Beyond Changes: Abandonment and Cardinal Change

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Most construction contracts state how contractors may recover compensation for increased costs due to changes or additions to the scope of work. Such clauses often require that change orders, notices, and approvals all be in writing; they also may provide unit prices for increased material quantities. These contracts may limit the contractor's recovery for the impact of change orders by setting fixed overhead percentages, by restricting total value to a capped amount (e.g., the contract price), or by stating that certain impacts are not recoverable. Owners often insist on such provisions in their prime contracts (and contractors insist on them in their subcontracts) because they anticipate that changes will occur, and they want to control the amounts that they must pay as a result. Contractors often have little choice but to agree to these clauses.

What happens, however, when the number or scope of changes on a project far exceeds what either party anticipated at contracting? In those circumstances, contract clauses may fail to compensate the contractor adequately because the impacts of those changes exceed any contingencies that the contractor included in its price or what it can add 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 that it cannot recover or walk off the job. In many jurisdictions, however, contractors need not make such a decision because they can recover under the doctrines of abandonment or cardinal change.

The theories of abandonment or cardinal change provide that where an owner (or a contractor vis-à-vis its subcontractor) makes excessive changes to a project, beyond what the parties reasonably could have anticipated at contracting, the contractor may recover its resulting increased costs in quantum meruit. 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).

This article discusses which courts apply these doctrines and, for those that do, what a contractor must prove and what it may recover. Particular attention is given to a recent California Supreme Court case, *Amelco Electric v. City of Thousand Oaks*,[1] which has redefined the concepts in several important respects.

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Many Jurisdictions Recognize Abandonment or Cardinal Change

The abandonment and cardinal change doctrines are widely accepted. Courts applying federal contract law have recognized the idea of a cardinal change doctrine since the 1960s.[2] Some form of abandonment or cardinal change has been adopted under the laws of at least twenty-two states,[3] several of which have accepted it for more than seventy-five years.[4] The doctrine has been implicitly recognized by at least three other states and the District of Columbia.[5]

Only Mississippi has expressly rejected the theories of abandonment and cardinal change.[6] In *Litton Systems, Inc. v. Frigitemp Corp.*, Litton hired Frigitemp as a subcontractor. Frigitemp sued on several grounds, including cardinal change, seeking recovery for extra work in quantum meruit. The subcontractor 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."[7] 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 holdings, 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.[8] Because Frigitemp could not prove the latter element, its claim failed as a matter of law.

Abandonment versus Cardinal Change

Most jurisdictions make no distinction between the abandonment and cardinal change doctrines. In those courts, either or both doctrines allow for contractor claims for added costs caused by excessive changes beyond the general scope of work of the contract.

In *L.K. Comstock & Co. v. Becon Construction Co., Inc.*,[9] the Eastern District of Kentucky discussed the two theories separately. It 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."[10] 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 the cardinal change theories.[11]

In *Amelco Electric v. City of Thousand Oaks*,[12] California became the first jurisdiction to define the doctrines differently. In *Amelco*, the California Supreme Court recently called the doctrines "fundamentally different." The opinion distinguished between a contractor's right to bring an abandonment claim, which it rejected, and its right to bring a cardinal change claim, which it purported not to address. 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 entitled to only breach-of-contract damages for the additional work constituting a cardinal change.[13] Although the court did not reach the issue of whether a cardinal change claim would be viable 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 them.

Application of Abandonment/Cardinal Change Doctrine to Public Projects

In *Amelco*,[14] California became the first jurisdiction to distinguish between private and public projects, allowing abandonment claims only for private jobs. The California Supreme Court held 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. This decision means that when a contractor bids on a public project in California, it assumes the risk that, if the project is very significantly changed, the contractor may incur substantial added costs for which it will not be paid.

The facts in *Amelco* provide a textbook case for an abandonment claim. 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."[15] 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 thirty-one of Amelco's 221 requested change orders, increasing the $6.1 million contract price by $1 million.

Amelco sued the city for more than $2 million under two theories of liability: breach of contract and abandonment. Under the latter cause of action, 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 it.[16] At trial, the court allowed Amelco to submit evidence of its damages under both theories using a modified total cost measure. The jury reached a verdict in Amelco's favor on both of its causes of action.

