

The logo for Carlton Fields, featuring the word "CARLTON" in red and "FIELDS" in white, both in a bold, sans-serif font. The text is positioned on a blue background with a yellow diagonal line and a grid pattern in the upper right corner.

**CARLTON
FIELDS**

Identification & Notification of Claims: Overcoming the First Obstacles to Successful Recovery

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Carlton Fields, P.A.



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Claims

- AIA A201-2017 ¶ 15.1.1
- A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

Changes

- Bilateral
- Unilateral
- Constructive

Notice

- Having the proper mindset
 - When in doubt, send letter giving notice.
- Notice of potential change
 - “An event has occurred that may give rise to a change.”
- Prejudice
- Different jurisdictions

Changes Clause – Federal FAR 52.243-4(a)

- (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes –
 - (1) In the *specifications* (including drawings and designs);
 - (2) In the *method or manner of performance* of the work;
 - (3) In the *Government-furnished property* or services; or
 - (4) Directing *acceleration* in the performance of the work.

Changes Clause – Federal FAR 52.243-4(a)

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided*, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

Changes Clause – AIA Documents A201-2017 §§ 7.1.1–.3

- **§ 7.1.1** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.
- **§ 7.1.2** A Change Order shall be based upon agreement among the Owner, Contractor, and Architect. A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor. An order for a minor change in the Work may be issued by the Architect alone.
- **§ 7.1.3** Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

Constructive Changes

- Impossibility
- Commercial Impracticability
- Undisclosed Intent

Interference with Means & Methods

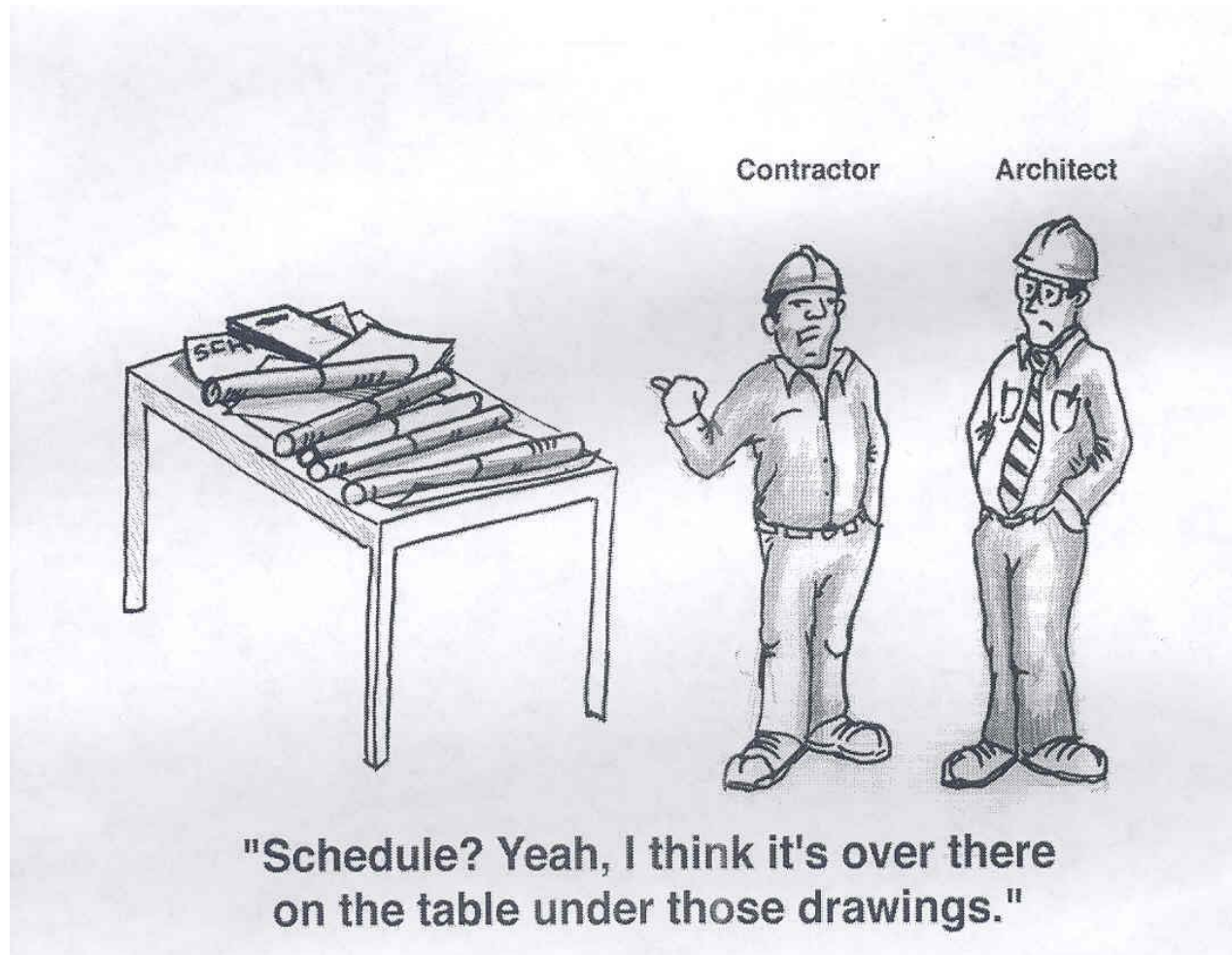
- Directions from the Contracting Officer
- Over-Inspection
- Schedule Disapproval



