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In This Issue

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CONTRACT STRATEGIES FOR MANAGING TARIFF RISKS

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Tariffs imposed on essential construction materials by the current federal administration are disrupting project budgets and schedules, and introducing substantial financial uncertainty into the construction and development realm for owners and contractors alike. Given the perpetual ambiguity and unresolved nature of current tariff negotiations, these economic pressures are anticipated to persist, potentially jeopardizing both current and prospective construction projects. However, this volatility presents an opportunity to adopt proactive contracting strategies. Incorporating strategically formulated, tariff-responsive provisions in construction contracts can serve to mitigate the adverse impacts of market fluctuations and provide stakeholders with greater control over project financial outcomes. This article examines a variety of contractual approaches designed to address tariff-related challenges, enabling project stakeholders to effectively navigate what appears to be, at least in the short-term, the new normal of financial uncertainty.

Andrew

Change Orders

One of the foundational strategies involves modifying contractual change order provisions. The integration of tariffs within change order processes can provide a practical and efficient

method to address cost escalations due to tariffs, as the explicit inclusion of tariff-related increases as allowable grounds for change orders can streamline resolution procedures. Even in the absence of explicit language in contractual change order provisions regarding tariffs, contractors may be entitled to request a change order for tariff related cost impacts on the basis that there has been a change in law. Accordingly, the change order process is likely to be the first entry point for tariff related negotiations, so a proactive approach to reviewing and revising these provisions is crucial.

As a starting point, change order provisions should insist on transparency, specifying documentation requirements that reveal actual costs at the manufacturer and supplier levels and related cost impacts to the contractor in order to substantiate entitlement to a change in price or time. Documentation should also include any relevant governmental tariff notices, and related government regulations. Further, establishing thresholds for entitlement, such as changes exceeding a certain percentage of the contract or subcontract value, or covering specific scope segments, or specific materials, ensures that significant cost increases are subject to oversight. This balance allows flexibility for modest increases while maintaining control over substantial financial impacts.

Another critical element for tariff-related change orders is the notice requirement. Contracts should mandate that contractors promptly notify owners of tariff-driven cost increases within a defined window (e.g., 14 or 30 days) following the enactment or application of tariffs that impact the project. The notice clause ensures that owners are equipped with early intelligence to assess potential budget deviations, explore alternative sourcing options, or implement financial contingency plans. Clear timelines for reporting also minimize disputes over claims for additional compensation, fostering transparency and cooperation between parties.

Price Escalation and De-Escalation Provisions

In an era where global trade dynamics and regulatory measures significantly influence construction costs, the careful drafting of contractual material price escalation and de-escalation provisions is crucial to effectively managing tariff-related uncertainties. These tailored clauses specify the circumstances under which contract sums may be adjusted to reflect increased material costs attributable to tariffs. Notably, these provisions should limit relief to tariffs enacted after contract execution, thereby incentivizing contractors to lock in prices early in the procurement process. This approach ensures that owners are shielded from pre-existing tariff burdens while providing a mechanism for adjusting the contract price when unforeseen regulatory changes occur post-execution.

In that effort, the escalation clause should ensure that the contractor is only ever entitled to the profit margins established by original contract pricing, allowing the parties to maintain the integrity of their bargain despite market fluctuations. Further, this allows the owner to immediately realize any benefit resulting from the removal or reduction of tariffs. Additionally, if the market for a commodity is particularly volatile, pricing can be established on a rolling basis by reference to a trusted index at regular intervals. For example, a typical escalation clause may establish rates for certain materials on a month-by-month basis by reference to the Bureau of Labor Statistics Producer Price Indexes. Such clauses balance the risk distribution, encouraging timely and strategic procurement decisions.

