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Abandonment: When the Going Gets Tough, Can the Contractor Get Going?

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9:45 – 11:00 a.m.

Wednesday December 10, 2025

S10 Presentation, Estero C

- Author/co-author of numerous construction law publications, including:
 - *Construction Contract and Alternative Dispute Resolution: Choosing the Right Shoe Size and Style*, The Practical Law. 23 (ALI Feb. 2023)
- Law 360 MVP — Construction (2025, 2021)
- Legal 500 Hall of Fame – Construction (2025)
- California Lawyer of the Year, Litigation – Construction, *Best Lawyers* (2023)
- National Law Journal Trailblazer in Construction / Real Estate (2020)
- Chambers Band 1 Construction (California)

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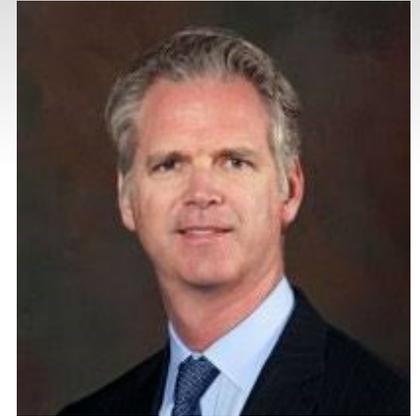
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- Directs and manages all claims development, litigation, and government investigations involving Kiewit entities
- Prior to joining Kiewit Corporation in 2003, trial lawyer engaged in private practice with a focus on issues within the construction industry
- Co-author *Construction Home-Court Statutes: Scope, Enforcement, and Preemption Under the Federal Arbitration Act*, *The Construction Lawyer* (Fall 2024)
- Co-author of forthcoming *Journal of the American College of Construction Lawyers* article: *Anti-SLAPP Statutes and Construction Disputes: When Might This Potent Tool Apply?*

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- Currently advises LACMTA on critical infrastructure procurement and construction projects, manages legal issues for LACMTA's large-scale projects, including public-private partnerships, construction manager / general contractor deliveries, leads solicitation, and litigation related to key LACMTA initiatives
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OVERVIEW

1. A Hypothetical Troubled Project
2. Termination
3. Contractor's Alternatives to Termination
4. Contractor's Duty to Perform
5. Declaratory Relief Claims
6. Suspension of Performance
7. Abandonment and Cardinal Change
8. The Mock Hearing
9. Hypothetical for the Mock Hearing
10. Audience Poll
11. Closing Thoughts

ABANDONMENT: HOW DOES IT COME UP IN CONSTRUCTION?



- **Contract Drafting**
 - Defined term
 - Exceptions to limitations of liability and waivers of consequential damages, etc.
- **Contractor Claims of Owner Abandonment**
 - E.g., Owner failure to comply with change order process; excessive change orders / cardinal change
- **Owner Claims of Contractor Abandonment**
 - E.g., Contractor walks off the job / termination for cause

ABANDONMENT: TWO TYPICAL TYPES

1. Abandoning the Contract: Contractor may complete the work and argue the contract was abandoned, the fixed price should be set aside and the Contractor should be compensated based on its total costs or on a quantum meruit basis (Abandoning the Contract).
2. Abandoning the Work: Contractor may stop work to minimize its losses, abandon the project and require Owner to hire a replacement contractor to perform the remaining work (Abandoning the Work).

A HYPOTHETICAL TROUBLED PROJECT

- Project is delayed and Contractor has submitted numerous change orders
- Owner blames Contractor (performance issues, insufficient resources, etc.) and Contractor blames Owner (design changes, differing site conditions, Owner caused delays, etc.)
- **Owner Options include:**
 - Termination (default or convenience)
 - Stop payment due to Contractor's breach or reduce / offset payments due to Contractor
 - Continue to pay Contractor and seek LDs and other damages
- **Contractor Options include:**
 - Termination (if contract terms allow)
 - Abandonment by Contractor (stop or suspend performance)
 - Seek declaratory judgment / expedited relief as to material breach
 - Continue performance and seek to recover for breach of contract or in quantum meruit (cardinal change or abandonment by Owner)

THE CONTRACTOR'S DILEMMA

- Contractor's contractual termination rights are often quite limited (nonpayment of undisputed amounts) but Contractor may also be limited in its ability to finance the project where requested change orders are in dispute
- If the parties cannot resolve their disputes, can the Contractor seek expedited relief or cease or suspend performance / walk off the job?
- Key Factors
 - Public or Private Project?
 - Contract Terms / Duty to Continue to Perform
 - Statutory Rights to Stop or Suspend Performance
 - Role of Surety