The California Supreme Court reversed, holding that a contractor cannot recover against a public owner under the theory of abandonment. It relied on California's void contract rule, which prohibits a contractor from being paid for work performed when a public owner was not authorized to award the contract in the first place.[17] 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.[18]

In their dissent, two justices noted that most jurisdictions allow abandonment claims.[19] They also opined that allowing abandonment claims for public projects would benefit the public by deterring poor construction planning and management by public entities. The dissent felt that 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.[20]

In contrast to *Amelco*, at least six other states (Arizona, Arkansas, Illinois, New York, Oregon, and Washington) have allowed abandonment claims against public owners.[21] Of course, the similar federal doctrine of cardinal change was *invented* for claims against the government on federal contracts.[22] Many other states have adopted the abandonment doctrine, or something similar, for private construction contracts, but they have not addressed the doctrine's applicability to public jobs. At least one state has simply assumed that the doctrine applies to public contracts, asking instead whether it also should apply to private jobs.[23]

Housing Authority of Texarkana v. E. W. Johnson Construction Co. [24] is typical of courts' application of the abandonment theory to public contracts. There, a city had directed numerous changes,[25] which the trial court found constituted a breach of contract.[26] On appeal, the city argued "that the contract permits the owner to make changes in the work of the contractor without invalidating the contract."[27] The Arkansas Supreme Court was unpersuaded and affirmed the trial court's holding that the city "breached the warranty of the plans and specifications submitted to the [contractor] resulting in cardinal changes in the contract."[28]

What Proof Is Required to Recover Under an Abandonment Claim?

The Elements of an Abandonment Claim

The points that a contractor must prove to recover under an abandonment claim in most jurisdictions are (1) the owner imposed changes that caused work beyond the general scope of work of the original contract and (2) those changes damaged the contractor by increasing its costs.[29]

The courts will look at several factors to determine whether owner-directed changes were excessive. The starting points are the size, complexity, and expected duration of a project. The court then may consider (1) the number of changes made; (2) how many changes actually were anticipated when the project started; (3) the magnitude of work involved in the changes; and (4) the length of time in which

such changes were made.[30] Judges also will look at the amount of extra work that the changes caused the contractor to perform, the extent to which the contractor's work was redesigned, and the magnitude of the extra costs that the contractor incurred.[31]

Effect of Changes Provision in Contract on Contractor's Ability to Recover for Abandonment

In most jurisdictions, the commonly found changes clause is no impediment to an abandonment or cardinal change claim.[32] All federal construction contracts must include a change order clause,[33] and all such contracts are subject to cardinal change claims under the appropriate facts.[34] One rationale for this rule is that it would be unfair to require a contractor to address the cumulative effect of changes before their ultimate impact can be assessed.[35] A few jurisdictions, however, refuse to apply the abandonment doctrine to cases involving contracts with changes clauses.[36]

Actual, Mutual Intent to Abandon as a Separate Element

A contractor in most jurisdictions does not need to prove actual, mutual intent to dispense with the contract as a separate element of its abandonment claim. Although the cases in several states indicate that mutual intent of the parties to discontinue the contract constitutes an element of abandonment, this is not, in effect, a separate requirement, because it will be implied from the basic requirements discussed above. In other words, if an owner issues an excessive number of changes that alter the scope of the work, that alone indicates that the owner intends to abandon the contract. Likewise, if the contractor agrees to go beyond the original scope of work by performing excessive changes directed by the owner, that implies that the contractor intends to abandon the contract.[37]

In California, for example, both *Opdyke & Butler v. Silver*[38] and *Daugherty Co. v. Kimberly-Clark Corp.*[39] make this apparent. In *Opdyke*, the contractor did "not rely upon any evidence of express abandonment"; rather, he argued "that abandonment may be implied from the acts of the parties."[40] The Court of Appeal affirmed the trial court's judgment for the contractor although the contractor offered no testimony "that the parties ever expressly agreed to abandon the written contract." Instead, the contractor "simply assumed, according to his testimony, that such abandonment and adoption had been worked by reason of the constant changes, and the constant interference with the work, by [the owner]."[41] The primary evidence that the court looked to for support of the trial court's abandonment finding was testimony that the owner directed numerous changes and the effect that those changes had on the project specifications, both of which "evinced a high degree of uncertainty on the part of [the owner] as to what he wanted done."[42] Proof that the parties ignored change order procedures was simply "more evidence" of acts by the parties from which a mutual intent to abandon could be inferred: "There was other *evidence* that should be mentioned, *tending* to the same conclusion," including the parties' ignoring of the contract's change order provisions.[43]

Likewise, in *Daugherty*, the Court of Appeal first discussed the evidence of the amount of the contractor's added costs, the number of changes, the extent of the design changes, the sizes of the individual changes, and the contractor's expectations regarding changes at the time of contracting.[44] The court reversed the trial court's summary judgment for the defendant-owner on the contractor's abandonment claim based on its conclusion that, "because of the tremendous number of changes, there was an issue as to whether the contract had been abandoned by the parties and they proceeded apart from the contract."[45] Citing *Opdyke*, the court reinforced this conclusion with the statement that "[a]bandonment of the contract can occur in instances where the scope of the work when undertaken greatly exceeds that called for under the contract."[46] While the court noted that there was evidence that the parties ignored change order procedures, it said nothing to indicate that this was necessary to its decision.

