

# VOICE

The

The official magazine of The Construction Users Roundtable

Fall 2015

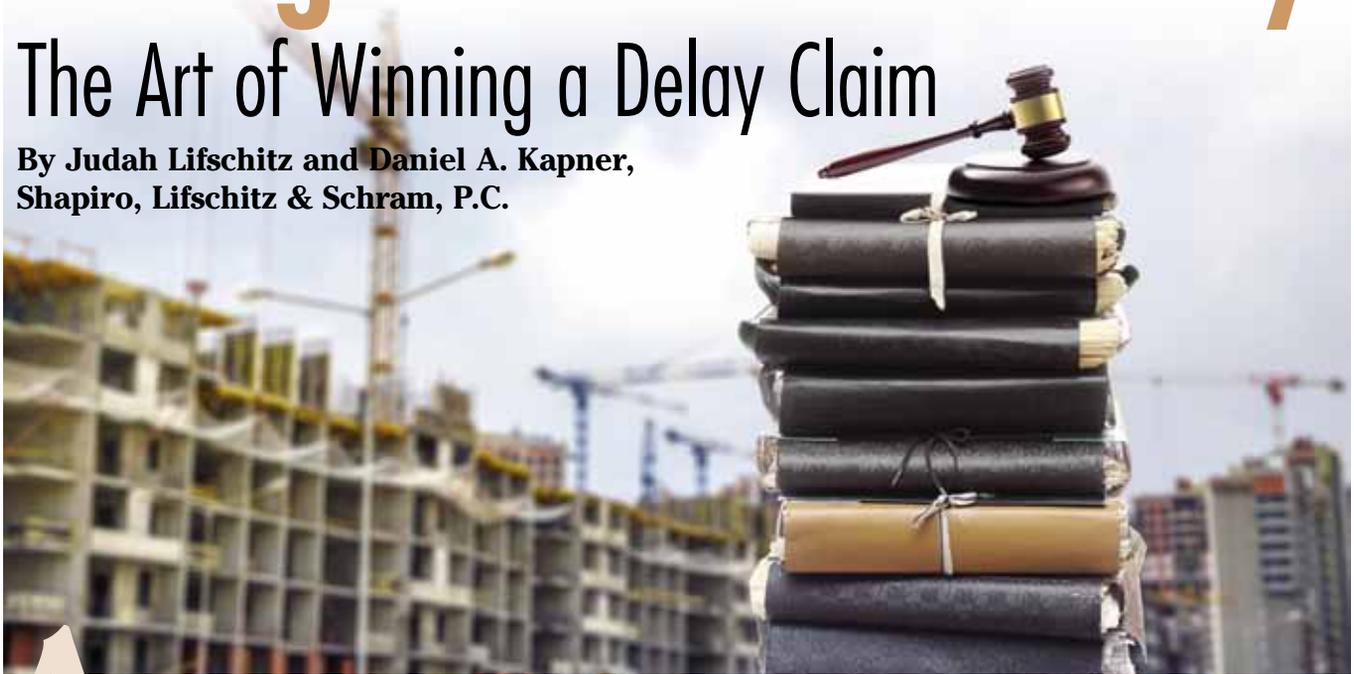
## An Owner's Toolbox:

Improve Project  
Outcome With  
the Help of CURT



# Telling the Owner's Story: The Art of Winning a Delay Claim

By Judah Lifschitz and Daniel A. Kapner,  
Shapiro, Lifschitz & Schram, P.C.



A type of claim we constantly encounter while advising owners of large construction projects is the delay claim. As owners know too well, resolving a delay claim requires a forensic analysis to determine the causes and impacts of delay, and an assessment of the relevant contract provisions and applicable law. However, if an owner and contractor are unable to negotiate a resolution of a claim and a formal legal proceeding is necessary, it is possible that the factfinder—whether judge, jury or arbitrator—will not have experience resolving construction disputes or be familiar with industry practices, concepts and terms that are central to resolving such a claim (for example, CPM, concurrent delays, float, etc.).

Therefore, it is essential that an owner in a legal proceeding strategically develop a well-reasoned theory of the case and present to the factfinder a clear, understandable and compelling narrative of the project. While the construction lawyer is the director—he or she designs, supervises and shapes the narrative so that it is tailored to the audience—the owner's scheduling expert is the storyteller.

The scheduling expert, who is typically an engineering consultant, will analyze as-planned and as-built schedules and

other project records to determine causes of delay and the impact(s) for which the project participants are responsible. Next, a written report will be prepared that explains his or her analysis and conclusions, and if necessary, an oral testimony will be provided. The scheduling expert has a critical role in a delay claim proceeding. He or she will develop the project narrative based on scheduling events from the project schedule and present to the factfinder a convincing story that supports the owner's theory of the case.

