Abandonment and Cardinal Change on State and Local Construction Projects

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Contracts for state and local public construction projects typically contain clauses stating how contractors may recover compensation for increased costs due to changes or additions to the scope of work. Such clauses may include written change order, notice, and approval requirements, and unit prices for increased material quantities. They also may limit the contractor's recovery for change impacts by setting fixed overhead recovery percentages, by restricting total value to a capped amount (e.g., the contract price), or by stating that certain impacts are not recoverable.

But what happens when the number or scope of changes on a public project are excessive, such that they go beyond what either party anticipated at contracting? In those circumstances, contract clauses may be inadequate to compensate the contractor because the impacts of those changes exceed what the contractor included in its contract price or can add onto the contract under contract procedures. Unless the contractor is allowed to go beyond the contract for a remedy, it will be faced with the difficult decision of whether to incur costs it cannot recover or walk off the job and risk a default termination. In many jurisdictions, contractors need not face such a decision because they can recover under the doctrines of abandonment and cardinal change.

The doctrines of abandonment and cardinal change provide that a contractor may recover its increased costs in quantum meruit where they result from excessive, owner-directed changes to a project, beyond what the parties could have reasonably anticipated at contracting. Contract provisions concerning change procedures and pricing do not apply to a claim for these costs. Under these circumstances, the owner is said to have "abandoned" the contract or made a "cardinal change" to the contract. Different jurisdictions use different terminology (although, as discussed below, at least one jurisdiction, California, treats the doctrines differently).

This article discusses the different state laws affecting recovery under the doctrines of abandonment and cardinal change on public projects. As will be apparent, a state's law is not always clear.

Many Jurisdictions Recognize Abandonment or Cardinal Change Generally

The abandonment and cardinal change doctrines are widely accepted. Courts applying federal contract law have recognized the cardinal change doctrine since the 1960s.[1] For private construction projects, some form of abandonment or cardinal change doctrine has been expressly recognized under the laws of at least 23 states and Puerto Rico,[2] and the doctrine has been implicitly recognized by at least four other states and the District of Columbia.[3] It is unclear in many of those jurisdictions, however, whether the courts would apply the doctrine to public projects. In one jurisdiction, California, the state supreme court has explicitly ruled that abandonment, while available for private projects, is *not* available for public projects.[4]

Whether abandonment and cardinal change claims are viable on any type of project remains an open question in all but one of the remaining 23 states. The exception is Mississippi, which has expressly rejected the abandonment and cardinal change doctrines for all projects.[5]

Abandonment versus Cardinal Change

Most jurisdictions that recognize the abandonment and cardinal change doctrines make no distinction between the two doctrines. In those jurisdictions, either or both doctrines allow for contractor claims for added costs caused by excessive changes beyond the general scope of work of the contract. For example, in *L.K. Comstock & Co., Inc. v. Becon Constr. Co., Inc.*,[6] which involved a private construction project, the Eastern District of Kentucky discussed the two theories separately, but noted that both doctrines address "situations where ordered changes exceed the general scope of the contract" and that "[r]egardless of which theory is applied, the result is the same: the party performing the work is entitled to seek a remedy outside the contract for the reasonable value of work performed."[7] In the case before it, the district court found that the changes ordered were within the parties' expectations at contracting and so rejected the contractors' claim under both the abandonment and cardinal change theories.[8]

California is the exception. In *Amelco Electric v. City of Thousand Oaks*, the California Supreme Court distinguished the doctrines, calling them "fundamentally different."[9] According to the court, under an abandonment claim, the contractor is entitled to recover its total cost (less payments received) for work both before and after the contract was abandoned. In contrast, under a cardinal change claim, the contractor is only entitled to breach of contract damages for the additional work constituting a cardinal change. While the court rejected a public contractor's right to bring an abandonment claim, it purported not to address a contractor's right to bring a cardinal change claim.[10]

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Different Jurisdictions' Approaches to Abandonment and Cardinal Change

