery or fraudulent endorsement, thereby precluding the employer from asserting a claim against the bank.[15] The UCC further has a burden shifting and fault allocation mechanism if both parties (*i.e.*, the bank and the customer) fail to exercise ordinary care. In such case, each party would bear responsibility based on their respective allocated fault.

UCC 3-103 defines "ordinary care" as:

> "**Ordinary care**" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by [] Article [3] or Article 4.

In other words, the bank can, in theory, have the customer enter into an agreement that removes the bank's obligation to review checks, detect forgeries, and prevent

14 UCC § 3-405(a)(3) (Am. L. Inst. & Unif. L. Comm'n 2022).

15 *Mfrs. Hanover Trust Co. v. Mfrs. & Traders Trust Co.*, 571 N.Y.S.2d 726 (1991).

fraud as long as the procedure does not vary "unreasonably" from generally banking usage and is not disapproved by specific provisions of the UCC. As banks have begun to uniformly move to this type of language in their account agreements, it appears that "general banking usage" is moving toward or has moved to disclaiming any responsibility for the review of fraudulent checks. What the bank did or did not do in a particular case, whether the bank followed its internal procedure, and whether the disclaimer runs afoul of one or more express provision of the UCC are important considerations in evaluating the bank's responsibility for a forged or altered check.

6. Bank Defenses Based on Security Services Offered for a Fee

Banks often utilize and/or provide customers the option of implementing certain fraud prevention procedures or programs to minimize the risk of loss due to unauthorized checks. Positive Pay and Payee Positive Pay are security software programs that banks use to protect against fraudulent checks. These systems work by matching the checks issued by a customer with those presented for payment; any discrepancies found can lead to a check being flagged for review or rejected, thus preventing fraud.

Positive Pay compares the amount of checks by check number to assure that the presented check matches the amount approved by the customer. As fraudsters have recognized this commonly used security feature, they have simply altered the payee, leaving the check number and amount the same to avoid triggering the Positive Pay review. Payee Positive Pay extends this protection by specifically verifying the payee's name against the list provided by the customer, adding an additional layer of security. This service is particularly effective in identifying and preventing fraud involving altered payee names and counterfeit checks.

Banks often use the existence of a Positive Pay agreement as a defense in claims against them. In an account agreement between the bank and the customer, banks often state that they are absolved of responsibility for a fraudulent check if the bank offers and a customer fails to utilize a security service and the service, if utilized, would have prevented the loss.

Under the UCC 4-103, banks and customers are free to enter into agreements that alter their respective rights and obligations under the UCC, except a bank cannot disclaim its obligation to act in good faith and to exercise ordinary care or to limit the damages resulting from its failure to do so. Banks use this provision, along with their account agreements, to attempt to shift responsibility for fraudulent checks to the customer (and its insurer).

In response, customers may assert that the bank cannot disclaim their responsibility for forged, altered, and other fraudulent items, as doing so, especially for a fee, is disclaiming an obligation to act in good faith and exercise ordinary care. Two cases have evaluated this issue in the context of Positive Pay, reaching somewhat inconsistent, although not fully irreconcilable, outcomes.

First, in *Cincinnati Ins. Co. v. Wachovia Bank, Nat. Ass'n*, a federal district court in Minnesota granted the bank's motion for summary judgment based on the deposit agreement's provision that if the customer failed to implement any of the services the bank offered to prevent payment of unauthorized checks, the customer was precluded from asserting a claim against the bank for improper payment of checks.[16] The check in question had been stolen and its payee altered.[17] The court assessed the cost and feasibility of implementing Positive Pay and determined that the provision was reasonable under UCC § 4–103.[18] It found that Positive Pay would have prevented the unauthorized transaction, and the customer failed to implement Positive Pay although it was offered by the bank.[19] Therefore, the claim asserted against the bank was dismissed.[20]

More recently, in *Majestic Building Maintenance, Inc. v. Huntington Bancshares Inc.,* the Sixth Circuit reversed the lower court's grant of a motion to dismiss in favor of the bank based on a very similar account agreement provision. [21] The Sixth Circuit held that the plaintiff had adequately alleged that the provision was an effort to disclaim the bank's duties of good faith and ordinary care barred by UCC § 4-103, which "would be considered manifestly unreasonable."[22] The court held:

> Plaintiff states a plausible claim that it was unreasonable for Defendant to absolve itself from liability for any fraudulent transaction that occurs on a customer's account when the anti-fraud products cost extra, the nature of the anti-fraud products is not revealed, and when the determination of what unauthorized transactions would have been discovered or prevented is left unexplained.[23]

The court also questioned whether "by charging the customer additional fees for these anti-fraud protection services, Defendant is effectively charging the customer for something it should arguably do at no additional cost—which is to exercise its

16 *Cincinnati Ins. Co. v. Wachovia Bank, Nat. Ass'n,* 2010 WL 2777478 (D. Minn. July 24, 2010).
17 *Id.* at *1.
18 *Id.* at *5.
19 *Id.*
20 *Id.*
21 *Majestic Building Maintenance, Inc. v. Huntington Bancshares Inc.,* 864 F.3d 455 (6th Cir. 2017).
22 *Id.* at 459.
23 *Id.* at 461.

ordinary duty of care."[24] The Sixth Circuit indicated that the provision is potentially enforceable, but only if the payor bank can show (1) that the service was known and made available, (2) the customer elected not to utilize the service, and (3) the service would have caught the fraud.[25]

This argument and related defense asserted by banks is completely foreclosed if there is not an enforceable account agreement. Often, banks do not obtain signatures from customers binding them to the account agreement. They use the use of the bank's services as tacit agreement to the terms of the account agreement. If the account agreement is not binding on the customer or if the terms have changed without agreement by the customer, the bank may have no defense regardless of the other legal issues presented.

If a bank desires to fully disclaim responsibility for fraudulent checks through provisions such as these and assuming courts will follow the *Wachovia* decision, it would be well advised to (1) have the customer sign the account agreement or documentation binding the customer to the terms of the account agreement and (2) clearly offer and document rejection of the additional security service offered to the insured. If sincerely attempting to prevent fraud rather than simply mitigating its own risk, the bank would make every attempt to educate the customer and encourage the customer to utilize its fraud prevention services. Even if all the other pre-requisites are met, it remains the bank's burden to prove that if the service had been utilized, it would have actually prevented the fraud.

Conclusion

The issues discussed above are some of the more common issues faced by insurers seeking to recover losses paid in relation to fraudulent, forged, and/or altered checks. These are not all of the issues that may be presented. A careful review of the Uniform Commercial Code as adopted in the jurisdiction at issue and the documents signed by and/or binding on the customer is critical to each analysis.

24 *Id.* at 460.

25 *Id.* at 461.

Case Note... continued from page 9

In December 2004 and again in November 2005, the City discovered cracks in welds performed by LB Steel.[8] As a result, the City required Walsh to fix the columns.[9] In February 2008, Walsh and the City entered into a limited settlement agreement in which Walsh agreed to conduct repairs to the columns at its own expense.[10] In November 2008, the City sued Walsh in Illinois state court for breach of contract and contractual indemnity to recover the costs the City incurred to investigate and remediate the defective welds.[11]

In January 2010, Walsh tendered its defense of the City's claims to the insurers under the CGL Policies, based on the fact that, as explained above, Walsh was named as an additional insured as required by the second-tier subcontract.[12] The insurers acknowledged receipt, but they never provided a final coverage decision and never defended Walsh in the City's lawsuit.[13]

Walsh agreed to settle the City's damages claims and then filed its own third-party complaint against LB Steel for breach of contract.[14] The Illinois state court found for Walsh on the breach of contract claim and entered a judgment against LB Steel in excess of $19,000,000.[15] LB Steel then appealed and filed for bankruptcy.[16] On appeal, the Illinois appellate court affirmed Walsh's judgment against LB Steel.[17] Walsh and LB Steel reached a bankruptcy settlement under which Walsh received payment in excess of $3,000,000 and was allowed an unsecured claim against LB Steel's bankruptcy estate in excess of $24,000,000.[18]

In November 2015, LB Steel's insurers sued Walsh in the Northern District of Illinois and sought a declaration that (1) the CGL Policies did not cover Walsh's judgment against LB Steel or the subsequent bankruptcy settlement and (2) they did not have a duty to defend Walsh in the City's underlying suit against Walsh.[19]

Walsh asserted four counterclaims and sought (1) indemnification under the CGL Policies for the $24,000,000 Walsh was seeking to recover from LB Steel, (2) recovery of the attorneys' fees and costs Walsh incurred in defending the City's

