SURETY TODAY PRESENTATION

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February 14, 2022

CARDINAL CHANGE DOCTRINE

I. INTRODUCTION

This article will explore the Cardinal Change doctrine. A cardinal change can provide a defense to a surety and its principal under certain circumstances. Virtually every construction contract has a clause that allows the owner or upstream contractor to make changes to the scope of work (the "Changes Clause"). In the federal construction context, such clauses are mandated by the provisions of the FAR. These Changes Clauses give the owner/contractor broad unilateral power to order changes to the work and generally require the contractor to perform the work, even if the contractor disputes or objects to the change. As the Supreme Court has observed, "[a] changes clause allows the Government to make unilateral contract modifications without seeking consent from the subcontractor and without being in breach of the contract." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 87 S. Ct. 1177 (1967). But what if the changes ordered are unreasonable and outside of the contemplation of the parties when the contract was entered into.

For example, what if the change(s) double or triple the original contract work and price or extend the work double or triple the original contract time. Is the contractor or surety still bound by the Changes Clause to perform? The cardinal change doctrine says no! This doctrine can apply to a surety in a number of ways. First, if a surety takes over a project, it may directly face an overly broad change that it may not wish to perform. Second, it can be raised by the principal, or by the surety through its right to assert its principal's defenses, as a defense to an obligee's change demand or claims for costs to perform overly broad change work. The principal's/surety's position would be that they are not responsible for such costs, because they were outside the permissible scope of the contract. Third, the doctrine can form the basis for claims for extra compensation in *quantum meruit* beyond the contract terms, if the principal was forced to perform the overly broad change work.

II. THE CARDINAL CHANGE DOCTRINE DEFINED

So, what is a cardinal change? A cardinal change is one which, because it fundamentally alters the contractual undertaking of the contractor, is not comprehended by the normal changes clause. *Am. Line Builders, Inc. v. United States*, 26 Cl. Ct. 1155, 1177–78 (1992). The Court of Federal Claims in *Edward R. Marden Corporation v. United States*, 194 Ct. Cl. 799, 808–09, 442 F.2d 364 (1971) stated that the purpose of the cardinal change doctrine "is to provide a breach remedy for contractors who are directed by the Government to perform work which is not within

the general scope of the contract." The Federal Circuit Court of Appeals put it this way: "A cardinal change occurs when …an alteration in the work [is] so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Rumsfeld v. Freedom NY, Inc.,* 329 F.3d 1320, 1332 (Fed. Cir.), *adhered to on denial of reh'g en banc*, 346 F.3d 1359 (Fed. Cir. 2003); *see also Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1543 (Fed.Cir.1996) (citations omitted); *AT&T Communications, Inc. v.Wiltel, Inc.*,1 F.3d 1201, 1205 (Fed.Cir.1993); *Allied Materials & Equip. Co. v. United States*, 215 Ct.Cl. 406, 569 F.2d 562, 563–64 (1978).

The Fourth Circuit Court of Appeals phrased it as - a "cardinal change" requires the contractor to perform duties that are "materially different from those originally bargained for." *Hancock Electronics Corporation v. Washington Metropolitan Area Transit Authority*, 81 F.3d 451 (4th Cir. 1996). In other words, a change is cardinal when it cannot be said to have been within the contemplation of the parties when they entered into the contract. *Universal Contracting & Brick Pointing Co. v. United States*, 19 Cl. Ct. 785, 792 (1990). Thus, by definition, a cardinal change is a change so profound that it is not redressable under the Changes Clause of the contract and renders the party directing the change in breach. *Appeals of Gassman Corp.,* ASBCA No. 44975, 00-1 B.C.A. (CCH) ¶ 30720 (Dec. 29, 1999) (*quoting AT&T Communications, Inc. v. Wiltel, Inc., supra*). Stated differently, a cardinal change is such an unreasonable, unanticipated change that it actually "constitutes a material breach of the contract." *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999); *Air–A–Plane Corp. v. United States*, 187 Ct.Cl. 269, 408 F.2d 1030, 1033 (1969); *General Dynamics Corp. v. United States*, 218 Ct.Cl. 40, 585 F.2d 457, 462 (1978); *Allied Materials & Equip. Co. v. United States, supra*. Because a cardinal change is a material breach it has "the effect of freeing the contractor of its obligations under the contract, including its obligations under the disputes clause to continue performance during the pendency of the dispute." *Id.; JJK Grp., Inc. v. VW Int'l, Inc.*, No. TDC-13-3933, 2015 WL 1459841, at *10 (D. Md. Mar. 27, 2015) (*quoting Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999)). Indeed, there is case law holding that where a cardinal change was found the contractor was excused from contract provisions such as no damage for delay clauses, waivers and claim notification provisions. Thus, when a cardinal change occurs, the performing party is legally justified in refusing to perform the change.

