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ISSUES OF CAUSATION IN CONSTRUCTION CASES

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Issues of Causation in Construction Cases

I. INTRODUCTION

It is axiomatic that a surety does not want to pay claims for damages caused by parties other than its principal. Inevitably, though, the surety issuing construction bonds will be faced with claims from owners or general subcontractors seeking to recover for losses to which other parties, aside from the principal, may have contributed. Claims seeking damages which are plainly susceptible to apportionment among the various contributing factors may be handled by establishing that only a portion of the losses were caused by the principal. However, other cases may not be so clear cut when the causes for the losses are seemingly inextricably entwined. These situations raise the question of whether the surety may be held liable for the full extent of the damages when the principal is one of many causes.

The problem of multiple causes contributing to the same loss may arise in a number of different contexts. Since the work of many contractors contributes to the finished product, failure of a number of the contractors to perform their work according to specifications may lead to the same claim for damages. For example, one contractor's use of sub-standard materials may combine with another contractor's variance from specifications to cause the collapse of a retaining wall and the subsequent damage to previously installed landscaping, thus leading to substantial excess construction costs. How should the damages be allocated between the contractors? Does the answer to this question change if either of the two defects in the contractors' work alone would have caused the same losses?

Another situation lending itself to this problem is delay damages. Delay damages can be a significant portion of the owner or general contractor's performance bond claim, often dwarfing the claimed excess construction costs.¹ The issue of multiple causes for delay damages can be particularly problematic for the surety whose principal is a finish trade whose work is on the critical path near the end of a project. In this circumstance, an obligee may attempt to hold the principal liable for all of its delay damages, relying solely on the fact that the principal was the last contractor to impact the critical path of the project and the completion date. The surety is therefore subject to the risk that their principal, a relatively minor trade, could be held liable for far more substantial delays and costs caused by much larger and more significant parties to a construction project merely because the delays mostly overlapped in time with the minor trade being last in time for completion.

According to the "substantial factor" test in causation analysis, the surety which bonded the contractor deemed to be the substantial or predominant contributing factor in the losses in a bond claim could be held liable for the entire amount of the damages, even though other parties or circumstances may have contributed to the loss. This paper addresses the issue of multiple contributing causes to the same loss and how the surety may handle claims which implicate more than one contractor with an eye toward avoiding the harsh result of the substantial factor test. Section II of the paper discusses the "substantial factor" test in causation analysis, both generally and in the specific context of breach of contract claims.

¹ See, e.g., *Downington Area School Dist. v. International Fidelity Insurance Co.*, 769 A.2d 560 (Pa.Comm. 2001), where the owner sought \$21,000 in excess construction costs and over \$300,000 in delay claims made by other contractors on the project.

Section III of the paper discusses cases where the courts have demanded that the claimant apportion damages among various causes and what strategies the surety may employ to avoid the outcome of becoming liable for the full extent of the damages.

II. CAUSATION ANALYSIS AND THE SUBSTANTIAL FACTOR TEST

A. The Problem With the Cause-in-Fact Test in Causation Analysis

According to basic principles of contract law, the party who breaches a contract is responsible for the foreseeable losses caused by his breach.² Thus, the obligee in a construction contract claim must show a causal relationship between the principal's breach and the claimed losses in order to recover damages. In theory, this rule prevents the obligee from recovering for losses caused by factors other than the principal's breach and for losses that would have occurred even if the principal did not breach.³

Determining whether the claimant's losses were indeed caused by the breaching party begins with the question of whether the breach was the legal cause, or the "cause-in-fact." A party will not be held liable for losses for which he is not a cause-in-fact.⁴ To be the cause-in-fact of the damages, the conduct of the breaching party must have been necessary to bring about the losses. In other words, if the damages would have occurred even without the defendant's breach, the defendant's breach was not a cause-in-fact of the damages, and the defendant cannot be held liable.⁵ For example, a contractor who does not install waterproofing material to a roof according to the project specifications, leaving a portion of the roof uncovered, will almost certainly be the cause-in-fact of water damage to the rooms below. On the other hand, and using an admittedly obvious example, if the same contractor's only breach of contract was failure to obtain a required permit for the job, that contractor will not be the cause-in-fact of water damage due to design defects in the specifications. Even if the contractor had secured the proper permit, the damages would have occurred nonetheless. Quite simply, the contractor will not be deemed responsible for damages that would have occurred even in the absence of his act or omission.⁶