Courts in many other jurisdictions adopting the abandonment or cardinal change doctrine will imply mutual intent to discontinue the contract where the owner has imposed and the contractor has performed excessive changes.[47] For example, in *H.T.C. Corp. v. Olds*, a Colorado appellate court described the contractor's evidence that the owner ordered "numerous," "extensive" changes and made no mention of the contract's change order process or whether the parties followed it.[48] It then held that "there was substantial evidence upon which the trial court could base its finding that there had been an abandonment of the original contract."[49]

In *L.K. Comstock,* a special master appointed by the Eastern District of Kentucky found that the extent of the changes ordered was within the parties' expectations at contracting and that the parties did not "conform strictly" with the contract's change order process.[50] Under those circumstances, the evidence of abandonment was insufficient to meet Kentucky's clear and convincing standard of proof.[51] This conclusion makes sense. The number of changes on a project will only be excessive and alter the scope of work if they go far beyond the alterations that the parties anticipated at contracting. This indirect showing of how the "meeting of the minds" changes is no different from any other evidence that a party intended to go beyond or outside agreed contract terms.

The Contractor Need Not Prove the Date of Abandonment

No reported case requires that a party alleging abandonment prove the date on which abandonment occurred. To the contrary, in *Opdyke*, the contractor "could fix no definite date" for the event culminating in the abandonment.[52] The court found this to be irrelevant, stating that "the precise or even the approximate day the written contract was abandoned and the oral one adopted, if such occurrences took place, is *not material*."[53] In *Amelco*, the court stated in dicta that, "[u]nder the abandonment doctrine, the plaintiff need not demonstrate . . . at what point the contract was abandoned."[54]

This conclusion is consistent with the nature of abandonment, which is often the culmination of an excessive number of changes, rather than one single event. There may be no particular instant that both parties "decide" to give up the contract. Rather, it is implied based on the excessive number of changes.

Requiring a plaintiff to prove when an abandonment occurred would also be generally contrary to the rule in many jurisdictions that a plaintiff must prove the *fact* of damage with certainty but need not prove the *amount* of damage with certainty.[55] If abandonment has occurred and damaged the contractor, when that discontinuation of the agreement occurred is potentially relevant only to the amount of recoverable damages, not to whether recovery may be had at all.

Allowing a contractor demonstrating abandonment to recover damages without imposing an additional requirement that it prove when the abandonment occurred does not necessarily mean that the contractor will receive a windfall. The contractor still must prove that the owner's abandonment caused it to suffer damages in the form of added costs.[56]

The Contractor Need Not Prove That the Nature of the Final Construction Product Was Changed

Abandonment will be found where the number of changes on a project is so excessive as to change the scope of the work.[57] In most jurisdictions, this does not mean that the changes must result in an entirely different end product.[58] It does not mean that a contractor must prove that it originally contracted to build a shack and ended up constructing the Taj Mahal. The extent of alteration in the work, rather than in the nature of the final construction product, is the relevant consideration in determining whether changes effect an abandonment of a construction contract.

In *C. Norman Peterson Co. v. Container Corp. of America,*[59] for example, the owner made numerous changes to the plans for a mill modernization project, and, while the court discussed the loss of productivity and increase in costs that resulted, it did not even mention the difference, if any, between the mill as specified in the original contract and as modified under the changed specifications.[60] Likewise, in *Daugherty*,[61] the court described the number of changes in the plans for construction of a mill and the resulting increase in the contractor's costs. The only mention of the changes' effect on the mill itself was a reference to "upgrading the mechanical and electrical installation."[62] In neither of these cases is there any indication that the court considered a change in the nature of the final construction product necessary to show that there was abandonment, so long as the work performed differed materially from the work that the parties anticipated.

Additionally, federal courts frequently have applied the cardinal change doctrine in cases where the end product is substantially similar to that which the contractor originally agreed to build. In *Edward R. Marden Corp. v. United States*,[63] for example, the plaintiff contracted to build an aircraft maintenance hangar. After erection, the hangar collapsed due to a defect in the construction sequence called for in the specifications.[64] The Navy ordered the contractor to reconstruct the hangar. Clearly, the scope of the contractor's *work* had changed, even though the final construction *product* had not. Under those circumstances, the court found a cardinal change:

> In the present case the reconstructed hangar was, presumably, the identical hangar called for in the original specifications. In other words, in directing reconstruction of the hangar, the Government did not alter the design or other physical characteristics of the structure. We do not view this as a crucial difference, however. *Where a cardinal change is concerned, it is the entire undertaking of the contractor, rather than the product, to which we look.*[65]