Caps on Tariff-Related Impacts

Finally, implementing a cap on tariff-related impacts offers predictability and risk containment. Contracts should specify a ceiling, using either a fixed dollar amount or percentage, that limits the total reimbursable costs attributable to tariffs across the project. This cap provides owners with greater financial certainty while still permitting

contractors to seek relief within predefined limits. Additionally, pairing the cap with a savings clause can help owners re-adjust and course correct in real time. In the spirit of collaboration, owners may want to consider a shared savings clause where any cost savings resulting from tariff reductions are divided between project stakeholders, which can incentivize efforts to minimize costs and adapt to changing regulatory landscapes across the board.

In conclusion, strategic contractual provisions are essential tools in managing tariff risks on construction projects. By facilitating transparent change processes, fostering timely communication, and establishing predictable financial limits, owners and contractors can mitigate the adverse effects of tariffs, ensuring project stability and fostering a cooperative approach to navigating economic uncertainties. These contractual strategies not only protect individual interests but also promote resilient contractual frameworks in an increasingly uncertain time for the construction industry.

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INSURANCE UPDATE: THE OREGON SUPREME COURT'S TWIGG DECISION AND "OCCURRENCE"

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In *Twigg v. Admiral Insurance Co.*, 373 Or 445 (2025), the Oregon Supreme Court confirmed that breach of contract damages can be covered under Coverage A of the standard commercial general liability policy (CGL) for property damage liability, provided the facts underpinning those contract damages have a "tortious connotation." What does that mean exactly? It means that even if a contractor is sued only in contract, the contractor's liability for breach of contract can still be covered if the following is satisfied:

[T]o establish the property damage alleged here was caused by an 'accident' within the meaning of defendant's CGL policy, plaintiffs were not required to formally allege a tort claim or obtain an award in tort. Rather, plaintiffs were required to establish that there was a basis in fact for imposing tort liability on [the insured], even though the same facts may have established [the insured's] liability in contract.

Id. at 471. In other words, "if the underlying record could support a tort claim, then it does not matter whether the underlying claim was in fact prosecuted in tort, contract, or both." *Id*. An "occurrence" or "accident" has been established for purposes of CGL coverage.


Emily

Oregon coverage attorneys have long debated whether breach of contract damages can be covered. The crux of this debate has not been an exclusion (the standard CGL Coverage A does not contain a general breach of contract exclusion), but rather whether breach of contract damages

could ever result from an "occurrence" or "accident," as the insuring agreement requires.

Insurers argued that breach of contract damages are not covered, and they were not without legal authority. Insurers cited *Oak Crest Const. Co. v. Austin Mut. Ins. Co.*, 329 Or 620 (2000), which declined to find coverage when it determined that "accident" has a "tortious connotation" and the record before the court did not demonstrate a breach of a duty of care. The court relied on a 1973 decision, *Kisle v. St. Paul Fire & Marine Ins.*, 262 Or 1, to reach this conclusion.

Insureds (and those standing in their shoes as judgment creditors) argued that breach of contract damages can be covered, and they, too, were not without legal authority. First, insureds pointed out that even *Oak Crest* and *Kisle* recognized that the negligent performance of a contract could demonstrate an "accident." Second, under a string of Oregon Supreme Court decisions from 1978, 1992, 1993, and 1996, insureds argued that the common meaning of "accident" must prevail, which is demonstrated by a mistake in construction work that results in unintended property damage, and referring to technical tort concepts to define "accident" was directly contrary to the Oregon Supreme Court's modern approach to policy interpretation. *See Botts v. Hartford Acc. & Indem. Co.*, 284 Or 95 (1978) (holding undefined policy terms are afforded their common meaning); *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Or.*, 313 Or 464 (1992) (establishing Oregon's framework for policy interpretation and resolving ambiguity); *Interstate Fire & Cas. Co. v. Archdiocese of Portland in Or.*, 318 Or 110, (1993) (admonishing that tort concepts should not be used to define policy terms unless explicitly referenced); *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 324 Or 184 (1996) (concluding that the common meaning of "accident" is an "incident or occurrence that happened by chance, without design and contrary to intention and expectation").