However, one of the difficulties in the application of this defense is that "[t]here is no automatic or easy formula which can be used to determine whether a change (or changes) is beyond the scope of the contract." *Appeals of Gassman Corp., supra* (*quoting Edward R. Marden Corp.*, 442 F.2d at 369); *see also Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 966 (Ct. Cl. 1965). Initially, in deciding whether a single change or series of changes is a 'cardinal change,' many courts observed that "one must examine the work done in compliance with the changes and ascertain whether it is essentially the same work that the parties bargained for when the contract was awarded." *Id.* (*citing Aragona Constr. Co. v. United States*, 165 Ct. Cl. 382, 390-91 (1964)). Essentially taking a literal approach to the doctrine. So, you will have some cases where the court will say - yes there were a lot of changes, delays and impacts, but you were contracted to build a tunnel and you built a tunnel. For example, in *United States ex*

rel. Sun Const. Co., Inc. v. Torix Gen. Contractors, LLC, Case No. 07–cv–01355–LTB–MJW, 2009 WL 3348287, at *4 (D. Colo. Oct. 15, 2009) the federal district court in Colorado denied summary judgment in light of unresolved issues of fact concerning whether a two-year delay and $1,000,000 in increased costs qualified as "significant changes" where the contractor "built the same tunnel they originally were hired to build, and in essentially the same manner and location." But the more modern interpretation of the doctrine is that "[a] cardinal change can occur even when there is no change in the final product because it is the 'entire undertaking' of the contractor, rather than the product, to which [courts] look." *Rumsfeld, supra.* (*quoting Edward R. Marden Corp.,* 442 F.2d at 370). Unfortunately for contractors and sureties facing a possible cardinal change, there is no reliable method to make a contemporaneous determination of cardinality. One court noted this dilemma stating "[t]he obvious risk faced by a contractor contemplating the suspension of performance because of an alleged breach by the owner is that the contractor who abandons the work is liable for breach if the abandonment is deemed wrongful. Undoubtedly, the cautious contractor might often proceed under the revised contract because of doubt whether he could invoke the cardinal change doctrine." *Allied Materials,* 569 F.2d at 564.

In *Becho, Inc. v. U.S.*, 47 Fed. Cl. 595 (2000) the Court of Federal Claims gave the following guidance concerning the cardinal change doctrine:

> [W]hile there is no precise calculus for determining whether a cardinal change has occurred, the courts have considered, *inter alia*, the following factors: (i) whether there is a significant change in the magnitude of work to be performed; (ii) whether the change is designed to provide a totally different item or drastically alter the quality, character, nature or type of work contemplated by the original contract; and (iii) whether the cost of the work ordered greatly exceeds the original contract cost.

Becho, Inc., 47 Fed. Cl. at 601.

The Court of Federal Claims in *Wunderlich Contracting*, 351 F.2d at 966, similarly observed that "[t]here is no exact formula for determining the point at which a single change or a series of changes must be considered to be beyond the scope of the contract and necessarily in breach of it. 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 on the project as a whole." While these more modern cases addressing cardinal change broaden its application, the lack of a clear standard or bright-line rule makes it very difficult to look at a given situation and definitively determine if the cardinal change doctrine will be upheld by the ultimate trier of fact.