A problem with the cause-in-fact analysis is that it does not provide an adequate result in those cases where two causes occurring at approximately the same time result in the same loss, and either one of the causes alone would have been sufficient to produce the loss. The following example illustrates this problem.⁷ A project to install a pedestrian walkway and plaza on the roof of an underground parking garage primarily involves two contractors: the design

² See *Fowler v. Campbell*, 612 N.E.2d 596 (Ind. 1993) (citing FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.1, at 148 (1990)).

³ DAN B. DOBBS, LAW OF REMEDIES § 12.4(2) at 777 (2d Ed. 1993).

⁴ W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41 at 264.

⁵ See *Lekas & Drivas, Inc v. Goulandris*, 306 F.2d 426 (2d Cir. 1962) (stowing cheese in insufficiently ventilated storage area on boat was not cause of spoilage because cheese would have been ruined in any location because of delays in voyage caused by war).

⁶ *Id.* at 265.

⁷ This scenario is based on an actual case currently being handled by our office.

professional responsible for designing the structure and layout of the plaza and the contractor charged with the actual installation a waterproofing layer and the walkway materials. In the course of installing the granite pavers used on the walkway, the installer accidentally cuts through the waterproofing in a number of areas. As a result, leaks appear in the garage below. However, after a number of weeks of use, the granite pavers become unstable and uneven because the designer did not take into account the uneven surface of the parking garage roof when designing the structure of the walkway. The bulk of the cost to remedy either of the problems with project involves removing and re-installing all of the granite pavers at an enormous additional cost to the owner. The installer could claim that he is not the cause-in-fact of the damages because, even in the absence of his breach of contract (slicing the waterproofing), the granite pavers would have required removal and re-installation. The design professional can make the same argument, that even without his faulty design, the same damages would have occurred because of the leakage caused by the installer.⁸ A strict application of the cause-in-fact analysis would leave the owner without a means of recovery for his damages, because, if neither contractor is a cause-in-fact, then it follows that neither could be held liable for the owner's damages.

The law, however, will not absolve both parties from responsibility where it is clear that each played a part in bringing about the damage. The next section discusses the use of the "substantial factor," developed in tort law, to determine liability for contract damages to which there are multiple contributing factors.

B. The Substantial Factor Test in Causation Analysis

The first area of law to resolve the multiple-cause problem with the cause-in-fact analysis was tort. In this area, courts reasoned that a party's action should be considered a cause-in-fact of the damage if it was a "substantial factor" in bringing it about.⁹ "Substantial factor" has been defined as "the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause."¹⁰ By definition, then, two or more of the multiple causes could be considered substantial factors. This would leave the trier of fact to analyze the comparative fault of the multiple causes and attempt to apportion the damages based on each party's culpability.

However, traditionally, comparative causation is not recognized in breach of contract actions involving damages that may have resulted from multiple causes.¹¹ Thus, the substantial factor test, as developed in tort law, does not necessarily resolve the problem of establishing liability when multiple causes lead to the same loss. Even if we can determine

⁸ For the classic tort law example of this scenario, see *Anderson v. Minneapolis, S. P. & S. S. M. R. Co.*, 179 N.W. 45 (Minn. 1920). In this example, Party A negligently sets a fire which grows to combine with another fire, set at a different location by Party B, and the combination destroys the plaintiff's property. Either fire alone would have caused the damage. Both Party A and Party B could argue that they were not the cause-in-fact of the plaintiff's damages because in the absence of each fire, the damage still would have occurred as a result of the other fire.

⁹ KEETON, *supra* note 4, § 41 at 266. See *Anderson v. Minneapolis, S. P. & S. S. M. R. Co.*, 179 N.W. 45 (Minn. 1920).

¹⁰ 2 RESTATEMENT, TORTS (1934) § 431, comment a.