THE CONTRACTOR'S PERSPECTIVE

- Commercial Issues
 - Contractor is incurring extra costs not being paid by Owner
 - Cash flow issues for Contractor / Subcontractors
 - Problems are compounded by delay / acceleration issues and costs
- Contractual / Legal Issues
 - When / how to commence dispute resolution process
 - Exceptions to continuing duty to perform
 - Risks to Contractor if it stops work or abandons the work
- Other Considerations

THE OWNER'S PERSPECTIVE

- Owner is disputing amounts in good faith
 - Merit issues
 - Quantum issues
- Contractor's duty to follow Owner's direction / continuing duty to perform
- Risks to Owner if Contractor stops / suspends performance
- Other considerations



SURETY CONSIDERATIONS

- **Issues for Contractor**
- **Issues for Owner**



TERMINATION

- **Termination for Cause: due to nonperformance or breach**
 - Terminating party must be able to prove default or material breach
 - Grounds for termination may or may not be stated in contract
 - Opportunity to cure?
 - Draconian remedy that will be closely scrutinized.
- **Termination for Convenience: “no-fault divorce”**
 - No right to terminate for convenience unless stated in contract
 - Otherwise, termination may be a breach subject to full contract damages

CONTRACTOR'S RIGHT TO TERMINATE

- Contractor has no right to terminate for convenience
- Contractor's right to terminate for default is usually quite limited
 - Owner's failure to make payment (only as to undisputed amounts, and if so, Owner must "reasonably" dispute the payment to avoid termination for default)
 - Owner's insolvency or bankruptcy
 - Material breach? What is "Material"? What if this is in dispute?

CONTRACTOR'S RIGHT TO TERMINATE

- Notice to Owner and opportunity to cure (make payment owed, etc.)
- Continuing duty to perform pending resolution of dispute?
- Lender restrictions in consent agreements on financed projects (frequently overlooked)



CONTRACTOR'S RIGHT TO TERMINATE

- Significant risks to Contractor if decision to terminate is wrongful, including:
 - Substantial potential damages / delays
 - Possible forfeiture of liability caps and waiver of consequential damages by Contractor
 - Surety issues / bonding
 - Reputational consequences
 - Disclosable event on public works projects
 - Responsibility issues and bid protests on public works projects

SAMPLE CONTRACTOR RIGHT TO TERMINATE CLAUSE

“Contractor may terminate this Agreement upon thirty days written notice to Owner if Owner fails to make payments to Contractor in accordance with the terms of this Agreement, except that Contractor shall not be entitled to terminate the Agreement if Owner (a) has disputed Contractor’s entitlement to payment and paid all undisputed amounts owed, and/or (b) Owner, within 30 days of such notice, cures any undisputed payment issues identified in the notice. Any Dispute regarding payment shall be resolved by means of Article ___ and Contractor waives any right to terminate this Agreement for any other reason.”

WHAT IF THE CONTRACTOR WRONGFULLY TERMINATES OR STOPS WORK?

- Contractor will be in material breach
- Contractor may lose protections of limitations of liability and waiver of consequential damages
- Potential exceptions to a contract's cap on aggregate liability may include:
 - Fraud
 - Abandonment of the work
 - Failure to achieve substantial completion
 - Termination for default



CONTRACTOR'S ALTERNATIVES IF IT CANNOT TERMINATE FOR DEFAULT

- Material breach by Owner excuses further performance
- Abandonment by Owner or cardinal change
- Termination right for an FME or suspension for a contractually specified period
- Contractual right to suspend for non-payment (disputed v. undisputed amounts)
- Is there a statutory right to stop or suspend performance?

NOTE: These remedies may be limited by Owner's contractual right to direct disputed work and Contractor's contractual duty to continue to perform the work.

SAMPLE CONTINUING DUTY TO PERFORM CLAUSE

_____ CONTINUATION OF WORK DURING DISPUTE.

Notwithstanding any Dispute, it shall be the responsibility of Contractor to continue to prosecute all of the Work diligently and in a good and workmanlike manner in conformity with this Agreement. Except to the extent provided in Section _____, Contractor shall have no right to cease performance hereunder or to permit the prosecution of the Work to be delayed. Owner shall, subject to its right to withhold or offset amounts pursuant to this Agreement, continue to pay Contractor undisputed amounts in accordance with this Agreement; provided, however, in no event shall the occurrence of any negotiation or arbitration prevent or affect Owner from exercising its rights under this Agreement, including Owner's right to terminate pursuant to Sections _____ and _____.

IMPACT OF CONTINUING DUTY TO PERFORM

- *Valley View Enterprises, Inc. v. United States*, 35 Fed. Cl. 378 (Fed. Cl. 1996).
- “The question to be resolved is not whether the contractor will perform the work at issue now but who will bear its cost in the future. The Government, by contract, has the right to unilaterally order the contractor to perform the work (if the parties cannot agree on what needs to be done).” *Id.* at 384.