III. HISTORY

The doctrine of cardinal change originated in federal contract law. The early cases when the doctrine was being formed all involved suits brought by contractors against the United States Government in the Court of Federal Claims. *See Allied Materials & Equipment Co., supra.*; *Air–A–Plane Corp., supra.*; *Wunderlich Contracting Co., supra.* It has been recognized that the

doctrine, in part, "was created as a check on the government's ability to circumvent the competitive-bidding process by ordering drastic changes beyond those contemplated in the contract...." *Cray Research, Inc. v. Department of Navy,* 556 F.Supp. 201, 203 (D.D.C 1982); *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.,* 120 Nev. 277, 89 P.3d 1009, 1020 (2004). While contractual changes clauses permit broad changes, a changes clause does not authorize a drastic modification beyond the scope of the contract which would be in violation of applicable procurement law and contract law. *Air–A–Plane,* 408 F.2d at 1033; *L.K. Comstock & Co. v. Becon Const. Co.*, 932 F. Supp. 906, 936 (E.D. Ky. 1993). Thus, the government cannot award a contract for the construction of one road under competitive bidding procurement law and then under the changes clause of that contract require the contractor to build a second road and avoid the competitive bidding process for that second road. Further, in creating this doctrine, the Courts have recognized that because of the broad nature of the changes clause, the power of the owner, be it a federal agency or a private developer, to order changes is subject to abuse. Thus, the cardinal change doctrine was created as an equitable remedy to allow a contractor, where the owner has abused its power, to assert a material breach of contract, alleging that the changes ordered exceed the reasonable expectations of the parties.

IV. WHERE DOES THE DOCTRINE APPLY

While the doctrine began in the federal courts, it has since been adopted in many state courts around the country. Further, while the doctrine originated in government procurement matters, it has been recognized in private projects as well. In one case for example, the opposing party argued that the doctrine was limited to government contracts. However, the court stated "[t]his position, however, ignores the essential similarity of public and private construction contracts with regard to the mechanism for unilateral ordering of changes by the party for whom the work is being performed, and concerns about misuse or overuse of that unilateral authority. These features of any contract for construction are the central focus of the cardinal change doctrine." *L.K. Comstock & Co. v. Becon Const. Co.*, 932 F. Supp. 906, 938–39 (E.D. Ky. 1993). Thus, the Court concluded, "this broad principle has been recognized by state courts as well as federal tribunals, and in private as well as public contract settings." *Id.*

In *Comstock*, the Kentucky federal court undertook a survey of state courts applying the cardinal change doctrine either explicitly or implicitly. For example, the *Comstock* Court pointed to cases in Pennsylvania (*Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506 (E.D. Pa.1987)("under the contract doctrine of "cardinal" change that where a party to a contract alters the terms of the other party's performance to such an extent that the alterations could not have been within the realm of the parties' contemplation as evidenced by the parties' written agreement, the other party may elect not to perform and hold the other party liable for breach."); Maryland (*Westinghouse Electric Corp., v. Garrett Corp.*, 437 F. Supp. 1301 (D. Md. 1977) *aff'd* 601 F.2d 155 (4th Cir. 1979) (court addressed subcontractor's defense of cardinal change under state law.); Arkansas (*Housing Authority of Texarkana v. E.W. Johnson Constr. Co.*, 264 Ark. 523, 573 S.W.2d 316 (1978); *Hensel Phelps Construction Co. v. King County,* 57 Wash. App. 170, 787 P.2d 58 (1990); Indiana (*Rudd v. Anderson,*153 Ind. App. 11, 285 N.E.2d

836, 840 (1972); and Oklahoma (*Watt Plumbing, Air Conditioning and Electric, Inc. v. Tulsa Rig, Reel & Mfg. Co.,* 533 P.2d 980, 982 (Okla.1975).