In *Twigg*, the Oregon Supreme Court walked a tightrope of stare decisis that both preserved its precedent but nonetheless clarified a pathway to coverage for breach of contract damages. To do that, it clarified the Oak Crest decision in two important respects. First, it concluded that when the Oak Crest court wrote that "accident" has a "tortious connotation," the court was stating a common meaning (a conclusion for which no party argued). Second, it viewed the Oak Crest decision narrowly as requiring only that the underpinning facts could have supported a tort claim, regardless of whether any tort claim was actually prosecuted. In walking this tightrope, the court both preserved the Oak Crest decision's continued, though narrowed, relevance in Oregon insurance law while clarifying once and for all that the CGL Coverage A insuring agreement can indeed be satisfied by breach of contract damages in Oregon.

Gone are the days that a CGL insurer can say breach of contract damages are never covered in Oregon.

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BUILDING CONFIDENCE IN UNPREDICTABLE MARKETS: CONTRACT DRAFTING TO ALLOCATE TARIFF RISKS

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Earlier this fall, I stopped into a furniture store hoping to buy a dining table I had admired for months. The salesperson apologized and explained that the store had stopped stocking it altogether. The table was manufactured in India, and the most recent rounds of tariffs had pushed the import cost so high—and made pricing so erratic—that continuing to order it was no longer viable. "Costs can jump significantly from one shipment to the next," he said. "We can't price what we can't predict."

It was a small reminder of a much larger reality: the cost and availability of materials used in Oregon construction projects are increasingly volatile. Private commercial, industrial, multifamily, and renewable-energy developments throughout the state are seeing dramatic swings in the price of steel, aluminum, lumber, electrical components, and other essential materials. Depending on the source country and timing, the cost of certain materials can climb by 20–60% or more, often with little advance notice. This instability affects both owners and contractors, who must balance budgets, competitive pressures, procurement timelines, and project viability.


Vanessa

In this environment, thoughtful risk allocation in construction contracts is critical. Material pricing and availability can no longer be treated as stable assumptions. Both parties must anticipate the likelihood that market conditions will shift after a contract is signed. Clear, well-considered provisions—supported by practical procurement strategies—offer the strongest protection against the financial and scheduling impacts of tariff-driven volatility.

The Contractual Impact of Tariffs and Supply-Chain Instability

Tariffs and other trade-related measures can alter material costs almost overnight. Steel, aluminum, electrical gear, and specialized equipment are particularly sensitive to these changes, and their pricing can move sharply in response to tariff adjustments, customs slowdowns, or global supply-chain disruptions.

Such fluctuations can upend feasibility studies, force budget revisions, and require owners to rethink sequencing or scope. Contractors face their own challenges: supplier quotes frequently expire within weeks, and guaranteed pricing has become the exception. Without clear contractual mechanisms to address volatility, material cost increases can erode margins, delay procurement, and strain the project relationship. Establishing expectations through contract language—paired with candid early communication—provides a roadmap for navigating these challenges.

Key Contract Clauses for Allocating Material-Cost Risk

1. Price Escalation Clauses.
A material price escalation clause is often the most effective way to address sudden increases in key material costs. These clauses introduce predictability by identifying which materials are covered, setting a defined percentage cost increase that triggers relief, and specifying how baseline pricing is measured—whether through supplier quotes, industry standards, or other objective references.

A strong escalation clause also describes what documentation must accompany any request for adjustment, such as updated quotes, supplier notices, or tariff index data. Because spikes in cost often coincide with procurement delays, the clause should also address potential effects on the project schedule. When drafted clearly, escalation clauses protect contractors from absorbing extreme price

swings while assuring owners that any adjustments will be grounded in verifiable data.

2. Force Majeure Clauses.
Force majeure provisions should be updated to reflect present-day risks. While traditional language focuses on weather events, labor unrest, or other uncontrollable occurrences, modern drafting should include supply-chain disruptions, import delays, material shortages, and governmental actions like tariff changes. These clauses typically provide time—not price—relief, but clarifying their scope helps reduce later disputes and creates a shared understanding of how unforeseen delays will be handled.