Following are our top five tried and true strategies for telling a winning story during a litigation or arbitration proceeding involving a delay claim:

## 1. Retain a Skilled and Highly Experienced Expert

In addition to having experienced and skilled counsel, the owner should retain a scheduling expert who has substantial experience analyzing delay claims and testifying in court, and has the resources available to execute the level of analysis needed for the case. Owners should retain an expert who not only understands the issues and has the skill to analyze the claim, but also someone who is articulate, poised, will appear competent and authoritative

before the factfinder, and will have the skill to defend his analysis during cross-examination.

## 2. Develop the Key Facts

Although experts are typically called to testify to provide an opinion or conclusion, winning a case requires concrete evidence. The scheduling expert should identify the key facts that underlie the claim and develop a thorough understanding of the project events, which ultimately will support the expert's opinion or conclusion. The expert should then prepare an as-built schedule that highlights the key facts and issues supporting the owner's theory of the case. By converting the facts into a detailed schedule, the expert becomes the owner's project historian as he or she is able to draw conclusions that flow directly from the schedule of events.

The expert should also create a document trail based on the schedule; each key event should be supported by contemporaneous project records, such as correspondence, meeting minutes, emails, contract documents, RFIs, field notes and diaries, project photographs, progress reports, and witness statements. Demonstrating the expert's detailed

*continued on page 34*

understanding of the facts and evidence is critical to establishing the expert's credibility and may determine whether and to what extent the factfinder will be persuaded by his or her testimony.

Developing a project narrative is not without challenges. It is not uncommon for an owner to trust that the contractor is getting the job done without carefully reviewing each project schedule and ensuring they are timely, shared and up-to-date. Every owner also runs the risk that schedules, daily reports, meeting minutes and other documents will have been

manipulated and/or will fail to accurately reflect what is happening on the ground. In the event there are inconsistencies, the owner's expert and counsel should work with the owner to confirm and substantiate the actual events.

### 3. Select the *Right Analytical Method for Proving the Claim*

The scheduling expert should carefully and strategically select an analytical method to prove cause, effect and liability for the delay claim. Construction lawyers and consultants debate what is

the *best* method for analyzing a delay claim—whether the narrative technique, measured mile, as-planned vs. as-built, TIA/schedule update methodology, etc.—but in any legal proceeding the expert should select the *right* analytical method for the case based on the applicable contract provisions, the facts and status of the job, the quality of the project records, the audience and counsel's input. The key is that the selected technique is credible, accepted in the industry, legally valid in the jurisdiction, and persuasive in light of the facts. The expert should undoubtedly utilize CPM-based analysis for whichever method is chosen.

The choice of the analytical method is critically important as the selection of an inappropriate methodology could result in disqualification of the expert and have devastating consequences for the owner's case. For a case in a federal court, after the U.S. Supreme Court's rulings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), a federal judge has broad latitude to find a scheduling expert's testimony inadmissible if the testimony lacks a reliable basis in the knowledge and experience of the construction claims discipline.

### 4. Know the Audience

The manner in which the story is shared with the factfinder depends to a large extent on the target audience. If the decision maker is an arbitrator with 30 years' experience arbitrating construction disputes, the owner's narrative should be told differently than if the factfinder is a judge or jury, who may not have the slightest understanding of the meaning of "float" or the various industry practices that may be addressed.

Many jurors are not particularly enthusiastic about sitting through a litigation involving a construction claim that is highly fact intensive and indeed may involve some math. Thus, it will be up to counsel and the expert to make the information as understandable and interesting as possible, which should be aided by demonstrative exhibits, such as graphs, diagrams and photographs.

*continued on page 40*

*Varco Pruden's Innovative Daylighting Solution*

# PRISMAX SL™

PrisMAX SL provides more light for longer periods of the day, enhancing a wide variety of indoor activities for customers, employees and visitors in your facility. These durable skylights use prismatic lens technology to deliver optimal daylight performance. PrisMAX SL was developed in conjunction with Sunoptics™ and when used as part of a sensed-controlled lighting package reduces the need for electrical lighting.

Designed to work on Varco Pruden's SSR™ or HWR™ roof systems, PrisMAX SL's unique "self-curling" structure uses a patented water-diverter and seam-mounted aluminum framing to create a long term, weathertight seal for years of maintenance-free performance.

With Varco Pruden's PrisMAX SL, you can expect:

- Reduced lighting costs
- Diffused lighting without hot spots
- Ideal for existing buildings or new construction
- Environmentally friendly, low maintenance performance

Build Smart,  
Build Green  
With Varco Pruden Buildings

**VP BUILDINGS**  
TRUSTED SINCE 1948

Powered by Sunoptics An AcuityBrands Company

For more information about PrisMAX SL,  
Visit [www.VP.com/ad/CURT](http://www.VP.com/ad/CURT).

continued from page 30

CURT's Young Professionals (YP) Advisory Board has often focused on labor shortages and, in particular, how to attract (and retain) new workers to the industry. YPs have presented at the CURT National Conference and, in the past few years, have hosted several of their own YP Summits that feature content geared towards younger construction professionals.

Dustin Bow (Pentair Technical Solutions), is the Chair of the YP Advisory Board. He encourages CURT member companies to send their YPs to their events because, "They will gain knowledge from active owners and contractors on current successful construction methodologies, as well as downfalls that need to be addressed. They will also get to interact and network with other YPs, while answering questions around current workforce issues, such as attracting and retaining talented employees."