The *Comstock* Court concluded "[i]n summary, a number of courts in decisions based upon state law have applied the doctrine of cardinal change. While it may not always bear the name "cardinal change," and may or may not be clearly borrowed from federal procurement law, the core theory that when an owner orders changes beyond the scope of the work agreed to be performed the contractor is entitled to damages (in some form) for breach, has been widely recognized. . . . 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." *L.K. Comstock & Co.,* 932 F. Supp. at 938–39.

While the cardinal change doctrine has received wide acceptance, it is not universally accepted. For example, the Court in *Ebenisterie Beaubois Ltee v. Marous Bros. Const.*, No. 02 CV 985, 2002 WL 32818011, at *3–6 (N.D. Ohio Oct. 17, 2002) sitting in diversity and interpreting Ohio law, held that the Ohio Supreme Court would not recognize the cardinal change doctrine. The Court reasoned that Ohio courts consistently refuse to allow recovery in quasi-contract where an express contract governs the subject matter of the dispute. The *Ebenisterie* Court cited to two other courts that rejected the cardinal change doctrine as well for similar reasons. Specifically, the Court referred to *Mellon Stuart Construction, Inc. v. Metropolitan Water Reclamation District of Chicago,* 1995 WL 124133 (N.D. Ill. 1995), in which the court found that the Illinois Supreme Court would decline to recognize a claim for "cardinal change" breach of contract. The court based its decision, in large part, on the deference Illinois provides to parties in defining their obligations under a contract. Similarly, in *Litton Systems, Inc. v. Frigitemp Corp.,* 613 F. Supp. 1377, 1382 (S.D. Miss. 1985), the district court refused to recognize a claim based on cardinal change breach of contract because "Mississippi law clearly and unequivocally denies extra-contractual relief where the parties have expressly contracted upon a subject." *See also Durr Mech. Constr., Inc. v. PSEG Fossil, LLC,* 516 F. Supp. 3d 407 (D.N.J. 2021)(holding that New Jersey would not recognize the cardinal change doctrine because quasi contract recoveries cannot apply with an express contract). As with so many issues, you will need to check the applicable jurisdiction to determine if the cardinal change doctrine is recognized.

The question may be asked by a surety, does the cardinal change doctrine apply to sureties? The answer is yes. Several courts have acknowledged specifically a surety's prerogative to raise the cardinal change doctrine as a defense. *See, e.g., United States ex rel. Sun Const. Co., Inc. v. Torix Gen. Contractors, LLC,* Case No. 07–cv–01355–LTB–MJW, 2009 WL 3348287, at *3 (D. Colo. Oct. 15, 2009); *In re Tech. for Energy Corp.,* 140 B.R. 214, 217 (Bankr. E.D. Tenn. 1992); *United States v. Seaboard Sur. Co.,* 622 F. Supp. 882, 887 (E.D.N.Y.1985); *Hartford Cas. Ins. Co. v. City of Marathon*, 825 F. Supp. 2d 1276, 1285–88 (S.D. Fla. 2011), *rev'd in part, vacated in part sub nom., Hartford Cas. Ins. Co. v. Intrastate Const. Corp.,* 501 F. App'x 929 (11th Cir. 2012); *Philadelphia Indem. Ins. Co. v. Ohana Control Sys., Inc.,* 450 F. Supp. 3d 1043, 1056–57 (D. Haw. 2020)