Air-A-Plane Corp. v. United States[66] makes the same point. During performance, the Army made "a large number of changes" in the contractor's work that increased the contractor's costs.[67] After the Army's contracting officer denied a substantial portion of the contractor's claim for an equitable adjustment, the contractor challenged that denial in the Armed Services Board of Contract Appeals. The board found that the contractor, "in bidding on the contract, had not anticipated that any substantial number of changes would be ordered."[68] It also found that the alterations were so numerous "that the contract took on the aspects of a design or development contract."[69] Portions of the contractor's work in *Air-A-Plane* were modified several times, and others, while not themselves changed, were affected by differences in other areas of the project. The board concluded that "[t]he frequency and nature of the changes were disruptive of [the contractor's] production." Despite those findings, the board held that the contractor's recovery was limited to the adjustments made under the contract's changes provision. The contractor appealed to the U.S. Court of Claims, alleging "that [the Army] breached the contract because the changes imposed amounted *in toto* to a cardinal change, beyond the scope of the Changes article."[70]

In its opinion, the Court of Claims stated the basic standard for a cardinal change: "whether the modified job 'was essentially the same work as the parties bargained for when the contract was awarded.'"[71] A particular case can be resolved only

> by considering the totality of the change and this requires recourse to its magnitude as well as its quality. [citations omitted] . . . There is no exact formula * * *. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole.[72]

Applying these general standards to the facts, the Court of Claims stated "that the [contractor's] claim of a cardinal change is very substantial and far from frivolous."[73] The court remanded, instructing the board to hear the contractor's cardinal change claim on its merits.[74] In so doing, the court again made clear that the extent of change necessary for a cardinal change may occur as a result of the number of changes, not just as a result of a change in the nature of the end product.

There is at least one jurisdiction, however, that has departed from this rule. In *Hensel Phelps Construction Co.*

v King County,[75] a Washington Court of Appeals stated that under the cardinal change doctrine, "[a] plaintiff will have no right to recover if the project as ultimately constructed is essentially the same as the one it contracted to construct." Applying this rule, the court held that a painting contractor's claim based on "having to work on an accelerated schedule, having to redo work, and contending with stacking of trades" did not qualify as a cardinal change because "there was not the slightest change in the shape or square footage of surfaces painted."[76] This case appears to represent an anomaly.

What Can a Contractor Recover Once It Proves Its Abandonment Claim?

The jurisdictions that recognize the abandonment doctrine allow contractors to recover in quantum meruit, that is, to recover the value of the added work that they provided.[77] Thus, those courts do not limit a contractor's recovery under an abandonment claim to contract prices.[78]

Should Jurisdictions Allow Abandonment and Cardinal Change Claims?

In the author's opinion, the abandonment doctrine leads to fair and just results. When an owner directs an excessive number of changes that cause a contractor to incur added costs that neither party anticipated at the time of contracting, the doctrine puts the responsibility for those extra expenses on the party that often caused them. To the extent that those added costs cannot be identified or measured accurately at or near the time they occur, the doctrine prevents the owner from reaping a potential windfall by invoking change order or notice procedures in the contract. When the excessive number of those changes makes it difficult (or impossible) for the contractor to prove the amount of added costs with certainty, the doctrine prevents the owner, as the party who caused those difficulties, or at least benefited from the work, from escaping liability by arguing that the contractor cannot meet its burden of proof as to the precise dollar value of those damages.

Unless a project is expressly stated to be a research and development project or a design-build project, the contractors normally anticipate (1) that the owner knows what it wants and (2) that when the owner provides plans and specifications, it has taken reasonable steps to ensure that they are correct and complete. When an owner provides the project's design, it impliedly warrants that its design is not defective.[79] The contractor is entitled to rely on that warranty. The doctrine of abandonment provides an effective means of making the owner responsible for all of the added costs caused by a breach of that warranty.

Most construction projects are extremely complex, involving many different trades performing interconnected work. On the normal job, a contractor can anticipate that the owner may direct some level of changes in the design, materials, or schedule, and is equipped to determine the costs of such changes close to the time in which they happen. In unusual cases, however, the alterations in the work may occur to an extent not anticipated in the parties' contract. That may be because the alterations required either are very different in nature from the changes normally encountered on similar projects or they are far more numerous than the parties reasonably would expect. Particularly where there is an extraordinary number of changes, inefficiencies often raise a contractor's costs. However, this extra expense may be detected only long after the inefficiencies first began and, even then, the real added costs are often impossible to determine with certainty. Because so many changes were not anticipated at contracting, the change order provisions in the parties' contract may not have been designed to deal with the situation and to compensate the contractor fairly. Frequently, the owner causes the excessive number of alterations, and therefore it should bear the additional costs not addressed by the contract procedures. In addition, in many cases the deviations ordered by the owner provide additional value to the owner; it would be unfair to allow the owner a windfall by not paying for them. The doctrine of abandonment essentially recognizes this and puts the responsibility for added costs on the owner.