Pentair often sends their YPs to these events. Trey Townsend, from Pentair, says it is worth it because, "The YPs bring back to the company a renewed energy and excitement for what they are doing. The idea sharing and personal development are also something we encourage and foster."

Topics of discussion often include what other companies are doing to address current industry problems, including attracting and retaining talent, improving construction productivity, new collaborative contracting methods, and so on. Attendees are also given the presentations and data presented as take-aways so that they can report back to their companies, spread the knowledge learned, and show value in their attendance.

The most-recent YP Summit was held in October in Cleveland, Ohio, and the next will be held in June 2016. CURT will also resume its online Lunch & Learn sessions (geared towards YPs) in the near future. Learn more on page 27.

Attending any (and preferably all) CURT workshops and events will help owners and contractors build better. Upcoming events, locations and topics can be found at [www.curt.org](http://www.curt.org).

continued from page 34

## 5. Turn the Owner's Story Into a Winning Argument

When presenting the owner's story, a testifying expert should persuade the factfinder—based on the project events, the contract and the expert's analytical approach—whether any delay affecting the critical path is (i) compensable, which will entitle the contractor to both time and money; (ii) excusable, which will entitle the contractor to only time, and not money; or (iii) inexcusable, which will entitle the contractor to neither time nor money, and for which the contractor is liable. An effective expert will present a credible story based on the facts that allocates responsibility for the subject delays.

### Conclusion

An owner litigating or arbitrating a delay claim is more likely to achieve a favorable outcome if the owner's expert has a command of the facts and evidence; articulates a compelling, understandable and relatable story that is based on the project record and is tailored to the target audience; and if the expert is sufficiently prepared for cross-examination.

*Judah Lifschitz, Esq. is Principal and Co-President of Shapiro, Lifschitz & Schram, P.C. in Washington, D.C. He is an experienced trial attorney and has tried cases to verdict in virtually every type of adjudicative forum. Mr. Lifschitz has extensive experience in construction related matters, including significant experience in power and energy construction representing clients with regard to EPC contracts as well as disputes. Contact him at (202) 689-1900 or [lifschitz@slslaw.com](mailto:lifschitz@slslaw.com).*

*Daniel A. Kapner, Esq. is a member of Shapiro, Lifschitz & Schram's construction law, litigation and trial, and power and energy groups. Mr. Kapner has significant experience advising owners, contractors and other clients to help achieve solutions to complex disputes. Contact him at (202) 689-1900 x3015 or [kapner@slslaw.com](mailto:kapner@slslaw.com).*

<b>COMMERCIAL AND INDUSTRIAL INSULATORS</b>	<b>CONSTRUCTION SAFETY SERVICE EXPERTS</b>	<b>INSULATION</b>
Insulators LMCT / iSave Team..... 28	Kelchner Inc. .... 14	Aeroflex USA Inc..... 15
<b>COMPLETE ELECTRICAL SERVICES</b>	<b>CONSTRUCTION SOFTWARE</b>	<b>LABOR MANAGEMENT TRUST</b>
Rosendin Electric..... 27	Viewpoint Construction Software ..... 32	Ironworker Management Progressive Action Cooperative Trust..... 18
<b>CONSTRUCTION ASSOCIATIONS</b>	<b>CONSTRUCTOR AND ENGINEERING SERVICES</b>	<b>LEAN CONSTRUCTION EDUCATION PROGRAMS</b>
American Institute of Steel Construction (AISC)..... IFC	S&B Engineers & Constructors..... 30	Associated General Contractors of America ..... 19
<b>CONSTRUCTION CONTRACTING FIRMS</b>	<b>CONTRACTING &amp; ENGINEERING SERVICES</b>	<b>MATERIALS MANAGEMENT SOLUTIONS</b>
PCL Industrial Construction Co..... 26	Matrix NAC..... 18	Atlas RFID Solutions.....0BC
Performance Contractors Inc. .... IBC	<b>GLOBAL CONSTRUCTION SERVICES</b>	<b>PRE-ENGINEERED STEEL BUILDING MANUFACTURING</b>
<b>CONSTRUCTION MAINTENANCE AND RENTALS</b>	Fluor Global Resources..... 10	Varco Pruden Buildings ..... 34
McAbee Construction Inc. .... 4	<b>HEAVY INDUSTRIAL LIFTING AND TRANSPORTING</b>	<b>PROJECT AND FACILITY MANAGEMENT SOLUTIONS</b>
<b>CONSTRUCTION ONLINE BOOKSTORE</b>	Barnhart Crane & Rigging ..... 24	Trimble ..... 8
National Center for Construction Education Research (NCCER) ..... 6	<b>INDUSTRIAL ELECTRICAL AND INSTRUMENTATION</b>	<b>UNION PROGRAMS</b>
	ISC Constructors LLC ..... 24	United Association (UA) ..... 22, 23