¹¹ See, e.g., *Fowler v. Campbell*, 612 N.E.2d 596, 602 (Ind. 1993); *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 644 (1983); *CTTI Priesmeyer, Inc. v. K&O Ltd. P'ship*, 164 S.W.3d 675, 683 (Tx. Ct. App.) (2005).

which of the causes are considered “substantial factors,” the question of who should be liable among those factors remains open.

While the concept of “substantial factor” has been used in breach of contract cases, its application in this arena is quite different than in tort cases. In contract cases, the cause which emerges as the sole or most substantial factor may be held liable for the full extent of the damages, even if other causes contributed to the loss. Language cited by a number of courts from *Corbin on Contracts* illuminates this concept:

In all cases involving problems of causation and responsibility for harm, a good many factors may have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally, the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all the contributing factors causing injury, and must his losses be segregated proportionately? To these questions the answer is generally No. In order to establish liability the plaintiff must show that the defendant's breach was a “substantial factor” in causing the injury.¹²

*Krauss v. Greenberg*¹³ is perhaps the seminal case applying the concept of the “substantial factor” to causation for breach of contract damages. In *Krauss*, King Kard Overall Company received a contract from the government to provide 700,000 pairs of leggings to the U.S. War Department. The contract set forth a strict delivery schedule and provided for liquidated damages for each day the deliveries of the completed leggings were delayed. King Kard contracted with American Cord and Webbing Company to provide the webbing needed to construct the leggings. American Cord did not deliver the webbing as required by the contract, and King Kard brought suit seeking the liquidated damages it was required to pay to the government for its delays in delivering completed leggings. While American Cord did not deny that it was late with its webbing deliveries, it claimed that its breach of contract was not the sole cause of King Kard's delays in fulfilling its contract with the government. At trial, American Cord introduced evidence showing that other factors had contributed to the delays, such as King Kard's eviction from its factory, a shortage of eyelets needed to make the leggings, and delays on the part of King Kard even after the webbing was delivered. Nonetheless, the trial court awarded to King Kard an amount equal to all of the penalties assessed by the government.

On appeal, American Cord sought a review of the trial court's instruction to the jury that King Kard's entire loss could be attributable to American Cord if American Cord's failure to deliver as promised was the “primary” or “chief” cause of the overall company's delays. It was American Cord's contention that if it was not the *sole* cause of King Kard's delays, it could not be held responsible for the any part of the penalty imposed on King Kard by the government.

¹² 5 CORBIN ON CONTRACTS 999 (quoted by *Bruckman v. Parliament Escrow Corp.*, 190 Cal. App. 3d 1051,1063 (1987); *Reiman Associates, Inc. v. R/A Advertising, Inc.*, 306 N.W.2d 292. 301 (Wis. Ct. App. 1981)).

¹³ 137 F.2d 569 (3d Cir. 1943).

In its opinion, the Court noted that one of the tests used to determine if a cause was a “legal cause,” or cause-in-fact, was the whether that cause was a substantial factor in bringing about the harm complained of. The Court, quoting a treatise on tort law,¹⁴ defined “substantial” in this context as “the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.”¹⁵ The Court further explained:

If a number of factors are operating one may so predominate in bringing about the harm as to make the effect produced by others so negligible that they cannot be considered substantial factors and hence legal causes of the harm produced. In that event liability attaches, the requisites of legal cause being shown, only to the one responsible for the predominating, or substantial, factor producing the harm.¹⁶

Based on this principle the Court held that the trial court’s instruction to the jury that American Cord would be liable for all of King Kard’s damages if it was the “primary” cause of the delays was appropriate. Indeed, the court noted that if anything, the judge’s charge was more favorable to American Cord than it ought to have been.¹⁷