V. SOME EXAMPLES OF CARDINAL CHANGES

One of the best methods of understanding the doctrine is to consider some examples of the cardinal change doctrine being applied. The first case is more of the classic cardinal change scenario where you have the government ordering a change to construct a whole different additional facility. In *Hartford Cas. Ins. Co. v. City of Marathon*, 825 F. Supp. 2d 1276, 1285–88 (S.D. Fla. 2011), *rev'd in part, vacated in part sub nom.*, *Hartford Cas. Ins. Co. v. Intrastate Const. Corp.*, 501 F. App'x 929 (11th Cir. 2012), the City of Marathon was undertaking significant construction to implement a new water treatment plan for the city and surrounding area. The new plan required the construction of seven water treatment plants around the city. Marathon awarded a contract to the contractor to build a treatment plant designated as Plant No. 3. Subsequently, the City issued a change order to the contractor requiring that treatment Plant No. 7 also be constructed as part of the contract. Plant No. 7 was based on separate plans and specifications and was to be constructed 5.5 miles away on a completely different site. As the Court observed, "this was not a change order that merely extended or altered the specifications, timeline, or cost of the original treatment plant—this was a change order that ordered the building of a *second* treatment plant." *Id.* Marathon argued that despite the difference in location, the Plant 7 Change Order was not authorizing a separate project under the contract because the plain language of the underlying construction contract contemplated changes and the Plant 3 Project and Plant 7 Project were interrelated because they were both part of Marathon's larger water treatment plan. The Court rejected Marathon's argument and stated that taken to its logical extreme, the argument would permit Marathon to issue change orders to include the entirety of the seven treatment plants under the Plant 3 contract and, in turn, obligate Hartford to bond additional millions of dollars without conducting an assessment of risk.

The Court noted that the original contract price was for $2,061,000.00 to construct Plant No. 3. The Plant No. 7 Change Order came at an additional cost of $2,984,487.00 - an increase of over 144 percent of the original contract sum. After reviewing all of the factors, the Court held that the Plant No. 7 Change Order was a cardinal change to the underlying construction contract. The Court also held that the facts demonstrated a significant, and potentially unbounded, increase in risk so as to prejudice and injure Hartford as the surety. As a result, the Court concluded that pursuant to the cardinal change doctrine Hartford was not obligated to bond the Plant No. 7 change order.

In this next case, we see the application of the cardinal change in a private project where the same project was built, but the manner of performance was dramatically altered. The case is *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 295, 89 P.3d 1009, 1021 (2004). In the *JA Jones* case, the overall physical characteristics of the work changed very little, so the central issue was whether the entirety of the changes and impacts on the contractor's work was so extensive as to force the contractor to perform work beyond the confines of the contract's changes clause. JA Jones was awarded a contract to install structural concrete at the Sands Exposition Center expansion in Las Vegas, Nevada. Jones' original bid amount was $8.4 million. In order to reduce the bid amount, the owner agreed to perform various site preparation tasks and to streamline other tasks to shorten, by about half, the time needed for Jones to complete its concrete construction, thus reducing Jones's labor, materials, equipment and overhead costs. Both parties made concessions and ultimately agreed that Jones would perform

the structural concrete work for $7.4 million. Because of the agreed upon site preparation and streamlined activities, Jones agreed to shortened milestones. However, those milestones were eventually exceeded by 8 months because of changes made by the owner to the work, and obstructions, hindrances, and inefficiencies that rendered Jones' work more difficult, time consuming and costly to perform. Once construction started, the owner essentially failed to provide any of the site conditions that it said it would provide and upon which Jones agreed to lower its bid. Jones asserted that out of its $7.4 million bid, it expected to capture $1.9 million in overhead and profit, leaving $5.5 million in anticipated costs. The actual costs, according to Jones, totaled over $8.8 million. Additionally, Jones's expert testified that about $4 million, or 62 percent of the Phase I work value, was incurred because of changes. Jones was paid $1,078,303 for some of the changed-work expenses incurred during the delay by the owner and at trial Jones was awarded another $1.1 million for its damages, however, its cardinal change claim was dismissed. Jones was seeking $5 million in damages.

On appeal the Nevada Supreme Court ruled that a cause of action based on the cardinal change doctrine was permissible under Nevada law and that Jones was entitled to assert its cardinal change claim. The Court reversed the dismissal and the case was remanded for a new trial.