POSSIBLE EXCEPTIONS TO CONTINUING DUTY TO PERFORM



- Does a material breach by the Owner excuse the Contractor's duty to continue to perform and compliance with that provision?
- What if the material breach is in dispute?
- Is the continuing duty to perform absolute or limited?
 - “The continuing duty to perform shall not apply when the total amount in dispute exceeds \$_____.”

POSSIBLE EXCEPTIONS TO CONTINUING DUTY TO PERFORM

- Draft terms to fit the needs of the project and qualify the contractual duty to continue to perform
- Issues to consider:
 - If the value of an unpaid claim exceeds a certain amount (possibly in proportion to the project value)
 - If the amount in dispute exceeds a certain amount (and what qualifies as a “dispute”)
 - If Owner pays claims more than a specified amount under a reservation of rights
 - Require Owner to pay direct costs pending resolution of dispute
 - Other terms that provide assurances / reduce risk (contractor posts security, bond, etc.)

WHAT IS A MATERIAL BREACH?

- “A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty.” Restatement (First) of Contracts § 397 (1932).
- In evaluating whether a breach is material the “following circumstances are significant[:.]”
 - (a) the extent that injured party will be deprived of benefits reasonably expected;
 - (b) the extent to which the injured party can be adequately compensated;
 - (c) extent of forfeiture by breaching party;
 - (d) the likelihood that the breaching party will cure;
 - (e) whether the conduct comports with good faith and fair dealing standards.

Restatement (Second) of Contracts § 241 (1981).

IMPACT OF A MATERIAL BREACH



- As a general rule, one party's material breach of a contract excuses the other party's performance under the contract.
 - *J.P. Stravens Planning Associates, Inc. v City of Wallace*, 928 P.2d 46, 49 (Idaho Ct. App. 1996) (“If a breach of contract is material, the other party's performance is excused.”)
 - *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (Cal. Ct. App. 2011) (“When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract.”)

MATERIAL BREACH & CONTINUING DUTY TO PERFORM

- Material breach by government “provides [the contractor] with a legal right to avoid the contract [and] discharges [their continuing] duty to perform” under the contract’s disputes clause. *Malone v. United States*, 849 F.2d 1441, 1446 (Fed. Cir. 1988).
- In *Metric Sys. Corp.*, the court held that the subcontractor (Metric) was under a duty to perform and distinguished the subcontract’s broadly written disputes clause from the standard FAR disputes clause as narrowly construed by *Malone* and a “line of authorities which have held that a contractor’s duty to proceed pending resolution of disputes does not extend to disputes involving alleged material breaches by the government.” *Metric Sys. Corp. v. McDonnell Douglas Corp.*, 850 F. Supp. 1568, 1580 (N.D. Fla. 1994).

MATERIAL BREACH & CONTINUING DUTY TO PERFORM

- Illustrative discussion of a material breach and the continuing duty to perform in uncitable California Court of Appeals decision: *Barton Properties, Inc. v. Superior Gunitite Co.*, No. B177108, 2006 WL 541025, at *5 (Cal. Ct. App. March 7, 2006) (unpublished).
 - “[W]here a general contractor . . . *materially* breaches a contract so as to delay or prevent the performance of the subcontractor . . . the subcontractor is not foreclosed from refusing to perform and rescinding the contract by reason of a contractual provision . . . which requires a contractor not to rescind the contract or stop working but instead to ‘continue the work diligently to completion.’” *Id.* at *5 (quoting the parties’ contract).
- Does the contract limit Contractor’s right to raise dispute / seek relief prior to substantial completion?

DECLARATORY RELIEF FOR CONTRACTORS TO BE EXCUSED FROM FURTHER PERFORMANCE

- Federal and state law allow for declaratory relief claims concerning rights under a contract. 28 U.S.C. § 2201 (2011) (“[U]pon the filing of an appropriate pleading, [the court] may declare the rights and other legal relations of any interested party seeking such declaration”); see, e.g., CAL. CIV. PROC. CODE § 1060 (party may seek “a declaration of his or her rights or duties with respect to another” may, “bring an original action or cross-complaint . . . for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract”).
- Some states also grant trial preference for declaratory relief claims. See, e.g., CAL. CIV. PROC. CODE § 1062.3 (declaratory relief claims should be “set for trial at the earliest possible date and shall take precedence over all other cases”).

