**Overview of delay claim case study**

This case study uses materials from Weitz Co. v. MacKenzie House, L.L.C., No. 07-0103-CV-W-ODS, 2010 WL 2292271, which was tried in the U.S. District Court for the Western District of Missouri in 2010. The case offers multiple opportunities for simulation exercises, not only because of the factual and legal issues involved, but more importantly because students can access an extensive body of filings from the case on Westlaw. Over 100 documents from the trial, including motions, an expert’s report, and transcripts are available at Weitz Co. v. MacKenzie House, L.L.C., No. 07-0103-CV-W-ODS, 2010 WL 2292271 (W.D. Mo. June 3, 2010). Also, the “History” link on Westlaw cites other orders and opinions in the case that include additional filings.

The information provided here draws selectively on pleadings and other filings and incorporates various allegations that were in dispute. This entire overview is offered solely for academic purposes.

**Background and players.**

Planning for the 3-building, 132-unit, apartment complex in the heart of Kansas City was in full swing in spring 2005, but negotiation of the owner-contractor agreement took several weeks. The project owner was MacKenzie, a Denver-based developer. The contractor was Weitz, an Iowa-based firm. MacKenzie had existing relationships with several construction industry firms, including third-party defendants Arrowhead and Concorde, subcontractors whom Weitz blamed for much of the delay. The owner-contractor agreement was finalized in late May 2005, although before that time, in April, Arrowhead started some site work.

The contract’s guaranteed maximum price, as adjusted, was approximately $14,300,000. The owner-contractor agreement between MacKenzie and Weitz was signed based on a presumed completion time of 458 days, initially calculated as calling for completion of the entire project by August 2006, with one of the 3 buildings to be completed before then. In late December 2005 (only several months into the project) Weitz terminated Arrowhead. In late December 2006 (months after the original completion deadlines), substantial completion was still far off. Weitz stopped work on the project by the end of December 2006, and MacKenzie terminated Weitz in January 2007. Weitz filed the breach of contract case against MacKenzie seeking in excess of $3 million in damages. The jury trial resulted in judgments in favor of MacKenzie (almost $5 million) and Arrowhead (over $550,000) on their counterclaims against Weitz. Concorde did not actively participate in the trial, but judgment was for Concorde on Weitz’s claim. The 8th Circuit affirmed on appeal. Weitz Co. LLC v. MacKenzie House, LLC, 665 F.3d 970 (8th Cir. 2012).

*The delay dispute.*Delays occurred early and often. Causes and impacts of the delays were hotly contested. Weitz claimed MacKenzie forced Weitz to use certain subcontractors that Weitz would not otherwise have used (particularly Arrowhead for site work and structural concrete and Concorde for over 25% of the total work) and that these subcontractors caused most of the delays, with MacKenzie itself responsible for other delays (poor management, improperly withheld or delayed progress payments). The contracts were based on AIA forms. Section 10.4 of the owner-contractor agreement, however, was a negotiated provision that Weitz claimed was intended to indemnify Weitz against problems attributable to certain subcontractors. Section 10.4 appears to be incomplete, although it does identify Concorde (but not Arrowhead) as having been selected by MacKenzie rather than Weitz. The trial court allowed Weitz to try the case on the theory that Section 10.4 was intended to transfer a significant degree of subcontractor default risk to MacKenzie, but the jury did not buy the argument.

*Weitz’s delay analysis.*Pat Brannon was the primary expert consultant and witness for Weitz. Brannon had worked extensively for Weitz on other projects, including as an expert witness on other delay claim cases, one of which involved another MacKenzie project. Brannon’s report and his trial testimony, using the “windows” method of delay analysis, essentially placed blame for the delays on MacKenzie, Concorde, and Arrowhead. Lin Heath, an expert for the defense, testified that Brannon’s report and analysis were seriously flawed.

*Basic filings to review.* While other filings available on Westlaw may be used for specific exercises, these are the basic filings to orient the students to the case:

* Weitz complaint.
* McKenzie answer and counterclaim.
* Section 10.4 of owner-contractor contract.
* Pretrial order on expert testimony.
* Pat Brannon’s expert report and the transcript of his testimony. While reviewing the full report and the entire transcript of the testimony will facilitate a comprehensive study, the selective portions specified here from the report and testimony can be the basis for more targeted exercises. From Brannon’s report, these pages: 1-23 (middle of the page); 83-88; 94-120 (end of Window #3). From Brannon’s testimony, pages: 9-14; 19 (line 11) – 28 (line 21); 111 (line 8) – 117 (line 7); 147 (line 15) – 158 (line 10).
* Transcript of testimony of Defendant’s Expert Witness, Lin Heath.