3. Change-in-Law Provisions
Because tariffs are governmental actions, a comprehensive change-in-law clause can be instrumental. Broadly defining "law" to include tariffs, duties, customs rulings, and related trade measures allows the contract to address cost or schedule impacts resulting from regulatory changes. These provisions should require timely notice and documentation so owners can evaluate the effect of new trade restrictions on the project.

4. Contingency Funds.
Many private projects rely on contingencies to cover unknowns, and dedicating a portion specifically to material-cost volatility can be particularly effective. This approach allows owners to plan for risk without inflating the contract price, while also helping contractors avoid padding bids to account for extreme market swings. The contract should explain how the contingency is managed and what happens to unspent amounts.

5. Alternative Materials Clauses.
When specified materials become unavailable or prohibitively expensive, substitution provisions offer flexibility. These clauses set out a procedure for evaluating alternatives and ensure that performance criteria, cost implications, and schedule impacts are addressed upfront. A clear substitution process helps the project proceed without unnecessary redesigns or disputes when supply-chain conditions shift.

Operational Strategies That Complement Strong Contract Language

Even the best-drafted contract provisions must be supported by practical strategies. Early and regular communication is the most important. Owners, contractors, and design professionals should identify tariff-sensitive materials early in preconstruction and share pricing data, supplier updates, and procurement timelines. Regular discussions help set expectations and minimize surprises as the project evolves.

Diversifying sources for key materials can also reduce vulnerability. Relying on a single supplier or country of origin increases exposure to trade-related shifts. Evaluating multiple suppliers—including domestic options—can provide greater stability even if initial pricing is higher.

Early procurement is another valuable tool when used thoughtfully. Locking in prices ahead of market swings can protect the budget, but the contract should address storage, insurance, risk of loss, and the implications of purchasing materials before they are needed. Long-lead items are often strong candidates for early purchase.

Finally, the choice of project delivery method influences how tariff risk is shared. Fixed-price models tend to place more risk on the contractor, while Cost-Plus and Guaranteed Maximum Price structures distribute risk more evenly. Negotiated CM/GC or Engineering, Procurement, and Construction (EPC) arrangements offer opportunities to address price volatility collaboratively during preconstruction. Tariff exposure should not dictate the delivery method, but it should be part of the decision-making process.

Conclusion

The dining table I never purchased is a small example of a broader challenge: global trade conditions increasingly influence the cost and availability of construction materials in ways that are difficult to predict. In Oregon's private construction market, where prices can swing sharply and with little warning, the key to stability is clarity—clarity in contract drafting, clarity in communication, and clarity in expectations.

By incorporating clear escalation clauses, modernized force majeure and change-in-law provisions, targeted contingencies, and well-defined substitution options—and by pairing those tools with proactive planning and strategic procurement—owners and contractors can better manage volatility without jeopardizing their projects. No contract can eliminate uncertainty, but well-drafted agreements allow the parties to allocate and address risk in a balanced and practical way.

In an industry shaped by fluctuating global conditions, clear allocation of risk remains one of the strongest tools for keeping projects on track.

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ARE QUANTUM MERUIT CLAIMS IN OREGON STILL VIABLE? *KIZER*, CARDINAL CHANGE, AND *DONOHUE*

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Changes on a construction project are a common source of disputes between owners, design professionals, contractors and other project stakeholders. To administer changes and control for risk, construction contracts often include change provisions to appropriately increase or decrease the contract price and time as appropriate. These change clauses, paired with notice provisions and dispute resolution provisions, often provide the contractual path forward for a contractor seeking compensation for change events. In Oregon, these change clauses may have even more importance with recent Court of Appeals decisions in *Kizer Excavating Co. v. Stout Bldg. Contrs.*, 324 Or App 211, *adh'd to as modified on recons*, 325 Or App 642 (2023) and *Seabold Constr. Co. v. Koz 2211 SW. 4th Ave.*, LLC, 344 Or App 688 (2025) which appear to limit a contractor's ability to bring a claim in quantum meruit if the work which the contractor seeks additional compensation for falls under the scope of the original contract.