Owners argue that allowing abandonment claims encourages contractors to submit artificially low bids with the intention of later submitting such claims.[80] Contractors, however, appreciate that abandonment is difficult to prove and, as a result, comparatively rare. A contractor that underbids its jobs with the expectation that the owner will order an excessive number of changes that alter the scope of work may be out of business quickly. It is no coincidence that there are few reported decisions applying the abandonment doctrine in most of the states that have adopted it.[81] The test fashioned by courts for recovery may be very hard to meet, and in the author's view, no reasonable contractor would bid on a job expecting to be able to rely on the doctrine later. In contrast, it has been argued that application of the doctrine to public construction contracts provides a tangible public benefit because it will provide an incentive for public owners to plan and manage their projects responsibly, which will in turn lead to projects that cost taxpayers less money and that better serve their intended public purposes.[82]

Conclusion

When projects go bad, contractors often look at the possibility of asserting abandonment or cardinal change claims. In many jurisdictions, such claims have been explicitly recognized. In most 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, however, that door has been shut. Whether other jurisdictions choose to follow California in this regard remains to be seen.

Endnotes

1. 27 Cal. 4th 228 (2002).

2. *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).

3. **Ala.**: Hutchinson v. Cullum, 23 Ala. 622 (1853); **Ariz.**: County of Greenlee v. Webster, 25 Ariz. 183 (1923); **Ark.**: Hous. Auth. of Texarkana v. E. W. Johnson Constr. Co., 264 Ark. 523 (1978); **Cal.**: C. Norman Peterson Co. v. Container Corp. of Am., 172 Cal. App. 3d 628 (1985); **Colo.**: H.T.C. Corp. v. Olds, 486 P.2d 463, 466 (Colo. App. 1971); **Ill.**: Cook County v. Harms, 108 Ill. 151 (1883); **Ind.**: Rudd v. Anderson, 285 N.E.2d 836 (Ind. App. 1972); **Ky.**: L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 933 (E.D. Ky. 1993) (applying Ky. law); **La.**: Nat Harrison Assoc., Inc. v. Gulf States Utils. Co., 491 F.2d 578, 583, *reh'g denied*, 493 F.2d 1405 (5th Cir. 1974) (applying La. law); **Md.**: Westinghouse Elec. Corp. v. Garrett Corp., 437 F. Supp. 1301, 1332 (D. Md. 1977) (applying Md. law); **Mich.**: R. M. Taylor, Inc. v. General Motors Corp., 187 F.3d 809 (8th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000) (applying Mich. law); **Minn.**: Fuller Co. v. Brown Minneapolis Tank & Fabricating Co., 678 F. Supp. 506, 509 (E.D. Pa. 1987) (applying Minn. law); **Mo.**: Baerveldt & Honig Constr. Co. v. Dye Candy Co., 212 S.W.2d 65, 69 (Mo. 1948); **N.Y.**: Kole v. Brown, 13 A.D.2d 920 (1961); **Ohio**: Oberer Constr. Co. v. Park Plaza, Inc., 179 N.E.2d 168, 171 (Ohio Ct. App. 1961); **Or.**: Hayden v. Astoria, 74 Or. 525, 533 (1915); **S.D.**: Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242, 254–55 (8th Cir. 1969) (applying S.D. law); **Tex.**: Nat'l Envtl. Serv. Co., Inc. v. Homeplace Homes, Inc., 961 S.W.2d 632, 635 (Tex. App. 1998); **Utah**: Rhodes v. Clute, 53 P. 990 (Utah 1898); **Wash.**: Kieburtz v. City of Seattle, 84 Wash. 196 (1915); **Wis.**: Olbert v. Ede, 156 N.W.2d 422 (Wis. 1968); and **Wyo.**: Scherer Constr., LLC v. Hedquist Constr., Inc., 18 P.3d 645, 656 (Wyo. 2001).

4. *Hutchinson*, 23 Ala. at 622; *County of Greenlee*, 25 Ariz. at 183; *Cook County*, 108 Ill. at 151; Norton v. Brown, 89 Ind. 333 (1883); *Hayden*, 74 Or. at 533; *Rhodes*, 53 P. at 990; *Kieburtz*, 84 Wash. at 196.

5. **D.C.**: Blake Constr. Co., Inc. v. C. J. Coakley Co., Inc., 431 A.2d 569, 578–79 (D.C. Ct. App. 1981); **Me.**: Claude Dubois Excavating v. Kittery, 634 A.2d 1299 (Me. 1993); **Okla.**: 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); **R.I.**: 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).

6. Litton Sys., Inc. v. Frigitemp Corp., 613 F. Supp. 1377 (S.D. Miss. 1985) (applying Miss. 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*, 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.

7. *Id.* at 1381.