More recently, the court in *Fowler v. Campbell*,¹⁸ citing *Krauss*, explained its approach to causation this way: “The test of causation in common law contract actions is not whether the breach was the only cause, or whether other causes may have contributed, but whether the breach was a substantial factor in bringing about the harm.” In *Fowler*, the owner of a newly built home experienced numerous sewage water back-ups. When the contractor who had installed the septic system attended to each of the back-ups, he discovered foreign materials and debris in the pump. The homeowner eventually discovered that the contractor had not installed their new septic system according to specifications. The homeowner was awarded damages for repair and clean-up of the home, excavation for a new septic pump, repairs to the wiring for the pump, and installation of a new septic system according to specifications. On appeal, the contractor argued that there was no causal relationship between his deviation from the plans and the homeowner’s damages because there was evidence that the homeowner had misused the septic system by depositing debris and other inappropriate materials into it. In upholding the trial court’s finding of causation, the Court applied substantial factor principles and found that, even though the evidence clearly showed that the homeowner did indeed misuse the system, the record contained sufficient evidence for a jury to conclude that it was the contractor’s breach of contract that was the substantial cause of the septic problems.

Not surprisingly, courts have used the substantial factor test to preclude plaintiffs from recovering any damages if the substantial factor in their losses is their own conduct. In *Thor*

¹⁴ 2 RESTATEMENT, TORTS (1934) § 431, comment a.

¹⁵ *Krauss*, 137 F.2d at 572.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 612 N.E.2d 596 (Ind. App. 1993).

Electric v. Oberle Assoc. Inc.,¹⁹ the plaintiff sought damages for its loss of bonding capacity in addition to direct damages resulting from the defendant's breach of contract. Oberle, the defendant, had failed to pay Thor for its work on a construction project, and Thor alleged that this resulted in its inability pay its subcontractors. Thor claimed that this damaged its business reputation and made it difficult to obtain bonding for other projects. The court acknowledged that Thor was required only to show that Oberle's breach was a substantial factor contributing to its loss of bonding capacity. Put another way, the burden was on Thor to prove that Oberle's contribution to its damages predominated over all other contributing causes. The court found that Thor did not meet this burden. The record contained evidence that the subcontractors could have been paid if Thor collected other accounts receivable and that Thor had a reputation among local financial institutions for failing to complete projects on time. The court determined Oberle's failure to pay Thor was not the substantial factor in Thor's inability to secure bonding. As a consequence, Thor's claim for damages was denied, even though Oberle's breach of contract was partly to blame.

The results of the substantial factor test in contract cases can be particularly harsh where it is clear that another's breach, while not the substantial factor in the claimant's losses, did contribute to some part of the damages. In the cases above, the outcomes are "all or nothing." The party whose breach was the substantial factor contributing to the plaintiffs damages was held liable for *all* losses resulting from the breach, even if other factors contributed to those losses. The plaintiff whose own actions were the substantial factor in his losses was denied any recovery, even though another party contributed to the loss. The surety facing a claim involving multiple causes will, obviously, want to avoid an "all" result levied against the surety.

The mere existence of multiple causes leading to a claimant's damages will not automatically implicate the substantial factor test in determining liability, and thus will also not automatically lead to one party being responsible for the full extent of the damages. A number of courts deciding construction cases have declined to hold principals and surety liable for all of the claimant's damages where the claimant has not proved that it is impossible to attribute certain parts of the damages to other causes. In these cases, the courts have, instead, required the claimant to provide a basis for allocating the damages in order to recover any part of their claim. The next section discusses some of these cases, in both the excess completion cost and delay damage contexts. These cases lead to possible strategies for the surety confronted with multiple-cause claims.

III. AVOIDING THE HARSHNESS OF THE SUBSTANTIAL FACTOR TEST

A. Are the Losses Really Inseparable?

In a pure case of multiple causes leading to the same loss, it is exceedingly difficult, if not impossible, to establish discrete portions of the loss which can be attributable to individual causes. For example, the claimed loss in *Thor Electric*, discussed above, was the contractor's "loss of bonding capacity." The parties, and the court, were incapable of dividing this loss into segments attributable to the various causes playing a role in the loss. A loss of bonding capacity is one single loss that does not have varying degrees, like monetary damages. Thor could either obtain bonds or it couldn't. Because contract law does not provide for

¹⁹ 741 N.E.2d 373 (Ind. App. 2000).

apportionment of damages, the court also could not determine that the defendant was 25% at fault and apportion the damages accordingly.