What *Kizer* and its progeny do not address, however, is what claims may be available if the impacts to the work and/or any additional work ventures far beyond what either party considered at the time of contracting, such that the changes cannot be compensated under the changes clause? In such circumstances, a claimant may consider looking to the doctrine of cardinal change. Alternatively, depending on the circumstances, a claimant may consider making a claim under *Portland ex rel. Donohue & Fleskes Corp. v. Hoffman Constr. Co.*, 286 Or 789 (1979) to seek relief in quantum meruit.

1. The Court of Appeals Strikes at Quantum Meruit.

In the recent past, the Oregon Court of Appeals appeared to take two swipes at plaintiffs who brought claims for quantum meruit where the parties agreed the work to be performed fell within the scope of the express contract.
The first, in *Kizer*, involved an excavating subcontractor who sought $36,602.72 in extra compensation under both a breach of contract theory and a quantum meruit theory for additional fill excavated beyond its estimate (which was incorporated into the subcontract). 324 Or App at 213-14. The subcontractor estimated excavating 1,500 cubic yards of fill (notwithstanding a clerical error in the estimate originally covering only 500 cubic yards). *Id.* at 213. In completing its

work, however, the subcontractor excavated, in total, 3,290 cubic yards of fill. *Id*. (identifying the disparity in part due to "an erroneous survey and . . . unanticipated water."). After the subcontractor's (untimely) change order was rejected, the subcontractor then sought compensation under twin theories of a breach of contract and quantum meruit. *Id*. at 214. At trial, the parties agreed that the excavation work was within the scope of the parties' subcontract. *Id*. at 215. The trial court, nevertheless, determined that the prime contractor's rejection of the change order made the additional work extracontractual, and it therefore entered a judgment in favor of the subcontractor on its quantum meruit claim. *Id*. The Court of Appeals disagreed, concluding that because the parties agreed the work was within the scope of the subcontract, the work could not provide a basis for relief in quantum meruit. *Id*. at 219-20.

Similarly, in *Seabold*, the Court of Appeals affirmed the trial court's dismissal of the plaintiff's claim for compensation in quantum meruit because the "[p]laintiff admitted that the contract governed the work at issue as well as delays and extra costs." 2025 Ore. App. LEXIS 1842 at *15 (Nov. 13, 2025). Again, the Court of Appeals held that where the parties agreed the work was within the contemplation of the contract, the work could not be compensated under a theory of quantum meruit.

Overall, *Kizer* and *Seabold* both present interesting fact patterns that may not be applicable in other circumstances (i.e., agreement on whether the work fell under the scope of the contract, estimating errors, etc.). Considering these cases, care should be taken when presenting a claim for quantum meruit.

2. The Availability of Quantum Meruit Claims.

Despite *Kizer* and *Seabold*, claimants may consider two other avenues for relief in quantum meruit if the circumstances arise. First, where the changes are so drastic that they go beyond the scope or nature of the contract such that the changes constitute a 'cardinal change.' Second, where the upstream party makes the work substantially more onerous, thus entitling the downstream party to additional compensation. *See Donohue*, 286 Or 789.


David

A. Cardinal Change.

While never specifically recognized in Oregon, plaintiffs may consider seeking relief in quantum meruit under a cardinal change theory if the changes on the project are "so drastic that it effectively requires the contractor to perform duties materially different than those originally bargained for." *Allied Materials & Equip. Co. v. United States*, 215 Ct. Cl. 406, 409 (1978). First coined in the federal contracting context in *General Contracting & Constr. Co. v. United States*, 84 Ct. Cl. 570 (Ct. Cl. 1937), so-called cardinal change has been recognized in some states but rejected by others. S*ee, e.g., Durr Mechanical Constr., Inc. v. PSEG Fossil, LLC*, 516 F. Supp. 3d 407, 416 (D.N.J. 2021) ("I find no compelling reason to recognize a cardinal change

doctrine claim under New Jersey law, and decline to do so.").