8. *Id.* at 1382 (citing *L.L. Glascock, Inc.*, 243 So. 2d at 67; *Delta Constr. Co.*, 198 So. 2d at 592; *Redd*, 151 So. 2d at 205).

9. 932 F. Supp. 906 (E.D. Ky. 1993).

10. *Id.* at 939.

11. *Id.* at 935–936, 946.

12. 27 Cal. 4th 228, 238 (2002).

13. *Id.*

14. *Id.* at 228.

15. *Id.* at 251–52 (J. Werdegar, dissenting).

16. *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)).

17. *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)).

18. *Id.* at 238–39.

19. *Id.* at 248–49 (J. Werdegar, dissenting).

20. *Id.* at 252–53.

21. 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); 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); *see also* 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).

22. *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).

23. *Scherer Constr.*, 18 P.3d at 645, 656.

24. 264 Ark. 523 (1978).

25. *Id.* at 528, n. 2.

26. *Id.* at 532–33.

27. *Id.* at 533.

28. *Id.* at 525, 529, 535.

29. *See, e.g.*, **Fed.**: Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965) (re causation requirement); **Ariz.**: County of Greenlee v. Webster, 25 Ariz. 183, 191 (1923); **Cal.**: C. Norman Peterson Co. v. Container Corp. of Am., 172 Cal. App. 3d 628, 640 (1985) (citing Daugherty Co. v. Kimberly-Clark Corp., 14 Cal. App. 3d 151, 156 (1971); Opdyke & Butler v. Silver, 111 Cal. App. 2d 912, 916–19 (1952)).

30. *See, e.g.*, **Cal.**: *Peterson*, 172 Cal. App. 3d at 641–42; *Opdyke*, 111 Cal. App. 2d at 916–918; *Daugherty*, 14 Cal. App. 3d at 155–56; **Ky.**: L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 933 (E.D. Ky. 1993); **Mo.**: Schwartz v. Shelby Constr. Co., Inc., 338 S.W.2d 781, 788–90 (Mo. 1960); Baerveldt & Honig Constr. Co. v. Dye Candy Co., 212 S.W.2d 65, 69 (Mo. 1948) ("It seems to us that in view of the numerous changes, some material and substantial and others trivial, the referee was justified in finding that the original contract was so modified and changed that it amounted to an abandonment thereof . . . ."); **N.Y.**: Tufano Contracting Corp. v. State of New York, 25 A.D.2d 329, 330–31 (1966) (increase in parkway reconstruction from 28 to 128 detours); **Wisc.**: Olbert v. Ede, 156 N.W.2d 422 (Wis. 1968) (sixty-nine changes under house construction contract).

31. *See, e.g.*, **Fed.**: Saddler v. United States, 287 F.2d 411 (Ct. Cl. 1961) (government change orders more than doubled length and total cubic yards of levy embankment); **Cal.**: *Peterson*, 172 Cal. App. 3d at 641–42; *Opdyke*, 111 Cal. App. 2d at 916–18; *Daugherty*, 14 Cal. App. 3d at 155–56; **Ky.**: *L.K. Comstock*, 932 F. Supp. at 933; **N.Y.**: Triple Cities Constr. Co., Inc. v. State, 194 A.D.2d 1037 (1993) (recovery in quantum meruit where state required highway construction contractor to go back and add slope protection to finished work); **Ohio**: Oberer Constr. Co. v. Park Plaza, Inc., 179 N.E.2d 168, 171 (Ohio Ct. App. 1961) (original excavation amount of 190,000 cubic yards increased by 35,000 to 40,000); **S.D.**: Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242, 254–55 (8th Cir. 1969) (added requirements for backfill increased cost of that operation by 300%); **Utah**: Rhodes v. Clute, 53 P. 990, 991 (Utah 1898) ("comparatively unpretentious frame house was raised into a pretentious brick structure, costing several thousand dollars more than the one for which the contract had been made"); **Wisc.**: *Olbert*, 156 N.W.2d at 422, 424 ("the house that was built was very different than the one originally contemplated").

32. *See, e.g.*, **Ariz.**: *County of Greenlee*, 25 Ariz. at 183, 191 ("Changes that radically extend the amount of work or that eliminate large portions of the work, or that greatly increase the cost thereof, are usually not included within the provision allowing alterations or modifications of the plans or specifications."); **Cal.**: *Peterson*, 172 Cal. App. 3d at 628; **Ill.**: Cook County v. Harms, 108 Ill. 151 (1883); **Ky.**: *L.K. Comstock*, 932 F. Supp. at 941; **Mo.**: Bogert Constr. Co. v. Lakebrink, 404 S.W.2d 779, 782 (Mo. Ct.

App. 1966); *Schwartz*, 338 S.W.2d at 781, 788–91; **N.Y.**: Langan Constr. Corp. v. State, 110 Misc. 177 (N.Y. 1920); **S.D.**: *Peter Kiewit Sons' Co.*, 422 F.2d at 242, 254–55.