In most construction cases, however, it is rare that the losses suffered cannot be divided into discrete smaller losses directly linked to an individual cause. Breaches of contract in construction cases usually result in some kind of monetary damages, which can increase or decrease depending on the nature and number of causes involved. It is possible to determine that in the absence of one of the causes, the claimant's damages may have been diminished. In a number of cases, the courts were not persuaded that the plaintiff was unable to sufficiently allocate its damages to the individual causes. Because the courts believed that an allocation among the contributing factors was possible, the courts declined to apply the substantial factor test and hold only one of the contributing causes liable for the plaintiff's damages. Instead, these courts held that the claimant had the burden of providing the court with a reasonable means of allocating the damages sought among the various causes. In the absence of this required showing, the claimants were be precluded from *any* recovery.²⁰

In *City of Westminster v. Centric-Jones Constructors, Inc.*²¹ the prime contractor was responsible for constructing a five-million gallon, below-ground concrete tank to hold treated water and a pumping station to move the water into the city's distribution system, all according to designs and specifications prepared by an engineering firm hired by the City. During construction, water began leaking from the tank into the underlying fill, destabilizing the foundation and causing the tank to shift. Structural problems in the walls and foundation of the pumping station were also discovered. The City terminated the contract with the contractor and sought recovery from the contractor's surety under a performance bond, which the surety denied. Meanwhile, on the recommendation of new engineers, the City demolished and rebuilt the tanks and the walls using new designs and specifications which included significant improvements to the structures. The City brought suit against the contractor, the surety, and the original engineering firm, seeking the entire cost of demolishing, redesigning, and rebuilding the structures. The City settled with the engineering firm, and the trial court directed verdicts in favor of the contractor and the surety, concluding that the City had failed to "present a reasonable basis on which the jury could apportion damages based on either the benefit of the City's bargain with [the contractor] or [the contractor's] breaches."²²

The Colorado Court of Appeals upheld the trial court's directed verdict. The Court held that the City had the burden of proving both the existence and the cause of its damages.²³ The Court stated that "[d]amages must also be traceable to and the direct result of the wrong sought to be redressed."²⁴ The City argued that it was impossible to segregate the damages

²⁰ See, e.g., *Lichter v. Mellon-Stuart Co.*, 305 F.2d 216 (3d Cir. 1962); *J. J. Kelly Co. v. United States*, 107 Ct. Cl. 594 (1947); *S.J. Groves & Sons Co., v. Warner Co.*, 576 F.2d 524 (3d Cir. 1978); *Travelers v. White Plains Housing Authority*, No. 72 Civ. 3774-WCC, 1980 U.S. Dist. LEXIS 9225 (S.D.N.Y. 1980); *United States for Use of Shields, Inc. v. Citizens and Southern National Bank*, 367 F.2d 473 (4th Cir. 1966).

²¹ 100 P.3d 472 (Colo. App. 2003).

²² *Id.* at 477.

²³ *Id.*

²⁴ *Id.* at 478.

caused by the contractor's breach from those caused by design errors and those arising from a betterment of the design. However, the court was not persuaded and said that the record did not support this argument because the City had not produced evidence showing the impossibility. The court noted that this was inexcusable because the City had gathered advice from many professionals over several years in the process of redesigning and rebuilding, and thus it was in a better position than the contractor to allocate costs to correcting the contractor's work, to design defects of other parties, and to additional benefits to the city.

In reaching its decision, the court in *Centric-Jones* looked to cases analyzing the "total cost" theory for guidance.²⁵ Indeed, those cases, which involve contractors in cost overrun disputes seeking to recover all costs of completion, may also be instructive in defending against claims for damages resulting from multiple causes. When a contractor seeks recovery under the total cost theory, it simply asks that it be paid the difference between the contract price and the actual cost to the contractor to complete the project. However, recovery under the total cost theory is generally disfavored²⁶ because it does not take into account the various reasons for the cost overruns that may not be the fault of the owner. Some jurisdictions employ a four-part test to determine whether the total cost method is appropriate in a particular case. The factors in this test pertinent to this discussion are (1) a determination that proving the contractor's actual losses directly is impractical and (2) that the contractor itself was not responsible for the added costs.²⁷ The *Centric-Jones* court seems to have mirrored these two factors in holding that the owner had the burden of proving that it was impossible to segregate the damages, and in the absence of that showing, had the burden of reasonably allocating the damages among the causes.