Because cardinal changes involve work that is different than what was contracted for, such a change is definitionally "not redressable under the contract." *Allied Materials & Equip. Co.*, 215 Ct. Cl. at 409; *see also Lake Union Drydock Co. v. United States*, 2007 U.S. Dist. LEXIS 78282, at *34 (W.D. Wa. Oct. 10, 2007). Therefore, a quantum meruit claim under a cardinal change theory would appear to survive (or bypass) *Kizer* because it operates inherently extracontractually. By its nature, the question of a cardinal change is fact-intensive, and each case must be analyzed on its particular facts and circumstances, considering both "the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole." *Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1033 (Ct. Cl. 1969) (quoting *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 966 (Ct. Cl. 1965)). Generally, courts look to see "whether the modified job is essentially the same work as the parties bargained for." *Merrill Contrs. v. GST Telecom*, 2003 Wash. App. LEXIS 294, at *21 (Wash. Ct. App. Feb. 25, 2003). Nevertheless, a cardinal change can occur even where the final product after the changes is the same as under the contract because courts look at the "entire undertaking of the contractor, rather than the product[.]" *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1332 (Fed. Cir. 2003) (quoting *Edwin R. Marden Corp. v. United States*, 442 F.2d 364, 370 (Ct. Cl. 1971)). Indeed,

There 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 upon the project as a whole. *Wunderlich Contracting Co.*, 351 F.2d at 966 (internal citation omitted).

Courts that recognize this doctrine often emphasize the extraordinary character of a cardinal change when examining what the parties originally bargained for and what the change event means in that context. For example, courts have found a cardinal change where:

- Numerous small changes effectively changed the nature of the contract. *Air-A-Plane Corp.*, 408 F.2d at 1033, 1037-38 (allowing a cardinal change claim to proceed to trial where, in a procurement contract for smoke generators, the government made numerous changes, essentially creating a development contract);
- The amount of work doubled. *Saddler v. United States*, 287 F.2d 411, 414-15 (Cl. Ct. 1961) (finding in a contract to construct a levee, the government doubled the amount of earth to be placed, which while generally falling within the purpose of the contract (to construct a levee) certainly fell beyond the scope of the intended contract);
- "[D]rastic consequences follow from defective specifications" resulting in work which was "not 'essentially the same work as the parties bargained for when the contract was awarded . . . based on the sheer magnitude of reconstruction work caused by the alleged defective specifications." *Edward R. Marden Corp.*, 442 F.2d at 369-70; and,
- An entire building was removed from the scope of work under the guise of the contract's changes clause. *General Contracting & Constr. Co.*, 84 Ct. Cl. at 579-80.

In contrast, courts have declined to find a cardinal change where:

- The project was not fundamentally altered in a way which the contract's remedial provisions could not cover, even though the plaintiff complained of accelerated work, redoing work, and contending with stacking of the trades. *Hensel Phelps Constr. Co. v. King County*, 57 Wn. App. 170, 182-83 (1990); and,
- The contractor was forced to substitute materials due to government priority orders during *World War II. Aragona Constr. Co. v. United States*, 165 Ct. Cl. 382, 384-85, 390-91 (Ct. Cl. 1964) ("All the changes that plaintiff was asked to make on this contract were interstitial in nature. For example, it substituted fabric-and-mastic waterproofing for copper flashing, wooden interior shelves for metal ones, and steel-and-enamel mirror frames for chromium ones.").

In practice, cardinal change is not a common remedy in the modern construction industry context. It involves a fact-intensive inquiry where the court must decide whether the changes (normally a large change or numerous small changes) fall outside the scope of the contract. When considering whether to advance a cardinal change claim (especially as a standalone claim and especially in Oregon), parties should carefully examine facts and circumstances of their claim in comparison to the decisions on record.

B. Donohue-Claims.

While an Oregon court has not specifically recognized cardinal change claims, there is a line of cases which recognizes that a contractor may be entitled to compensation in quantum meruit if the upstream party makes the work more difficult. *See Hayden v. Astoria*, 74 Or 525 (1915); *McDonald v. Supple*, 96 Or 486 (1920); *City of Portland ex rel. Donohue & Fleskes Corp. v. Hoffman Constr. Co.*, 286 Or 789 (1979).