Mississippi does not allow contractors to recover for abandonment or cardinal change on any type of project. According to a federal district court (the only court to opine on the issue), Mississippi law does not allow public or private contractors to recover under an abandonment or cardinal change theory. The seminal case is *Litton Systems, Inc. v. Frigitemp Corp.*, which involved a dispute between the prime contractor and one of its subcontractors on a federal project.[11] In that case, Litton had hired Frigitemp as a subcontractor for its construction of Landing Helicopter Assault vessels for the United States. After Litton sued Frigitemp for backcharges, Frigitemp countersued on several grounds, including cardinal change, seeking recovery for extra work in quantum meruit. The district court granted Litton's motion for summary judgment on Frigitemp's cardinal change claim, holding that such claims are not recognized under Mississippi law.[12]

In *Litton Systems*, Frigitemp had submitted evidence that "large scale changes were made to the contract work during the course of construction" and expert testimony that those changes "were so massive that no one could have anticipated them at the time of contracting."[13] Frigitemp relied on cardinal change cases, primarily from the U.S. Court of Claims, none of which applied Mississippi law. The district court refused to follow those cases, relying instead on Mississippi court decisions stating that, in order to recover under quantum meruit, a party must show (1) that it performed work that was not anticipated by the contract and (2) that there were no provisions in the contract concerning payment for unanticipated extra work. Since Frigitemp could not prove the latter element, its claim failed as a matter of law.[14]

California allows prime contractors to recover for abandonment only on private jobs, but allows subcontractors to recover from prime contractors both on private and public jobs. In *Amelco Electric v. City of Thousand Oaks*,[15] California became the first jurisdiction to make a distinction between private and public projects with regard to abandonment claims, allowing prime contractors to recover on such claims only for private jobs. The California Supreme Court held in *Amelco* that a contractor cannot rely on the abandonment theory of liability to recover its added costs from a public owner where the owner made excessive changes beyond the initial scope of the contractor's work.

The facts in *Amelco* provide a textbook case for an abandonment claim. *Amelco* arose from a contract to provide electrical work as part of the construction of a civic arts plaza. The City of Thousand Oaks awarded Amelco the contract after Amelco presented the low bid of $6.1 million. As the dissenting opinion noted, "It appears the City let the project out for bid before its plans were sufficiently complete . . ., and then imposed numerous and substantial changes to the project while giving Amelco no extra time to complete the additional work."[16] As a result, the City issued more than 1,000 sketches to clarify or change the original contract drawings, nearly a quarter of which affected the electrical cost. The City agreed to only 31 of Amelco's 221 requested change orders, increasing the contract price by $1 million. At the end of the project, Amelco filed a claim against the City that eventually totaled more than $2 million for the additional uncompensated work, based on a theory that the City abandoned the original contract through its excessive change orders. The City denied Amelco's claim.

Amelco sued the City under an abandonment theory of liability. Under that theory, existing California case law held that a contractor could recover from a private owner for the reasonable value of its services where the owner had made so many changes to a contract that it could be deemed to have abandoned the contract.[17] At trial, the court allowed Amelco to submit evidence of its damages under an abandonment theory, and Amelco prevailed. After the court of appeal affirmed, the City appealed to the California Supreme Court.

The California Supreme Court reversed the court of appeal's decision, holding that a contractor cannot recover against a public owner under the theory of abandonment. The court relied on California's void contract rule that prohibits a contractor from being paid for work performed under a contract that is subsequently declared void because the public owner was not authorized to award the contract in the first place.[18] In *Amelco*, the court extended the application of this rule from problems that arise during the bidding of a contract to problems that arise during performance. The court concluded that allowing abandonment claims in the public works context would render the concept of competitive bidding meaningless.[19]

Although the court did not reach the issue of whether a cardinal change claim would be viable on public projects in California, it is unclear under the court's logic how contractors could assert cardinal change claims against public owners when they cannot bring abandonment claims against such owners.[20]

In their dissent, two justices noted that most jurisdictions allow abandonment claims and that, under the majority decision, California becomes the first jurisdiction to allow abandonment claims for private but not public projects.[21] The dissent opined that allowing abandonment claims for public projects would benefit the public because it would deter poor construction planning and management by public entities and because disallowing such claims would lead contractors to stop building where the public owner had imposed excessive changes, rather than continuing to work at the risk of never getting paid.[22]

More recently, a California court of appeal has interpreted the rule in *Amelco* as applying only to contractor claims made directly to public owners.[23] In *Sehulster*

Tunnels/Pre-Con v. Traylor Bros. Inc./Obayashi Corp., the court held that *Amelco* does not preclude a subcontractor on a public project from recovering from the prime contractor under an abandonment theory.