The cost overrun case of *Lichter v. Mellon-Stuart*,²⁸ reflects the application of these concepts and is yet another example of a court requiring a clear allocation of damages among the contributing causes. In *Lichter*, a masonry subcontractor sought the difference between the contract price for his work and the actual, increased cost of his performance, claiming that the additional costs stemmed from the general contractor's breach of contract. The subcontract provided that the subcontractor's only remedy for delays on the project was additional time and thus could not seek monetary compensation for delays. The project did not complete on-time, but the subcontractor claimed that his increased costs were not attributable to delays but to the fact that the contractor refused to suspend the interior masonry work until the mechanical trades had finished their work. According to the subcontractor, the result was that his work had to be performed in a piecemeal fashion throughout the project. In other words, the subcontractor claimed that the contractor breached the subcontract by not allowing the subcontractor to wait and proceed with his work in the most efficient manner possible.

The court found that the contractor had, in fact, breached its contract by not permitting the subcontractor to perform in the most efficient manner. However, non-compensable delays, in addition to the contractor's breach, also contributed to the subcontractor's additional

²⁵ *Id.*

²⁶ See, e.g., *Amelco Elec. v. City of Thousand Oaks*, 38 P.3d 1120 (Cal. 2000).

²⁷ *Centric-Jones*, 100 P.3d at 478 (citing *Amelco*, 38 P.3d at 1120).

²⁸ 305 F.2d 216 (3d Cir. 1962).

expenses. In the face of these additional causes, the subcontractor demanded the full amount of its additional cost from the general contractor, claiming that it was impossible to apportion the damages. The Court held that, in the absence of a clear allocation among contributing causes, the subcontractor could not recover *at all* if any “substantial part” of the extra charges was attributable to factors other than the contractor’s breach. Since a substantial part of the extra costs was the consequence of factors other than the breach, and the subcontractor could not provide a basis for allocating the damages, the subcontractor’s entire claim was rejected.²⁹

In a decision which verges on recognizing comparative causation in the arena of breach of contract, the Court of Claims also required an allocation of damages among the various causes. In *Roberts v. United States*,³⁰ the government brought a counterclaim against a contractor and its surety seeking, among other things, the full cost of removing and reinstalling a roadway the government alleged was improperly constructed. The court found that the roadway contained three types of defects: patent defects which were present at the time of the government’s acceptance of the work, latent defects attributable to the contractor’s failure to follow the contract provisions, and defects resulting from faulty design by the government.³¹ The court said that the government was required to “shoulder the burden of ‘establishing the fundamental facts of liability, causation, and resultant injury’ relating to the claim for which [it] seeks recovery.”³² The Court held that the contractor could not be held liable for damages caused by the owner’s defective design or for defects which were readily discoverable at the time of acceptance. However, the government attempted only to prove what it would cost to replace the entire roadway or twenty sections evidencing cracking and spalling. It did not put forth evidence showing that only the contractor’s error caused the defects in the roadway or that there was a discrete element of loss that would not have been sustained by the government but for the contractor’s defective installation. The Court held that “[s]ince defendant’s evidence does not provide any basis for making a reasonably accurate determination of the amount that defendant has been damaged as a result of latent defects in the roadway that are attributable to plaintiff’s failure to comply with the contract,” the government was not entitled to any recovery for the roadway replacement claims.³³

In both *Roberts* and *Centric-Jones*, the Court recognized that other factors, aside from the defendant’s alleged breach, played a part in the total damages. In addition, those Courts found that it was *not* impossible to allocate the damages in some reasonable way among the various factors causing the damages. In *Roberts*, the court even identified the three categories of causes contributing to the government’s damages. What emerges from these cases is the principle that without evidence that the damages were so intertwined that allocation was impossible, “nothing . . . excuses the [claimant] from providing the jury with a reasonable, albeit imprecise, basis on which to apportion damages.”³⁴

²⁹ See also U.S. *ex re/* Sheldon Electric v. Blackhawk Heating & Plumbing Co., 69 Civ. 4273-JMC, 1980 U.S. Dist. LEXIS 9207 (S.D.N.Y., April 22, 1980).