For instance, the Oregon Supreme Court recognized a party may abandon the contract where the "original contract has been deviated from in so many matters that it can hardly be regarded as controlling the parties at all" and therefore seek recovery under an implied contract in quantum meruit. *Hayden*, 74 Or at 531 (internal citations and quotations omitted). In *Hayden*, the plaintiffs incurred extra costs in building a dam due to the owner's change in plans and delays to the work. 74 Or 525. The Court further held that, if through the act or omission of the owner, the work is delayed in such a way as to make the performance impossible, the claimants are entitled to recover in quantum meruit. 74 Or at 533. The *McDonald* case followed *Hayden*, in determining that because the upstream party failed to perform its part of the contract, which made the work more difficult and delayed its completion, the claimant could recover in quantum meruit. 96 Or at 496-97 ("The testimony . . . tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract, which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been, if the material had been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover upon a quantum meruit") (internal citations omitted). Note that both *Hayden* and *McDonald* were decided prior to the coinage of the term "cardinal change" in *General Contracting & Constr. Co*, 84 Ct. Cl. 570 (Ct. Cl. 1937), and therefore could not use it.

Nearly 60 years later, in *Donohue*, the Oregon Supreme Court further refined the rule presented in *Hayden*, holding that "quantum meruit recovery is available to a contractor whose performance has been made substantially more difficult and costly by the other party's actions," and that "a finding that an abandonment of the contract can be inferred from the parties' actions is not required."

286 Or at 798. Further, *Donohue* permitted recovery as measured by the reasonable value of the performance rendered by the claimant (including reasonable profit and overhead) as opposed to the value received by the upstream defendant. *Id.* at 802-03.

Kizer did not seek to change or otherwise redefine the rule set forth in *Donohue*, permitting a downstream party to seek relief in quantum meruit if that party's performance was made substantially more difficult and costly due to the actions (or inactions) of the party upstream. The Oregon Supreme Court's decisions in the *Donohue* line of cases remain good law.

C. Alternative Pleading.

As a final note, neither *Kizer* nor *Seabold* addressed the Oregon Supreme Court's rule in *Kashmir Corp. v. Patterson*, 289 Or 589, 591-92 (1980), which permits alternative pleading of a breach of contract and quantum meruit claim. ("We have frequently held that a plaintiff may plead alternatively on an express contract and in quantum meruit, and that the plaintiff cannot be required to elect upon which theory plaintiff will rely."). Indeed, the *Kashmir* court advised the "prudent pleader" to present alternative claims for relief when the facts support multiple avenues of recovery. *Id.* at 592.

Although *Seabold* was decided on the pleadings, the court rejected a quantum meruit theory only after the plaintiff admitted that "the contract governed the work at issue as well as delays and extra costs," thus preventing any extracontractual recovery. *Seabold Constr. Co. v. Koz 2211 SW 4th Ave.*, LLC, 2025 Ore. App. LEXIS 1842, at *15 (Nov. 13, 2025). Therefore, should the facts and circumstances provide or suggest the same, "prudent" practitioners should consider pleading an alternative claim for quantum meruit.

3. Conclusion

The *Kizer*-line of cases appear congruent with a theory of cardinal change—if the change cannot be compensated by the contract because it is drastic enough to constitute a cardinal change, then a claimant may properly seek quantum meruit relief. Of course, Oregon has not specifically recognized such a theory of claim or recovery. Oregon has recognized, however, that when a contractor's work is made substantially more onerous as a result of the actions or inactions of an upstream party, the contractor may seek quantum meruit relief under the *Donohue* line of cases—relief which is measured by the reasonable value of the contractors' work (including profit and overhead). The recent decisions from the Court of Appeals do not address the Oregon Supreme Court's decision in *Donohue* and, as of today, *Donohue* remains good law.