Kiewit-Turner v. Dep't of Veterans Affairs,
2014 CIVBCA LEXIS 230, 2014-1 B.C.A. (CCH) P35, 705 (B.C.A. May 22, 2014)



DECLARATORY RELIEF FOR CONTRACTORS TO BE EXCUSED FROM FURTHER PERFORMANCE

- *Kiewit-Turner v. Dep't of Veterans Affs.*, 2014 CIVBCA LEXIS 230, 2014-1 B.C.A. (CCH) P35, 705 (B.C.A. May 22, 2014):
 - The Civilian Board of Contract Appeals found declaratory relief an appropriate remedy to excuse Contractor's further performance where Owner breached by substantially changing the design and failing to issue change orders. *Id.*
 - Notably, in a later hearing on the merits of Contractor's claim, the Board declared Contractor had no obligation to continue performance due to the VA's breaches, independent of Contractor's right to recover damages. *Kiewit-Turner v. Dep't of Veterans Affs.*, 2014 CIVBCA LEXIS 370, 2015-1 B.C.A. (CCH) P35, 820 (B.C.A. December 9, 2014).
 - Board states that Contractor is not required to continue performance and serve as the VA's "long-term banker." *Kiewit-Turner*, 2014 CIVBCA LEXIS 230 at *13.

NEW CALIFORNIA LAW GOVERNING PRIVATE CONTRACT CLAIMS RESOLUTION AND PAYMENT

- Beginning January 1, 2026, new contracts for private projects will be covered by California's "Private Works Change Order Fair Payment Act" to be codified as CAL. CIV. CODE § 8850.
- California Civil Code section 8850 outlines specific procedures and timeframes for private construction project claim resolution procedures and payments.
- The law is intended to provide for "prompt and fair" payment to contractors and subcontractors, reduce litigation costs, and "promote[] economic stability within the construction industry and ensure efficient project completion." CAL. CIV. CODE § 8850(a).

KEY TERMS OF CALIFORNIA'S NEW PRIVATE PROJECT CLAIM AND PAYMENT LAWS



- Under California Civil Code section 8850, a contractor's claim should receive a "reasonable review" within 30 days identifying disputed/undisputed portions. CAL. CIV. CODE § 8850(d).
- Undisputed portion established by reasonable review, informal conferencing, or mediation must be paid within 60 days. CAL. CIV. CODE §§ 8850(d)–(f).
- Waivers are void. *But*, parties can agree to change order, claim and dispute process and requirements "so long as the contractual provisions do not conflict with or otherwise impair the [statute's] timeframes and procedures[.]" CAL. CIV. CODE § 8850(m)(2)(B).

PENALTIES FOR VIOLATIONS OF CALIFORNIA'S NEW PRIVATE PROJECT CLAIM AND PAYMENT LAWS

- Significant interest of **2% per month that could result for large contractor recoveries and owner interest payments:**
 - “undisputed amounts” not paid in a timely manner (CAL. CIV. CODE § 8850(h)(1)), and
 - If disputed amounts are later found to be owed in an arbitration or litigation, such amount “shall bear interest at 2 percent per month, beginning from the date on which those amounts would have been due had they not been disputed.” *Id.* § 8850(h)(2) (emphasis added).
- Contractor’s right to unilaterally suspend performance for an owner’s failure to comply with the new statute. *Id.* § 8850(k).

STATUTORY RIGHT TO STOP OR SUSPEND WORK ON PRIVATE PROJECTS

- California is one of several states to expressly allow contractors to suspend performance on private projects for unpaid claims in certain circumstances.
- Oregon, Arizona, Montana, Illinois and Oklahoma also have statutes addressing suspension of performance for unpaid claims. OR. REV. STAT. ANN. § 701.635; ARIZ. REV. STAT. ANN. § 32-1185; MONT. CODE ANN. § 28-2-2117; 815 ILL. COMP. STAT. ANN. 603/15; OKLA. STAT. ANN. tit. 61, § 225.
- Kansas permits contractors and subcontractors to suspend performance when “undisputed payments” are not made within seven business days in both private and public contracts. KAN. STAT. ANN. § 16-1803, 1805 (private works contracts); KAN. STAT. ANN. § 16-1903, 1905 (public works contracts).

IF A CONTRACTOR CANNOT STOP PERFORMANCE, WHAT ARE ITS OPTIONS TO RECOVER ADDITIONAL COSTS?

ABANDONMENT & CARDINAL CHANGE

- Many states treat abandonment and cardinal change as almost interchangeable setting aside the contract price but not the duty to continue to perform.
- “Both abandonment and cardinal change may properly be utilized to establish a basis for recovery outside the original contract in cases where the contractual obligations of a construction contractor vary materially from the original expectations of the parties regarding the scope and manner of work.” *L.K. Comstock & Co., Inc. v. Becon Constr. Co., Inc.*, 932 F. Supp. 906, 931 (E.D. Ky. 1993).
- “The evidence required to demonstrate the occurrence of cardinal change is similar to that required by the contract-abandonment theory,” but the Nevada Supreme Court maintained them as separate legal theories. *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1021 (Nev. 2004). Both theories “may result in a damages award based on quantum meruit.” *Id.* at 1019 n.25.

ABANDONMENT & CARDINAL CHANGE

Although some states treat abandonment and cardinal change as interchangeable, California treats the doctrines as “fundamentally different.” *Amelco Electric v. City of Thousand Oaks*, 38 P.3d 1120 (Cal. 2002).