In *Sehulster*, Traylor Brothers contracted with the City of San Diego to build a tunnel and subcontracted with Sehulster for the manufacture and supply of tunnel ring segments. After Traylor Brothers made substantial changes to its purchase order, Sehulster submitted a claim for cost overruns it attributed to the changes. When Traylor Brothers rejected the claim, Sehulster sued for breach of contract and abandonment, and Traylor Brothers cross-complained against the city for indemnity. The jury awarded Sehulster $2.8 million in damages and determined that Traylor Brothers was entitled to 30 percent indemnity from the city.

The court of appeal affirmed the abandonment award, but reversed the indemnity determination. It found that "the public policy considerations underlying the Supreme Court's decision [in *Amelco*] do not apply in the context of two contracting private entities."[24] Since the court also found that Traylor Brothers was not entitled to implied contractual indemnity under the particular facts of the case, it declined to consider whether *Amelco* would preclude a contractor from recovering from the public owner under an implied contractual indemnity theory where it has incurred liability under an abandonment theory.[25]

Eight states and Puerto Rico expressly or implicitly allow contractors to recover for abandonment on public jobs. In contrast to California and Mississippi, at least eight other states (Arizona, Arkansas, Illinois, Maine, New York, Oregon, Washington, and Wyoming) and Puerto Rico have allowed abandonment claims against public owners.[26] All of those jurisdictions, except Maine and Wyoming, have expressly allowed such claims. A court in Wyoming has simply assumed the doctrine applies to public contracts, asking instead whether it should also apply to private jobs.[27] And the Supreme Judicial Court in Maine implicitly recognized the cardinal change doctrine in a public contract case, although it declined to apply the doctrine on the facts before it.[28]

An Arkansas decision, *Housing Authority of Texarkana v. E.W. Johnson Constr. Co.*,[29] is typical of courts' application of the abandonment theory to public contracts. There, a city had directed numerous changes,[30] which the trial court found constituted a breach of contract in finding for the contractor.[31] On appeal, the city argued "that the contract permits the owner to make changes in the work of the contractor without invalidating the contract."[32] The Arkansas Supreme Court was unpersuaded and affirmed the trial court holding that the city "breached the warranty of the plans and specifications submitted to the [contractor] resulting in cardinal changes in the contract."[33]

Another example of a court applying the abandonment doctrine to a public project is the Arizona court's decision in *County of Greenlee v. Webster*.[34] In that case, the plaintiff contracted with the County of Greenlee to construct and improve a roadway. During construction, the county made many alterations in its plans and specifications, resulting in alteration of the quantity, location, and extent of the work. The contractor sued for breach of contract, contending that the county's alterations were unreasonable and changed the general character of the contract. After the trial court denied the county's request for dismissal, the county appealed. Citing *Cook County v. Harms*, an abandonment case involving a public project in Illinois,[35] the court stated that changes clauses generally cover "only such alterations as are incident to and in aid of the main contract," and do not cover "[c]hanges that radically extend the amount of the work, or that eliminate large portions of the work, or that greatly increase the cost thereof."[36] On this basis, the court concluded the contractor was not entitled to recover under the contract, but was entitled to recover in quantum meruit. Since the contractor had not pled a quantum meruit claim, the appellate court directed the trial court to dismiss the contractor's breach of contract complaint.

Many states have adopted the abandonment doctrine for private contracts, but have not addressed the doctrine's applicability to public jobs.