As always in the practice of law, care should be taken when pleading, presenting, and preparing claims. Knowledgeable construction law practitioners should consider the strengths and weaknesses of each type of claim when pleading and litigating the same.

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THE VERTICAL SHIELD FALLS: PRACTICAL STRATEGIES FOR SB 426 COMPLIANCE

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For decades, the "vertical separation" of liability has been a cornerstone of construction risk management. If a subcontractor failed to pay their crew, the worker had a lien right against the property and a claim against their employer, but the General Contractor (GC) and Owner were generally insulated from direct wage liability—provided they hadn't contractually assumed it.

On January 1, 2026, that vertical shield effectively vanishes for private construction projects in Oregon. Senate Bill 426 creates statutory joint and several liability for owners and "direct contractors" regarding the unpaid wages of "unrepresented employees" at any tier of the project. With the effective date weeks away, simply advising clients to "be careful" is insufficient. We need to overhaul their contracts and administration protocols now. Here is the practice guide for the new regime.

The New Liability Landscape

Under the new ORS provisions created by SB 426, if a sub-subcontractor (or any lower-tier entity) fails to pay wages or fringe benefits to an employee who is not covered by a collective bargaining agreement, that employee can sue the GC and the Owner directly. The claimant does not need to exhaust remedies against their direct employer first. The liability includes unpaid wages, interest, penalties (which can be substantial under Oregon wage-and-hour law), and attorney fees.

Matthew

The "Void Indemnity" Trap

Many practitioners are currently attempting to draft their way out of this with aggressive indemnity clauses. Proceed with caution. SB 426 explicitly invalidates any provision that attempts to waive the worker's right to claim against the GC/Owner. Furthermore, it limits the efficacy of standard indemnity clauses where the subcontractor agrees to hold the GC harmless for wage claims.

However, the statute does preserve a statutory right of recovery. While you cannot stop the worker from suing your client, your client has a statutory right to sue the non-paying subcontractor for actual damages, liquidated damages, and attorney fees.

Drafting Tip: Ensure your subcontracts mirror the statutory language. Instead of a generic "indemnify and hold harmless for all claims," include a specific provision acknowledging the direct contractor’s statutory right to recover wage payments made on behalf of the subcontractor pursuant to SB 426, including a stipulated right to withhold these amounts from future progress payments.

Three Operational "Must-Haves" for 2026 Contracts

If your client is a Direct Contractor or a large commercial Developer (the law exempts public works and residential projects of five or fewer units), their contracts must include these three mechanisms effective January 1:

1. The "Right to Audit" & Certified Payrolls

Certified payrolls are no longer just for public works (BOLI) projects. SB 426 grants direct contractors the statutory right to request payroll records from subcontractors.

The Clause: Your contract should make the submission of redacted certified payroll reports a condition precedent to payment.

The Detail: The statute requires these records to include the names of all workers, contact info, and their classification (employee vs. independent contractor). You need this data before a claim arises to verify that the "independent contractors" on site aren't actually misclassified employees creating liability for your client.

2. The "Pre-Emptive" Withholding Clause

The statute clarifies that an owner or direct contractor may withhold payment "in an amount and to the extent" that they have paid wages on behalf of the sub.

The Clause: Expand your standard withholding clause. It should explicitly allow withholding not just for actual payments made, but for potential liability upon receipt of a notice of non-payment or failure to provide the certified payrolls mentioned above.

3. The Return of the Payment Bond

For the last decade, many GCs have waived payment bond requirements for subcontractors to save the 1–2% premium cost. SB 426 changes the calculus.

The Strategy: For any significant subcontract, the risk of strict wage liability likely outweighs the premium cost. A payment bond effectively shifts the SB 426 insolvency risk from your client to the surety. Advise clients to re-evaluate their bonding thresholds immediately.

Conclusion

SB 426 is a "wake-up call" legislation. It assumes that upstream parties are in the best position to police wage theft downstream. Whether we agree with that policy or not, the liability is real and imminent. By tightening certified payroll controls and enforcing strict withholding rights, we can help our clients navigate this structural shift without being left holding the check.

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