- **Abandonment:** “[O]nce the parties cease to follow the contract’s change order process, and the final project is materially different from the project contracted for, the contract is deemed inapplicable or abandoned and is set aside. The plaintiff may then recover the reasonable costs for all of its work.” *Id.* at 1126.
- **Cardinal Change:** “The contractor may recover breach of contract damages for that additional work,” but unlike with the theory of abandonment, nothing in the cardinal change theory “direct[s] that the terms of the...contract are held inapplicable or set aside for the period prior to the breach, or that the government’s payments for other work not affected by the cardinal change are suddenly compensated on a quantum meruit basis.” *Id.*

TYPICAL ELEMENTS OF ABANDONMENT & CARDINAL CHANGE

| | Abandonment | Cardinal Change |
|----------|--|--|
| Elements | <ul style="list-style-type: none"> • Intent to abandon the contract (e.g. disregard change order procedures) • Material change in scope of work/breach | <ul style="list-style-type: none"> • Fundamental change / alteration of the contract beyond original scope or thing to be constructed (qualitative and quantitative factual assessment) |
| Remedy | <ul style="list-style-type: none"> • Quantum Meruit • Reasonable Costs Recoverable • Total Cost Recovery* | <ul style="list-style-type: none"> • Quantum Meruit* • Breach of Contract Damages* • Re-bid of Awarded Contract* |

ABANDONMENT: INTENT TO ABANDON

- Abandonment is determined based on the facts and circumstances surrounding the transaction. *R.M. Taylor, Inc. v. Gen. Motors Corp.*, 187 F.3d 809, 813 (8th Cir. 1999).
- Intent to abandon exists when one “positively and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, or where by its conduct it clearly shows an intention to abandon the contract.” *Bogert Constr. Co. v. Lakebrink*, 404 S.W.2d 779, 782 (Mo. Ct. App. 1966) (quoting *Collins v. Collins*, 83 N.W.2d 213, 216–17 (Mich. 1957)).
 - *Bogert Constr. Co.*, 404 S.W.2d at 782 (abandonment established where changes “were accomplished in complete disregard” of the contract’s modification provisions).
 - *Crockett Homes v. Tracy*, 243 N.E.3d 539, 564 (Ohio Ct. App. 2024) (finding that the contractor did not abandon when it refused to perform due to non-payment by owner because there was insufficient evidence of contractor’s intent to abandon contractual obligations).

ABANDONMENT: IS THE PROJECT MATERIALLY DIFFERENT?

- *C. Norman Peterson Co.*, 172 Cal. App. 3d at 645.
 - A California court of appeals found abandonment when the changes ordered by the owner defendant “severely impacted Plaintiff’s planned construction operation, caused a loss of productivity, and resulted in increased costs for performing of both the contract work and the changed work.” *Id.* at 645–646.
- *O’Brien & Gere Technical Serv’s, Inc. v. Fru-Con/Fluor Daniel Joint Venture*, 380 F.3d 447, 455 (8th Cir. 2004).
 - “The scope, quantity, and frequency of changes are factors in a court’s finding the parties abandoned a contract. . . . [U]nder normal circumstances in the construction business, a myriad of changes may not so transform a project as to reflect abandonment of the contract by the parties. This case is different. While the parties understood a certain amount of change was inherent to the design and construction process, the number and frequency of the design changes transformed . . . the nature of the task. . . .”

ABANDONMENT: IS THE PROJECT MATERIALLY DIFFERENT?

- This is not a case where a project was “completely redesigned after the contract was placed.” *Daugherty Co.*, 14 Cal. App. 3d at 155–56 (finding question of fact on subcontractor’s argument that contract had been abandoned based on numerous changes to the work and new procedures for handling change orders instituted after the contract was signed).



STATE LAW ADOPTION OF ABANDONMENT

- Ten states allow recovery for abandonment on public projects and expressly or implicitly adopt abandonment for private projects
- Twenty states and Washington D.C. recognize abandonment as a basis for recovery on private jobs but have not extended the doctrine to public projects
- California allows abandonment on private projects and rejects it for public projects (and distinguishes abandonment from cardinal change)
- The remaining states have neither recognized nor rejected recovery based on the abandonment doctrine