³⁰ 357 F.2d 938 (Ct. Cl. 1966).

³¹ *Id.* at 948.

³² *Id.* at 949 (quoting Wunderlich Contracting Co. v. U.S., 351 F.2d 956, 968 (Ct. Cl. 1965)).

³³ *Id.* at 957.

³⁴ City of Westminster v. Centric-Jones Constructors, Inc., 100 P.3d 472, 479 (Colo. App. 2003).

What this means for the surety is that it must analyze the damage claims with an eye toward establishing that the claimant's loss can be segregated. The surety should attempt to discern what its principal would be liable for in the absence of the other contributing causes and argue that this is the extent to which the surety may be held liable. In addition, it should look for ways to partition the causes and the resulting damages, as the court in *Roberts* did, so that it has a strong argument that the obligee must provide a basis for allocation.

B. Multiple Factors in Delay Claims

Some courts have held that in delay claims "where both parties contribute to the delay, neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party."³⁵ This rule has evolved in cases involving claims by contractors against the United States for delay costs the contractor incurred while performing contracts on projects owned by the government and is well illustrated in *Kremer v. United States*.³⁶ In *Kremer*, the Court found that both the plaintiff contractor and the owner, the United States, contributed to the delays for which the contractor sought damages. However, the contractor was unable to prove how much of the delay was attributable to the government and how much to the contractor. Through accounting records, the court was able to determine that six days of salary for the contractor's supervisor were directly and solely attributable to delays caused by the government. Because the contractor was unable to apportion its remaining damages between his own actions and the government's breach, the contractor was permitted to recover only this small portion of the loss, even though there was no doubt that the government had contributed to the remaining delays. *Kremer* illustrates the principle that uncertainty as to the cause from which the damages proceed may result in denial of a damage claim.³⁷

*J. J. Kelly Company v. United States*³⁸ is another case addressing a delay claim by a contractor against the United States as owner of a project. In this case, however, the claimant had not contributed to the delay. While the project in question was completed 82 days later than required in the contract, the U.S. determined that the delays were not the fault of the contractor and extended the time of completion under the contract by 82 days. The contractor, however, sought recovery from the government for its own delay damages citing an alleged 82-day delay in receiving certain protector units required for the work and that were to be provided by the government. The contractor also experienced difficulty in acquiring other materials because of a preference system for purchasing in effect at the time. According to the contract between the parties, the U.S. could not be held liable for damages attributable to the preference system. The Court held that the contractor had the burden of showing what portion of the delay damages were directly attributable to the government's delay in delivering the protector units. The Court recognized that the delay was not the fault of the contractor but yet refused to award the contractor damages, saying "since a portion of [the delay] was due to conditions for which the defendant cannot be held liable and, since on the basis of the

³⁵ *Blinderman Construction Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982).

³⁶ 88 F. Supp. 740 (Ct. Cl. 1950).

³⁷ *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472 (Colo. App. 2003).

³⁸ *J. J. Kelly Co. v. United States*, 107 Ct. Cl. 594 (1947).

testimony and the documents in the record, we are unable to separate this portion and have no reasonable basis in the record for calculation of the portion that was due to each of the two causes of delay, the record does not afford a definite ground for recovery on the part of the plaintiff.”

The increased use of the critical path analysis to determine responsibility for delay damages has, in some ways, changed the way that parties and courts analyze delay damages. The rules cited in *Kremer* and *J.J. Kelly* still hold true where there are concurrent delays attributable to both the claimant and another party. The claimant has the burden of proving that the other party was the sole cause of the delay. If the claimant contributed to the delay, the other party may also make a claim for delay, and neither party may recover because the delay essentially offset each other.³⁹

These concepts, as well as the cases discussed in this section, may be helpful to the surety when there is evidence that the owner contributed to its own delay costs. However, in some cases the surety will be handling claims asserted by an owner, alleging that the principal’s breach of contract caused all of its delay damages on a project, even though other contractors may have contributed to the damages. An obligee may attempt to hold the principal liable for all of its delay damages, relying solely on the fact that the principal was the last contractor to impact the critical path of the project and the completion date. For example, a general contractor may claim that a finish trade who delayed the completion of the project beyond the contractual completion date is responsible for all of the general contractor’s added costs, including field costs and overhead for the period of delay and increased labor and materials costs. The general contractor may point to a critical path analysis and claim that the finish trade was the last sub-contractor in time which pushed the end of the project beyond the completion date, so its delay was the cause of all the damages.