8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 1039.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*

claims, (3) indemnification of the $10,000,000 Walsh paid to the City under the settlement and any additional costs incurred in remediating the defective welds, and (4) sanctions.[20]

The United States District Court granted the insurers' motions for summary judgment and also denied Walsh's request for sanctions.[21] Walsh then appealed to the United States Court of Appeals for the Seventh Circuit.[22]

Analysis

Property Damage

On appeal, Walsh first argued that the district court erred when it determined the CGL Policies did not cover Walsh's damages.[23] The Seventh Circuit emphasized that all three of the CGL Policies only covered "damage to the property of others—not to LB Steel's own property."[24] Thus, in order to succeed on the coverage question, Walsh would have needed to demonstrate some physical injury to "tangible property ***beyond*** the steel elements fabricated by LB Steel."[25]

Walsh argued that once the welds cracked, (1) the entire canopy became structurally unstable and (2) the structural instability was a physical change to the canopy system that increased the potential for collapse, which was in turn sufficient to trigger coverage.[26] However, the Court rejected this argument as Walsh offered no evidence of the "structural instability" other than the cracked welds themselves and, under Illinois law, an increased potential for future property damage does not itself constitute property damage.[27] The Court explained that, where such damage has yet to manifest, there is no "property damage" that triggers traditional CGL coverages.[28] Furthermore, Walsh took measures to prevent damage to other parts of the canopy system and those costs were not recoverable under the policies.[29]

Similarly, Walsh also argued that their damages were covered by the CGL Policies because the elements manufactured by LB Steel were so intertwined with the canopy structure that damage to the steel columns necessarily meant damage to

20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* at 1040.
24 *Id.*
25 *Id.* (emphasis in original)
26 *Id.* at 1041.
27 *Id.* at 1041 (discussing *Traveler's Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d. 481, 502 (Ill. 2001)).
28 *Id.*
29 *Id.*

the canopy as a whole.[30] The Court rejected this argument and explained that when the definition of property damage requires physical injury, economic injury is not sufficient to show property damage. Moreover, Walsh had offered no evidence of physical damage other than the cracked welds themselves.[31] The Court explained that, although Walsh suffered economic losses while retrofitting the defective steel columns, the defects in the columns did not require Walsh to disassemble the entire canopy and completely start over.[32] The Court noted, however, "The outcome may be different if physical abnormalities in the columns required Walsh to disassemble the canopy and start anew, but that was not the case."[33]

From a policy standpoint, the Court concluded that all of Walsh's damages were limited to LB Steel's own defective work and to find coverage in this case would mean that manufacturers like LB Steel could perform defective work without consequence, knowing that they could later recover any adverse judgments under their CGL policies.[34]

Duty to Defend

The second argument that Walsh raised on appeal was that the district court erred when it found that the insurers owed no duty to defend them in the City's underlying suit against Walsh.[35] The Seventh Circuit prefaced their analysis by explaining that courts determine the duty to defend by looking only at the insurance policy and the complaint for which defense is sought.[36] Thus, in order to succeed on the duty to defend question, Walsh needed to show that the City's claims against them contained allegations that potentially fell within policy coverage.[37] In other words, the City's allegations needed to somehow indicate that there might have or could have been damage to parts of the canopy *not* supplied by LB Steel because, as explained above, LB Steel's CGL policies only covered damage to the property of others—not to LB Steel's own property.[38]

To this point, Walsh relied on the City's conclusory statement that its damages included costs associated with "repair."[39] According to Walsh, this language should have been sufficient enough to put the insurers on notice that the defective welds

30 *Id.*
31 *Id.* at 1042.
32 *Id.*
33 *Id.*
34 *Id.* at 1041.
35 *Id.* at 1040.
36 *Id.* at 1043 (discussing *Pekin Ins. Co. v. St. Paul Lutheran Church*, 78 N.E.3d 941, 951 (Ill. App. Ct. 2016)).
37 *Id.*
38 *Id.*
39 *Id.*

may have caused physical damage to non-LB Steel elements, thereby potentially implicating the CGL Policies and thereby triggering the duty to defend.[40] However, the Court rejected this argument and explained that the City's complaint made it clear that the "repairs" were made to defective welds themselves and not to other canopy elements.[41] The Court also highlighted that the City's complaint did not suggest the possibility that LB Steel's defective welds might have caused damage to other parts of the canopy system.[42]