33. Federal Acquisition Regulation 43.205 (48 C.F.R. Pt. 43).

34. *See, e.g.*, *Saddler*, 287 F.2d at 411; Atl. Dry Dock Corp. v. United States, 773 F. Supp. 335 (M.D. Fla. 1991).

35. *Saddler*, 287 F.2d at 563–64; *Atlantic Dry Dock*, 773 F. Supp. at 339–40; *L.K. Comstock* 932 F. Supp. at 942.

36. *See, e.g.*, **Mich.**: R.M. Taylor, Inc. v. General Motors Corp., 187 F.3d 809, 813–14 (8th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000) (citing Michigan court cases finding implied abandonment, all of which concern contracts with no change order provisions, and declining to extend doctrine to contract that includes such a provision); **Okla.**: Watt Plumbing, Air Conditioning & Elec., Inc. v. Tulsa Rig. Reel & Mfg. Co., 533 P.2d 980 (Okla. 1975).

37. *See, e.g.*, **Cal.**: Amelco Elec. v. City of Thousand Oaks, 27 Cal. 4th 228, 235–36 (2002) (citing C. Norman Peterson Co. v. Container Corp. of Am,; 172 Cal. App. 3d 628, 643 (1985); Opdyke & Butler v. Silver, 111 Cal. App. 2d 912, 916 (1952); Daugherty Co. v. Kimberly-Clark Corp., 14 Cal. App. 3d 151, 156 (1971)); **Colo.**: H.T.C. Corp. v. Olds, 486 P.2d 463, 466 (Colo. App. 1971) ("A contract will be treated as abandoned when the acts of one party, inconsistent with its existence, are acquiesced in by another.") (citing Baker v. School Dist. #48, 120 Neb. 513 (1930); Reichert v. Mulder, 121 Neb. 11 (1931); Tulsa Opera House Co. v. Mitchell, 165 Okla. 61 (1933)); **Ill.**: *Cook County*, 108 Ill. at 157–59; **Ky.**: L. K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 933 (E. D. Ky. 1993) ("Parties can be shown to have abandoned the contract expressly or implicitly. . . . [A] fact finder can infer abandonment from attendant circumstances and the conduct of the parties."); **Mo.**: Schwartz v Shelby Constr. Co., Inc., 338 S.W. 2d 781, 787 (Mo. 1960) ("An abandonment may be accomplished by express mutual consent or by implied consent through the actions of the parties."); **N.Y.**: Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 309–13 (1986) (contractor may recover for abandonment where the owner is responsible for delays that are so unreasonable that they connote intent to abandon the contract); **Or.**: Hayden v. Astoria, 74 Or. 525, 533 (1915) (changes that substantially increased portions of the contractor's work "must be considered as not being within the contemplation of the parties at [contracting]" and, therefore, with regard to the project as constructed, "there was no meeting of the minds of the parties as to the amount of compensation").

38. 111 Cal. App. 2d 912, 914–18 (1952).

39. 14 Cal. App. 3d 151, 155–56 (1971).

40. *Opdyke*, 111 Cal. App. 2d at 916.

41. *Id.* at 914.

42. *Id.* at 916–18.

43. *Id.* at 918 (emphasis added).

44. *Daugherty*, 14 Cal. App. 3d at 155–156.

45. *Id.* at 156.

46. *Id.* (citing Opdyke & Butler v. Silver, 111 Cal. App. 2d 912, 916 (1952).

47. *See, e.g.*, **Colo.**: H.T.C. Corp. v. Olds, 486 P.2d 463, 466 (Colo. App. 1971) ("It is the settled and general rule that a contract may be abandoned by mutual consent and that such consent may be implied from the acts and conduct of the parties."); **Ill.**: Cook County v. Harms, 108 Ill. 151, 157–59 (1883); **Ky.**: L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 933 (E.D. Ky. 1993) ("[p]arties can be shown to have abandoned the contract expressly or implicitly" and "a fact finder can infer abandonment from attendant circumstances and the conduct of the parties"); **Mich.**: Dault v. Schulte, 187 N.W.2d 914, 915 (1971); **Mo.**: Schwartz v. Shelby Constr. Co., 338 S.W. 2d 781, 788 (Mo. 1960).

48. *H.T.C. Corp.*, 486 P.2d at 465–66.

49. *Id.* at 467.

50. *L.K. Comstock*, 932 F. Supp. at 935.

51. *Id.* at 936. Kentucky appears to be the only jurisdiction that requires contractors to prove their abandonment claims under a clear and convincing proof standard, rather than the common civil preponderance of evidence standard.

52. Opdyke & Butler v. Silver, 111 Cal. App. 2d 912, 915 (1952).

53. *Id.* at 915–16 (emphasis added).