Eighteen other states and Washington, D.C., allow contractors to recover for abandonment on private jobs, but whether they would allow recovery on public jobs has not been decided. Many other states have adopted the abandonment doctrine or something similar for private contracts, but have not addressed the doctrine's applicability to public jobs, at least not in any reported decisions. States that have expressly recognized abandonment or cardinal change on private projects, but have not addressed public projects, include Alabama, Colorado, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, Ohio, South Dakota, Texas, Utah, and Wisconsin.[37] Three more states—Oklahoma, Pennsylvania and Rhode Island—and Washington, D.C., have also implicitly recognized abandonment or cardinal change, but have only done so in the context of private jobs.[38] No reported case has decided whether any of these jurisdictions would allow recovery under either theory on public jobs.

At least one jurisdiction, Michigan, has limited application of the abandonment doctrine in a way that would likely preclude abandonment recovery on public jobs. Specifically, in *R.M. Taylor, Inc. v. General Motors Corp.*, the Eighth Circuit held that abandonment claims are not allowed under Michigan law where the parties' contract

contains a change order clause.[39] Since such clauses are commonly, if not always, used in public contracts, this limitation effectively eliminates abandonment claims on such projects in Michigan. Unlike Michigan, most jurisdictions that allow abandonment claims have not imposed this limitation.[40]

Other than Michigan and, of course, California, most jurisdictions that have recognized abandonment for private projects would likely recognize the doctrine for public projects as well. California's refusal to allow abandonment claims on public jobs depends on its "void contract rule,"[41] which is not the law in most states. Without that rule, California's rationale for distinguishing between private and public jobs for purposes of allowing contractor recovery would not apply.

The remaining 22 states have neither recognized nor rejected recovery for abandonment. The courts in 22 states have not yet considered abandonment or cardinal change in any reported decision. In most, if not all, of these jurisdictions, contractors could assert claims under either theory based on basic contract and waiver principles. The courts in these jurisdictions would likely follow the majority rule and allow recovery on private and public jobs, unless they have a void contract rule similar to that in California.

Conclusion

When projects go bad, contractors need to look at the possibility of asserting abandonment or cardinal change claims. In some jurisdictions, such claims have been explicitly recognized for public projects. Many other jurisdictions have recognized either or both theories in the context of private jobs, but have not addressed whether they would allow recovery for public jobs. In still others, the door is open under the right facts to assert an abandonment or cardinal change claim under basic contract and waiver principles. For public projects in California and all projects in Mississippi, however, that door has been shut. Whether other jurisdictions choose to follow California or Mississippi in this regard remains to be seen. PL

Endnotes

1. *See, e.g.*, *In re* Boston Shipyard Corp., 886 F.2d 451, 456 (1st Cir. 1989); Edward R. Marden Corp. v. United States, 442 F.2d 364, 369 (Ct. Cl. 1971); Air-A-Plane Corp. v. United States, 408 F.2d 1030, 1033 (Ct. Cl. 1969).