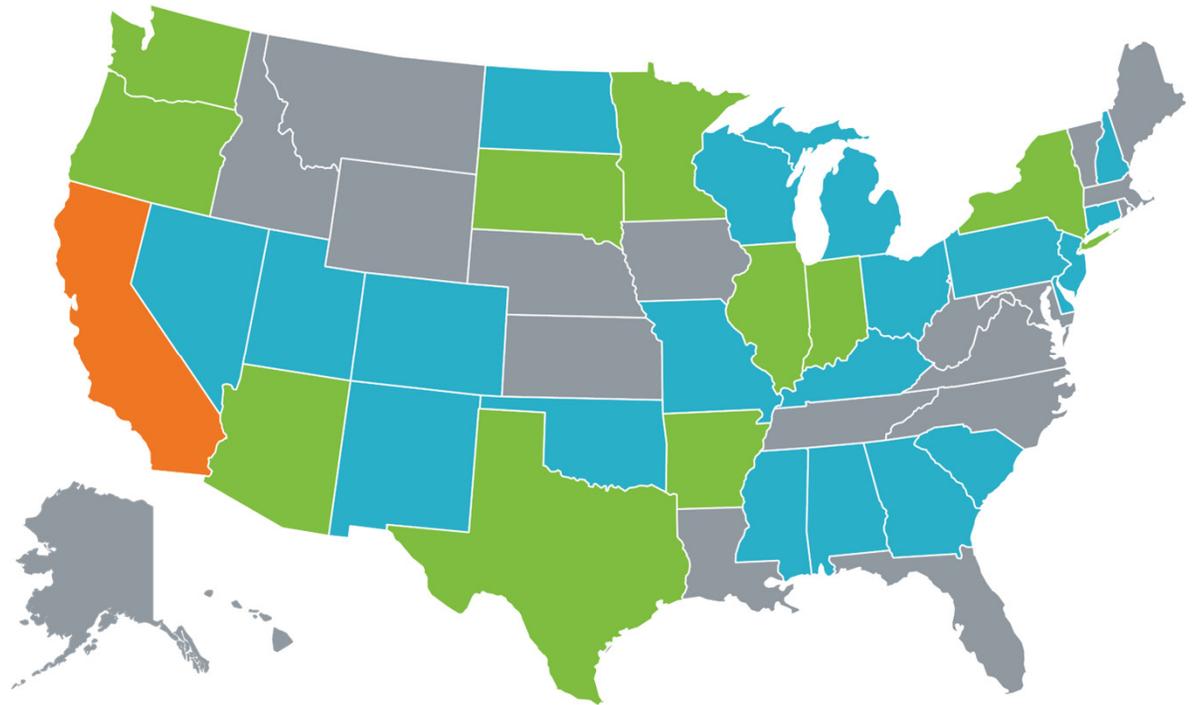


ABANDONMENT FOR PUBLIC WORKS CONTRACTS

- In *Amelco*, 38 P.3d at 1125, 1127, the California Supreme Court held that abandonment is not recognized on public projects:
 - “The question in this case is whether a public entity is liable under an abandonment theory to a contractor when it makes numerous changes to the contract work, and these changes allegedly make it difficult and more costly to perform the contract because of delay, interference with the work of other trades, and other problems not captured in the price of the executed change orders. . . .”
 - “We conclude [an abandonment theory] does not [apply to a public entity], since such a theory is fundamentally inconsistent with the purpose of the competitive bidding statutes.”
- A subcontractor may still bring an abandonment claim against a general contractor even where the prime contract is with a public entity for a public work. *Suhulster Tunnels/Pre-Con v. Traylor Bro’s, Inc./Obayashi Corp.*, 111 Cal. App. 4th 1328, 1343-44 (Cal. Ct. App. 2003).

STATE LAW AND ABANDONMENT

-  **Adopted Abandonment for Public and Private Works Contracts**
-  **Adopted Abandonment for Private Works Contracts**
-  **Rejected Abandonment for Public Works Contracts**
-  **No Clear Rule on Abandonment**



CARDINAL CHANGE DOCTRINE

- Contracts can be drafted to define a cardinal change
- Statutes may address what constitutes a cardinal change
- Remedies for a cardinal change violation vary, depending on applicable law
- As allowed by the jurisdiction, successful plaintiffs may recover based on:
 - Quantum meruit
 - Breach of contract damages
 - Remedies other than damages (e.g., re-bid of public contracts)

CARDINAL CHANGE DOCTRINE

- Plaintiffs who show a cardinal change that rendered competitive bidding unfair may also seek an order requiring a re-bid of the contract
 - “Contract modifications may not materially depart from the scope of the original procurement; otherwise the modification prevents the complaining party (and other potential bidders) from competing for what is, in reality, a new and different contract.” *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 791 (1997); *American Apparel, Inc. v. United States*, 108 Fed. Cl. 11, 27 (Fed. Cl. 2012).
 - Relevant inquiry is “whether Government modifications changed the contract enough to circumvent the statutory requirement of competition.” *AT&T Commc’ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).
 - A finding of cardinal change may result in an order for termination of the contract and result in a contractor having to re-compete for the work. *CW Gov’t Travel, Inc. v. United States*, 61 Fed. Cl. 559, 576 (Fed Cl. 2004).