54. Amelco Elec. v. City of Thousand Oaks, 27 Cal. 4th 228, 240 (2002).

55. *See, e.g.*, **Cal.**: Zinn v. Ex-Cell-O Corp., 24 Cal. 2d 290, 297–98 (1944); **N.Y.**: Najjar Indus. v. City of New York, 87 A.D.2d 329, *aff'd*, 68 N.Y.2d 943 (1986); Berley Indus., Inc. v. City of New York, 45 N.Y.2d 683, 687 (1978).

56. *See, e.g.*, **Fed.**: Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965); **N.Y.**: Tufano Contracting Corp. v. State of New York, 28 A.D.2d 951, 952 (1967) (prior award erroneous because included work within originally contemplated scope).

57. C. Norman Peterson Co. v. Container Corp. of Am., 172 Cal. App. 3d 628, 640 (1985) (citing Daugherty Co. v. Kimberly-Clark Corp., 14 Cal. App. 3d 151, 156 (1971); *Opdyke*, 111 Cal. App. 2d at 916–19).

58. *See, e.g.*, **Fed.**: Edward R. Marden Corp. v. United States, 442 F.2d 364 (Ct. Cl. 1971); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); **Cal.**: *Peterson*, 172 Cal. App. 3d at 628; *Daugherty*, 14 Cal. App. 3d at 151; *but see* **Wash.**: Hensel Phelps Constr. Co. v. King County, 57 Wash. App. 170, 182–83 (1990).

59. 172 Cal. App. 3d 628 (1985).

60. *Id.* at 637.

61. 14 Cal. App. 3d 151 (1971).

62. *Id.* at 156.

63. 442 F.2d 364, 369–70 (Ct. Cl. 1971).

64. The plans failed to require that "the tie rods had to be installed before the arches were released on the buttresses." *Id.* at 370.

65. *Id.* (emphasis added).

66. 408 F.2d 1030 (Ct. Cl. 1969).

67. *Id.* at 1031–32.

68. *Id.* at 1031.

69. *Id.* at 1032.

70. *Id.*

71. *Id.* at 1033 (citations omitted).

72. *Id.* (quoting Wunderlich Contracting Co. v. United States, 351 F.2d 956, 966 (Ct. Cl. 1965)).

73. *Id.*

74. *Id.* at 1033, 1038.

75. 57 Wash. App. 170, 182 (1990).

76. *Id.* at 182–83.

77. *See, e.g.*, **Ky.**: L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 933 (E.D. Ky. 1993) ("[I]f the original plan for the work had been so entirely abandoned, . . . the plaintiff . . . would be permitted to recover for the whole work done, according to measure and value, as if no contract had ever been made . . . .") (quoting Wright v. Wright, 11 Ky. 179, 181 (1822)); **Mo.**: Schwartz v. Shelby Constr. Co., Inc., 338 S.W. 2d 781 (Mo. 1960); **N.Y.**: The Foundation Co. v. State of New York, 233 N.Y. 177, 188 (1922); Depot Constr. Corp. v. State of New York, 23 A.D.2d 707–08 (1965), *aff'd*, 19 N.Y.2d 109 (1967); *see also* **Cal.**: Amelco Elec. v. City of Thousand Oaks, 27 Cal. 4th 228, 239 (2002) ("Under the abandonment doctrine, . . . the plaintiff may recover the reasonable value for all of its work."); **Minn.**: Zontelli & Sons, Inc. v. Nashwauk, 373 N.W.2d 744, 753 (Minn. 1985) (held that contractor was entitled to recover under actual cost provision of contract, rather than unit price provision, where changes in quantities were so extreme "as not to have been contemplated by the parties at the time of contracting").

78. *Id.*; *but see* Litton Sys., Inc. v. Frigitemp Corp., 613 F. Supp. 1377, 1384 (S.D. Miss. 1985) (rejecting cardinal change doctrine and stating, in dicta, "that 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").

79. United States v. Spearin, 248 U.S. 132, 136–37 (1918); Montrose Contracting Co., Inc. v. County of Westchester, 80 F.2d 841, 842 (2d Cir. 1936); Souza & McCue Constr. Co. v. Superior

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7. *Id.* at 93.
8. *Id.* at 90.
9. *Id.* at 90 n.6.
10. *See* Supplementary Consumer Procedures Glossary of Terms.
11. *Ibid.*
12. Procedure C-1(d).
13. Procedure C-2(a).
14. Procedure C-2(b), (c), and (e).
15. Procedure C-3.
16. Procedure C-4.
17. Procedures C-5, C-6.
18. Procedure C-7.
19. *Id.*
20. Procedure C-1(d); footnote to Commercial Rule R-1.
21. Procedure C-8.
22. *Id.*
23. *Id.*