2. **Alabama:** Hutchinson v. Cullum, 23 Ala. 622 (1853); **Arizona:** County of Greenlee v. Webster, 25 Ariz. 183 (1923); **Arkansas:** Hous. Auth. of Texarkana v. E. W. Johnson Constr. Co., 264 Ark. 523 (1978); **California:** C. Norman Peterson Co. v. Container Corp. of Am., 172 Cal. App. 3d 628 (1985); **Colorado:** H.T.C. Corp. v. Olds, 486 P.2d 463, 466 (Colo. App. 1971); **Illinois:** Cook County v. Harms, 108 Ill. 151 (1883); **Indiana:** Rudd v. Anderson, 285 N.E.2d 836 (Ind. App. 1972); **Kentucky:** L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 933 (E.D. Ky. 1993) (applying Kentucky law); **Louisiana:** Nat Harrison Assoc., Inc. v. Gulf States Utilities Co., 491 F.2d 578, 583, *reh'g denied*, 493 F.2d 1405 (5th Cir. 1974) (applying Louisiana law); **Maryland:** Westinghouse Elec. Corp. v. Garrett Corp., 437 F. Supp. 1301, 1332 (D. Md. 1977) (applying Maryland law); **Michigan:** R. M. Taylor, Inc. v. General Motors Corp. 187 F.3d 809 (8th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000) (applying Michigan law); **Minnesota:** Fuller Co. v. Brown Minneapolis Tank & Fabricating Co., 678 F. Supp. 506, 509 (E.D. Pa. 1987) (applying Minnesota law); **Missouri:** Baerveldt & Honig Constr. Co. v. Dye Candy Co., 212 S.W.2d 65, 69 (Mo. 1948); Havens Steel Co. v. Randolph Eng'g Co., 613 F. Supp. 514, 533 (W.D. Mo. 1985); **Nevada:** Paterson v. Condos, 55 Nev. 134 (1934); **New York:** Kole v. Brown, 13 A.D.2d 920 (1961); **Ohio:** Oberer Constr. Co. v. Park Plaza, Inc., 179 N.E.2d 168, 171 (Oh. Ct. App. 1961); **Oregon:** Hayden v. Astoria, 74 Or. 525, 533 (1915); **Puerto Rico:** Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth., No. 80–0743(RA), *slip op.* (D.P.R. 8/23/83) at 37b, *aff'd*, 744 F.2d 880 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985); **South Dakota:** Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242, 254–55 (8th Cir. 1969) (applying South Dakota law); **Texas:** Nat'l Envtl. Service Co., Inc. v. Homeplace Homes, Inc., 961 S.W.2d 632, 635 (Tex. App. 1998); **Utah:** Rhodes v. Clute, 53 P. 990 (Ut. 1898); **Washington:** Kieburtz v. City of Seattle, 84 Wash. 196 (1915); **Wisconsin:** Olbert v. Ede, 156 N.W.2d 422 (Wis. 1968); and **Wyoming:** Scherer Constr., LLC v. Hedquist Constr., Inc., 18 P.3d 645, 656 (Wyo. 2001).

3. **District of Columbia:** Blake Constr. Co., Inc. v. C. J. Coakley Co., Inc., 431 A.2d 569, 578–79 (D.C. Ct. App. 1981); **Maine:** Claude Dubois Excavating v. Kittery, 634 A.2d 1299, 1301–02 (Me. 1993); **Oklahoma:** Watt Plumbing, Air Conditioning & Elec., Inc. v. Tulsa Rig, Reel & Mfg. Co., 533 P.2d 980 (Okla. 1975) (rejecting subcontractor's claim, and distinguishing cardinal change cases, based on express agreements between subcontractor and contractor regarding compensation for each change before altered work was performed); **Pennsylvania:** E.C. Ernst, Inc. v. Koppers Co., Inc., 476 F. Supp. 729, 757–58 (W.D. Pa. 1979); **Rhode Island:** Clark-Fitzpatrick, Inc./Franki Found. Co. v. Gill, 652 A.2d 440, 442 (R.I. 1994) (judgment below awarded contractor damages for cardinal change claim).

4. 27 Cal. 4th 228 (2002). The California Supreme Court denied Amelco's application for rehearing on March 13, 2002. Amelco Elec. v. City of Thousand Oaks, 2002 Cal. LEXIS 1689 (3/13/02).

5. Litton Sys., Inc. v. Frigitemp Corp., 613 F. Supp. 1377 (S.D. Miss. 1985) (applying Mississippi law) (citing Jackson v. Sam Finley, 366 F.2d 148 (5th Cir. 1966)); Citizens Nat'l Bank v. L.L. Glascock, Inc., 243 So. 2d 67 (Miss. 1971); Delta Constr. Co. v. City of Jackson, 198 So. 2d 592 (Miss. 1967); and Redd v. L&A Contracting Co., 151 So. 2d 205 (Miss. 1963)). In *Litton*, the District Court quotes *Redd*, 151 So. 2d at 208, stating that "where there is a contract, parties may not abandon same and resort to quantum meruit." 613 F. Supp. at 1382. The court then concludes that "Mississippi does not subscribe to the cardinal change doctrine." *Id.* at 1384.

6. 932 F. Supp. 906 (E.D. Ky. 1993).

7. *Id.* at 939.

8. *Id.* at 935–36, 946; *see also* Scheck Mech. Corp. v. Borden, Inc., 186 F. Supp. 2d 724, 734–35 (W.D. Ky. 2001).