There are a number of reasons why an obligee may focus on only one sub-contractor – perhaps only this sub-contractor had a bond sufficient to cover the losses, or for strategic relationship purposes, the obligee is hesitant to make claims against other sureties. Whatever the obligee’s reasons, the surety to whom the claim is directed will need to analyze the entire construction project to see if other contractors have contributed to damages claimed by the obligee. Other, more significant contractors may have caused substantial delays early on in the project. These delays may have had the effect of causing much of the delay costs and expenses which arise later in the project. Overhead and administration costs which would have been incurred earlier in the project may be pushed into the later months, precisely when the finish trade is completing its work. Also, these delays earlier in the project may have caused additional contractors to still be on site while the finish trade is completing its critical path work. Should the finish trade be responsible for the general contractor’s costs of having five supervisors on-site when three of them were occupied by other contractors?

In some cases, a critical path analysis will reflect the individual parties responsible for discrete portions of the delays and allow for an allocation of damages. In other cases, however, a critical path analysis will lay all of the liability for the delay at the feet of one contractor. If you happen to be the surety for this unfortunate contractor, it will be important to remember that a critical path analysis is but one method for determining liability for delay costs. It is here that advocacy for use of other means of determining and proving causation of

³⁹ BRUNER, PHILIP L. & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 15:67 (2002).

damages will be necessary. Based on the case law discussion in this section, the surety may be able to argue that the damages suffered by the obligee are not inseparable and can, in fact, be allocated among the various contributing factors throughout the critical path. By showing that an allocation is possible, this strengthens the argument that the claimant has the burden of providing a reasonable basis for allocation. In addition, by breaking the claimant's damages into smaller parts related to delays throughout the project, the more likely that another contractor will be the substantial factor in that particular piece of the damages.

IV. CONCLUSION

Construction claims where there are multiple causes for the obligee's damages pose unique challenges for the surety with respect to its potential exposure and its defense to the claims. Historically, case law indicated that if the principal was the substantial factor leading to the obligee's damages, the principal could be held liable for all of the damages, even if partially caused by other parties, including the obligee itself. However, the courts have shown a reluctance to assess the full extent of damages against one contributing party in construction cases where it appears possible to allocate the damages among the various factors. Some courts have held that unless the obligee can prove that it is impossible to segregate the damages, the obligee has the burden of presenting a reasonable basis from which the fact finder can allocate the damages among the various causes and factors. This means that the surety faced with a claim for damages resulting from the principal's breach of contract should be careful to examine all of the different possible factors leading to damages and attempt to show that segregation *is* possible and the surety should only be held liable for the damages causally linked to the principal's breach. When the obligee argues that the damages cannot be divided into discrete losses, the surety must be ready to refute that claim and argue that the obligee's claim must fail because it has not drawn the required connection between the principal's breach and the damages claimed.

The surety presented with a claim for damages should keep the following questions in mind when developing a defense strategy:

- Are there other contributors to the damages sought by the obligee? What is the extent of their contributions?
- Are the principal's actions a substantial factor in the damages? Can the other factors be considered "substantial"?
- Is the obligee's claim truly one of a single, indivisible loss with multiple causes? Or is it possible to break the loss down and allocate portions of it to certain contributing factors, thus triggering the claimant's burden to provide the court with a basis for apportioning the damages?
- If the claim is for delay damages, are the damages sought truly attributable only to the principal? Or did other subcontractor's delays on the critical path in the project contribute to the overall loss?

By framing the analysis of the damages in such a way that the obligee's claim for the full extent of its damages is really a claim for the sum of a number of discrete and divisible elements of damages, the surety may avoid the harsh consequences of the substantial factor test and instead pay, at most, only for the damages actually caused by its principal.

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