From a policy standpoint, the Court concluded that if it accepted Walsh's theory, an insurer would have a duty to defend any lawsuit where the complaint contains a generalized statement of damages or a conclusory request for relief.[43]

Sanctions

Lastly, Walsh argued that the district court should have imposed sanctions on the insurers pursuant to an Illinois statute (215 Ill. Comp. Stat. 5/155(1)).[44] Sanctions can be imposed when there is "an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable."[45] The Court explained that it is not unreasonable to litigate a bona fide dispute, and because the insurers' position prevailed, the dispute was bona fide and sanctions were not warranted.[46]

Concurrence in Part

The concurring opinion agreed with the majority that the defective welds were not, and did not cause, "property damage" under the CGL Polices.[47] However, the opinion dissents as it pertains to the majority's decision that there was no duty to defend.[48] The dissenting opinion asserted that an insurer can refuse to defend only if the underlying complaint precludes *any* possibility of coverage under the policy.[49] The dissent posits that the City's complaint did not preclude *any* possibility of coverage under the policy, as the complaint's silence on the issue of damages for elements other than the welds was not an admission that there was no possible physical damage to other elements of the canopy.[50]

---

40 *Id.* at 1044.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.* at 1040.
45 *Id.* at 1045 (quoting 215 Ill. Comp. Stat. 5/155(1)).
46 *Id.*
47 *Id.* (Scudder, J., concurring in part and dissenting in part).
48 *Id.*
49 *Id.* at 1046.
50 *Id.* at 1046-47.

Conclusion

Illinois law contemplates that there may be scenarios in which a second-tier subcontractor's CGL insurers must defend and/or indemnify a general contractor against claims arising from the second-tier subcontractor's work. This ruling illustrates that both the duty to defend and the duty to indemnify depend on the specific coverage provided by the insurers and the specific types of property damage at issue. In cases where an insurance policy requires damage to property other than the property of the insured in order for coverage to be triggered, a general contract may need to show actual, manifested, physical damage of property other than that of the second-tier subcontractor's work in order to trigger the insurer's defense and/or indemnity obligations.

Stay Connected with TIPS

Stay informed on Section news, TIPS meetings, events, and key topics in your practice area by following TIPS on X, LinkedIn, Instagram, and YouTube! Engage with TIPS on social media by clicking the provided links.

Calendar

October 16-19, 2024	**TIPS Fall Meeting** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Royal Sonesta Kauai** Kauai, HI
January 15-17, 2025	**Fidelity & Surety Law Midwinter Conference** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Austin Marriott Downtown** Austin, TX
January 29- February 5, 2025	**ABA Midyear Meeting** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**TBD** Phoenix, AZ
February 20-22, 2025	**Insurance Coverage Litigation Conference** Contact: Janet Hummons – 312/988-5656 Yasmin Koen – 312/988-5653	**Estancia La Jolla Hotel** La Jolla, CA
February 21-22, 2025	**Life Health & Disability Insurance, Employee Benefit ERISA, and Insurance Regulation Conference** Contact: Theresa Beckom – 312/988-5672 Sara Lossett – 312/988-6372	**Estancia La Jolla Hotel** La Jolla, CA
March 12-15, 2025	**Transportation Mega Conference** Contact: Janet Hummons – 312/988-5656	**Hilton New Orleans Riverside** New Orleans, LA
March 15-16, 2025	**Admiralty Maritime Law Conference** Contact: Theresa Beckom – 312/988-5672	**Hilton New Orleans Riverside** New Orleans, LA
April 23-25, 2025	**Motor Vehicle Product Liability Conference** Contact: Janet Hummons – 312/988-5656 Yasmin Koen – 312/988-5653	**Omni Scottsdale Montelucia** Scottsdale, AZ
May 7-10, 2025	**TIPS Section Conference** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Capital Hilton** Washington, DC
May 22-24, 2025	**Fidelity & Surety Law Spring Conference** Contact: Janet Hummons – 312/988-5656 Yasmin Koen – 312/988-5653	**Wild Dunes Resort** Isle of Palms, SC
June 2025	**TIPS/ABOTA National Trial Academy** Contact: Janet Hummons – 312/988-5656	**National Judicial College** Reno, NV