In this next case a cardinal change resulted from a failure to provide adequate construction drawings. In *Westinghouse Electric Corp., supra.*, the plaintiff subcontracted with Westinghouse to assemble cooling pods for military electronic countermeasure devices. Westinghouse delayed several months in supplying plaintiff with source control drawings ("SDC's"), which are similar to the construction drawings. Source Control Drawings would have specified dimensions and tolerances and, like issued-for-construction drawings, would greatly facilitate the subcontractor's efficient performance. Due to the lack of SDC's plaintiff was required to make constant design revisions, and it incurred substantial additional costs trying to overcome these deficiencies and maintain the tight completion schedule. The court examined the effect of Westinghouse's delay in supplying SCD's and held that Westinghouse imposed a cardinal change upon plaintiff. According to the court, failure to provide SCD's fundamentally altered the nature of plaintiff's undertaking. Having SCD's to work from was the basis of plaintiff's bargain. Plaintiff was entitled to the ease of working from a single source of information and to the facilitation of incorporating otherwise disruptive changes that come from having such a source or "base line." On a contract with a tight delivery schedule the source control drawings became critical and fundamental, going to the heart of the vendor's undertaking. *Id.* at 1333.

In *Edward R. Marden Corp., supra.*, the plaintiff was working on the construction of an aircraft maintenance hangar when the structure collapsed, causing substantial damage to equipment and work already completed. Following the collapse, the plaintiff, *under protest*, cleaned up the debris and reconstructed the hangar as directed by the Government. The plaintiff then brought a claim for breach of contract, asserting that the Government's specifications had been defective, the structure collapsed due to the defect, and the plaintiff was ordered to reconstruct the hangar which resulted in increased costs of $3.7 million. The court found that

considering the sheer magnitude of reconstruction work caused by the alleged defective specifications, a cardinal change had occurred. Therefore, because the reconstruction work had not been bargained for when the contract was awarded, the plaintiff's breach of contract claim was not redressable under the contract's changes clause.

VI. POTENTIAL IMPEDIMENTS TO CARDINAL CHANGE

A. Entering Into Change Orders

1. Change Orders May Bar Defense

In some cases, the courts have denied a cardinal change claim because the contractor entered into change orders and continued performing. In *Colonna's Shipyard, Inc. v. United States*, No. 2:14-cv-331, 2015 WL 9008222 (E.D. Va. Dec. 14, 2015), the court found that a cardinal change did not occur under a contract for ship repair work when new "growth" work was added to a specification package and the parties entered into forty-six contract modifications. Although the court noted that the growth work exceeded the plaintiff's expectations, the court explained:

> ... Plaintiff has not satisfactorily established that the work performed was materially different from that specified in the Contract. Despite the difficulties encountered, a contract to repair a ship remained a contract to repair a ship, and the modifications indicate that these changes were clearly redressable under the Contract. Had the changes been so profound that they were not redressable, it is unlikely that the parties would have been able to negotiate forty-six (46) bilateral contract modifications.

Id. at *19 (*citing Amertex*, 1997 WL 73789, at *1).

In *Watt Plumbing, Air Conditioning & Elec., Inc. v. Tulsa Rig, Reel & Mfg. Co.*, 533 P.2d 980 (Okla. 1975), the plaintiff was the electrical subcontractor in a project to construct a new hospital wing. Although the parties adhered to the contractually required written change order process, at the completion of the project the plaintiff-subcontractor sued for *quantum meruit* recovery based upon a theory of breach by excessive changes. Rejecting the plaintiff's claim, the Oklahoma Supreme Court held:

> It is axiomatic that by mutual assent parties to an existing contract may subsequently enter into a valid contract to modify the former contract provided there is consideration for the new agreement. An alteration of a contract cannot constitute a breach of contract because it becomes a part of the contract. The contract as altered is the agreement between the parties. Id. at 983.