9. 27 Cal. 4th 228, 238 (2002).

10. 27 Cal. 4th 228, 238 (2002).

11. *See supra* note 5.

12. *Id.* at 1382–84 (citing Jackson v. Sam Finley, 366 F.2d 148 (5th Cir. 1966)) ("Mississippi does not subscribe to the cardinal change doctrine. . . .").

13. *Id.* at 1381.

14. *Id.* at 1382 (citing Citizens Nat'l Bank v. L.L. Glascock, Inc., 243 So. 2d 67 (Miss. 1971); Delta Constr. Co. v. City of Jackson, 198 So. 2d 592 (Miss. 1967); Redd v. L&A Contracting Co., 151 So. 2d 205 (1963)).

15. 27 Cal. 4th 228 (2002).

16. *Amelco*, 27 Cal. 4th at 251-52 (J. Werdegar, dissenting).

17. *Id.* at 235–36 (majority opin., citing C. Norman Peterson Co. v. Container Corp. of Am., 172 Cal. App. 3d 628 (1985); Daugherty Co. v. Kimberly-Clark Corp., 14 Cal. App. 3d 151 (1971); Opdyke & Butler v. Silver, 111 Cal. App. 2d 912 (1952)).
18. *Id.* at 238 (citing Miller v. McKinnon, 20 Cal. 2d 83, 87–88 (1942); Zottman v. City and County of San Francisco, 20 Cal. 96, 99–102 (1862)).
19. *Id.* at 238–39.
20. 27 Cal. 4th at 238.
21. *Id.* at 248–49 (J. Werdegar, dissenting).
22. *Id.* at 252–53.
23. Sehulster Tunnels/Pre-Con v. Traylor Bros. Inc./Obayashi Corp., 111 Cal. App. 4th 1328, 1343–45 (2003).
24. *Id.* at 1344–45.
25. *Id.* at 1352 n.22.
26. County of Greenlee v. Webster, 25 Ariz. 183 (1923); Hous. Auth. of Texarkana v. E. W. Johnson Constr. Co., 264 Ark. 523 (1978); Cook County v. Harms, 108 Ill. 151 (1883); Claude Dubois Excavating v. Kittery, 634 A.2d 1299, 1301–02 (Me. 1993); Westcott v. State, 36 N.Y.S.2d 23 (1942); Hayden v. Astoria, 74 Or. 525 (1915); Kieburtz v. City of Seattle, 84 Wash. 196 (1915); Scherer Constr., LLC v. Hedquist Constr., Inc., 18 P.3d 645, 656 (Wyo. 2001) (assumes, without deciding, that cardinal change doctrine applies to public owners); Paul N. Howard Co., No. 80–0743(RA), *slip op.* (D.P.R. 8/23/83) at 37b, *aff'd*, 744 F.2d 880 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985); *see also* Stuart A. Weinstein-Bacal, *Construction in Puerto Rico: Navigating the Legal Quagmire*, 71 REV. JUR. U. P.R. 29 (2002).
27. Scherer Constr., LLC v. Hedquist Constr., Inc., 18 P.3d 645, 656 (Wyo. 2001).
28. Claude Dubois Excavating v. Kittery, 634 A.2d 1299, 1301–02 (Me. 1993).
29. 264 Ark. 523 (1978).
30. *Id.* at 528 n.2.
31. *Id.* at 532–33.
32. *Id.* at 533.
33. *Id.* at 525, 529, 535.
34. 25 Ariz. 183.
35. 108 Ill. 151.
36. 25 Ariz. at 191–92.
37. *See supra* note 2.
38. *See supra* note 3.
39. 187 F.3d 809, 813–14 (8th Cir. 1999) (applying Michigan law).
40. *See, e.g.*, Peter Kiewit Sons', 422 F.2d 242, 254-55 (8th Cir. 1969) (applying South Dakota law) and Bogert Constr. Co. v. Lakebrink, 404 S.W.2d 779, 782 (Mo. Ct. App. 1966) (both cited by *R.M. Taylor*, 187 F.3d at 813–14).
41. *Amelco*, 27 Cal. 4th at 238.