REJECTION OF CARDINAL CHANGE

- **Some states reject the cardinal change doctrine.**
- In *Litton Sys., Inc v. Frigitemp Corp.*, a U.S. district court in Mississippi considered a subcontractor's cardinal change argument. The court held that Mississippi law "does not subscribe to the cardinal change doctrine and [] even if such was the law in Mississippi, the relief to be accorded would be damages for breach of contract and not the extra-contractual relief of quantum meruit." See *Litton Sys., Inc v. Frigitemp Corp.*, 613 F. Supp 1377, 1384 (S.D. Miss. 1985).

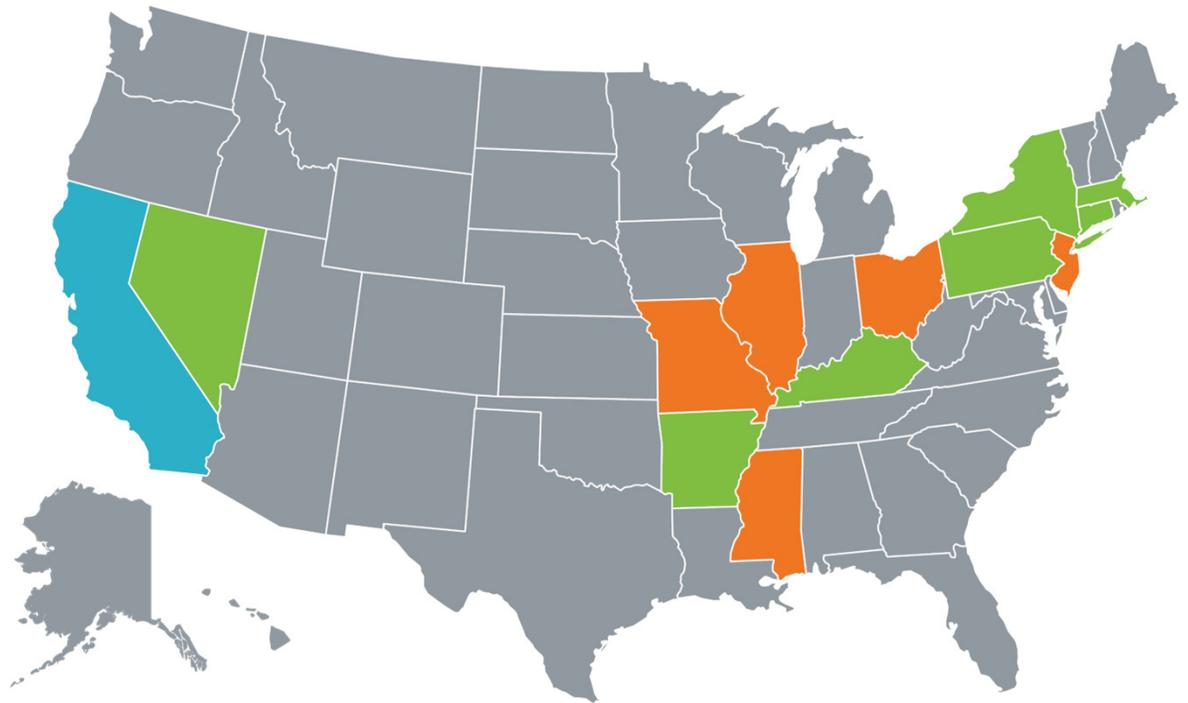
REJECTION OF CARDINAL CHANGE

- New Jersey declined to recognize the doctrine, finding “no compelling reason to recognize a cardinal change doctrine claim under New Jersey law.” *Durr Mech. Constr., Inc. v. PSEG Fossil, LLC*, 516 F. Supp. 3d 407, 416 (D. N.J. 2021).
- Missouri offers mixed results. One court found that “there are no Missouri cases addressing the cardinal change doctrine” and that “[a]pplying the cardinal change doctrine to the instant case has no support or precedent in Missouri law.” *Fru-Con/Fluor Daniel Joint Venture v. Corrigan Bros., Inc.*, 154 S.W.3d 330, 336 (Mo. Ct. App. 2004).



STATE LAW AND THE CARDINAL CHANGE DOCTRINE

- Adopted Cardinal Change
- Rejected Cardinal Change
- No Clear Rule Re Cardinal Change
- California *Amelco* (distinguishes doctrines and no clear Cardinal Change Rule)



THE MOCK HEARING

*Never Late Construction
(Contractor)*

vs.

*Always Fair County
(Owner)*

THE PROJECT

- Contractor is low bidder on a fixed price, design-bid-build project for a new MLB spring training facility in California being built by a county pursuant to a relocation agreement with the unnamed team. County's agreement with team requires facility to be ready by Spring 2027 or team can opt out.
- Design changes by Owner / Architect and alleged differing site conditions.
- Owner paid Contractor change orders on some issues, but Owner disputes other alleged changes and relief claimed by Contractor.
- Contractor is losing money on the Project and having cash flow issues because of Owner's failure to pay change orders totaling \$100 million.
- Project is approximately 50 percent complete.
- Contractor threatens to stop work and walk off the job.