2. Change Orders May Not Bar Defense

On the other hand, a number of decisions have recognized that a cardinal change claim is not barred by the fact that some or all of the changed work at issue is covered by executed change orders. The fact that a party may have sought, released, or otherwise compromised a claim under a contract's equitable adjustment clause or other remedial clauses will not

necessarily, at least in some courts, operate as a bar to claims for relief outside the contract. In *Saddler v. United States*, 287 F.2d 411 (Ct. Cl. 1961), a contractor recovered under a cardinal change theory even though the contractor executed a change order concerning the changed work. Near the completion date of the project, the government imposed a change which more than doubled the amount of earth and other material that the contractor was required to place in a levee. The contractor performed the changed work, but initially refused to execute the change order the government issued. Rather, it proceeded with the work under protest. After losing a claim of breach for additional compensation before the Corps of Engineers Claims and Appeals Board, the contractor executed the change order. He received compensation for the additional work, and accepted final payment. However, on appeal, the court of appeals held that a cardinal change occurred because the work covered by the executed change order altered the fundamental nature of the work performed. There are numerous cases where the cardinal change doctrine was applied even though change orders were entered into. The *JA Jones* and *Marathon* cases discussed above are examples.

B. Releases and Waivers

The cardinal change claim may be waived in a release or settlement. *In re Boston Shipyard Corp.*, 886 F.2d 451 (1st Cir. 1989) the plaintiff contracted for the overhaul of a naval vessel for approximately $5 million. There were hundreds of change orders. The Plaintiff and the government eventually negotiated a settlement of claimed costs due to delay and disruption in the amount of $500,000, which was executed as a modification to the contract. The modification bore the language that it "definitizes a settlement of all contractor's claims on the above job order" as of a certain date. *Id.* at 454. The court found that the modification barred the plaintiff's claim under the cardinal change doctrine.

On the other hand, in *Atlantic Dry Dock Corp. v. United States*, 773 F. Supp. 335 (M.D. Fla. 1991) the court refused to bar a cardinal change claim as matter of law on grounds of accord and satisfaction despite the fact that the contractor entered into 130 change orders each of which provided that the change was "in full and final settlement of all claims arising out of this modification including all claims for delays or disruptions resulting from, caused by, or incident to such modifications or change orders."

Another potential issue faced by sureties is the presence of waivers/consents in the terms of the bonds. It can be effectively argued that such waivers/consents are invalid and unenforceable as a result of the cardinal change doctrine. *See e.g.* J. Lewin & C.E. Schaub, Jr., *Construction Law* § 9:85 (2009); Duncan L. Clore et. al., *Bond Default Manual,* 3rd ed. at 19 (2005) ("With respect to contracts or bonds containing provisions allowing for alterations to the work, the courts have held that changes not fairly within the contemplation of the parties at the time the contract was made, constituting a material departure from the original undertaking, will release a non-consenting surety from its obligations under its bonds."); *Success Constr. Co. v. Superintendent of Ins.*, 220 A.D.2d 339, 340 (N.Y.A.D. 1995); *Atlantic Dry Dock Corp.*, 773 F. Supp. at 339–40 (Court noted that determining the merits of a cardinal change claim requires an examination of the totality of the circumstances surrounding the project and the many modifications. Two of the relevant circumstances are the cost of completing the project and the

number of changes made. These facts cannot be known until the project is completed or nearly completed.); *L.K. Comstock & Co. v. Becon Const. Co.*, 932 F. Supp. 906, 937–38 (E.D. Ky. 1993) ("If a cardinal change exists, contractual waivers are ineffective to bar a cardinal change claim); *Hartford Cas. Ins. Co. v. City of Marathon, 825 F. Supp. 2d 1276, 1284 (S.D. Fla. 2011), rev'd in part, vacated in part sub nom. Hartford Cas. Ins. Co. v. Intrastate Const. Corp.,* 501 F. App'x 929 (11th Cir. 2012). In addition, in order to provide a valid consent or waiver, such action must be knowing and voluntary. When none of the relevant facts or information are known or even in existence there cannot be a knowing waiver or consent.

VII. CONCLUSION

The cardinal change doctrine can be a very handy tool in the right circumstances and it can be wielded in a variety of circumstances – as a defense, as the basis of a claim or as justification for refusing to perform work. The surety will need to ensure that the doctrine applies in the relevant jurisdiction and review the case law to determine if the doctrine will apply in a specific factual scenario.