THE CONTRACT

- Contract states that Contractor may only terminate if Owner fails to pay **undisputed** amounts within 30 days.
- Contractor must give notice and opportunity for Owner to cure payment issue before termination.
- Contract includes tiered dispute resolution with mediation or other agreed upon form of ADR and requires Contractor to continue to perform expeditiously pending resolution of a claim or dispute.
- Contract requires payment and performance bonds.

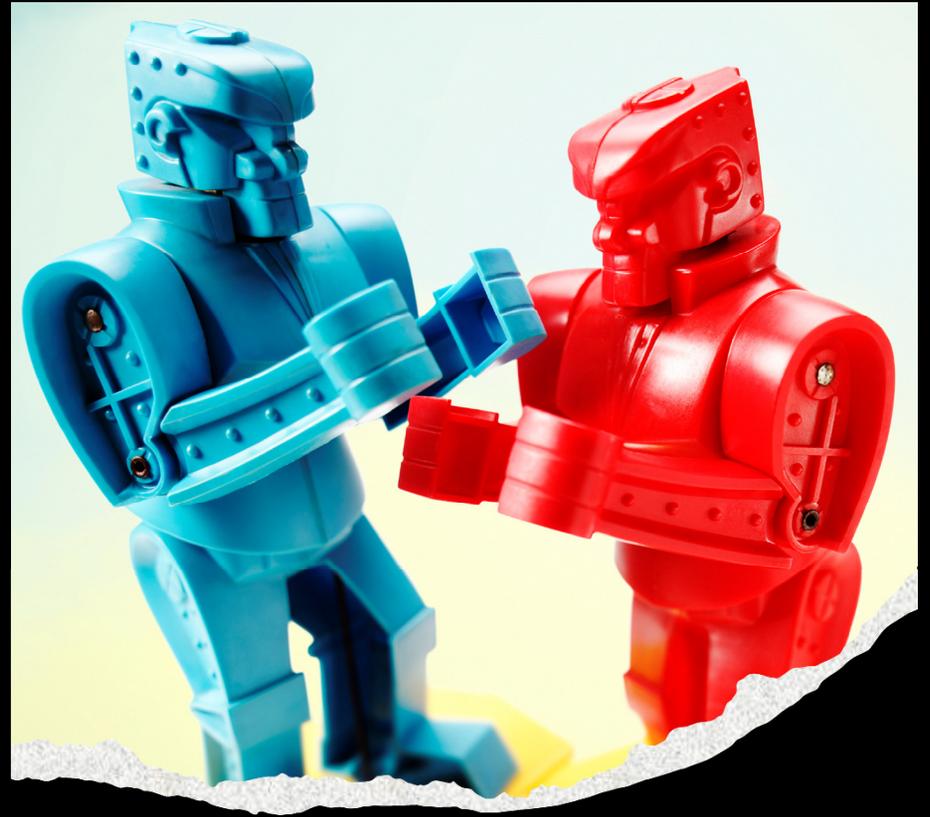
THE LAWSUIT

- Contractor files lawsuit seeking declaratory relief that Contractor may immediately cease performance on the project due to Owner's alleged material breach of contract and failure to pay change orders.
- Court orders expedited trial on declaratory relief which is entitled to statutory preference.
- County moves for summary judgment arguing that Contractor is not entitled to declaratory relief as a matter of law and Contractor's remedy would be for damages or additional costs (e.g., quantum meruit).

THE STIPULATED UNDISPUTED FACTS

- Contractor satisfied early dispute resolution requirements of the Contract
- Owner County has paid \$100 million in change orders on top of \$400 million original contract price
- Owner disputes an additional \$100 million in Contractor's change orders
- Owner has issued 301 Change Orders
- Contractor is losing money on the Project
- Case is assigned to the Honorable Daniel D. McMillan and the County's motion for summary judgment is about to be heard

LET'S GET
READY TO
RUMBLE . . .



SHOULD JUDGE MCMILLAN GRANT THE COUNTY OWNER'S MOTION?

- Go to the QR code or PollEv.com/jonesday020
- Choose:
 - “Yes, Grant the Motion.”
 - “No, Deny the Motion.”





Audience Poll

And the Winner
Is...

CLOSING THOUGHTS

- When the going gets tough, can the Contractor get going?
- Arguments may be made on both sides
- Facts of the dispute and nature of the project are relevant
- Applicable law must be considered and can play a major role in which doctrines apply, what relief may be available, etc.
- Statutory schemes can also provide a basis for a contractor to suspend work

How was our session?

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