Superior Knowledge

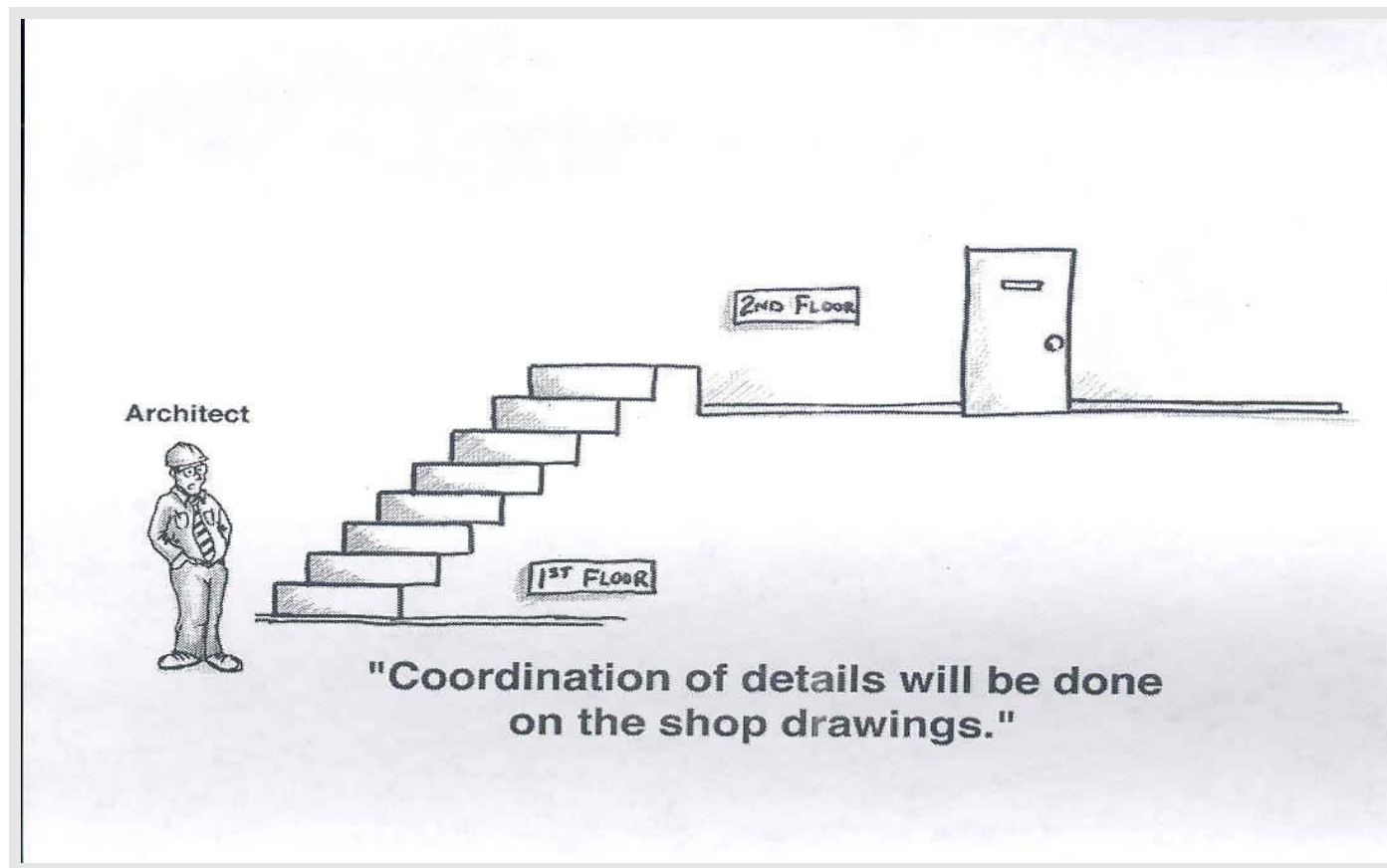
- *Helene Curtis Industries, Inc.*
- Misrepresentation or Fraudulent Inducement

Schedule Changes

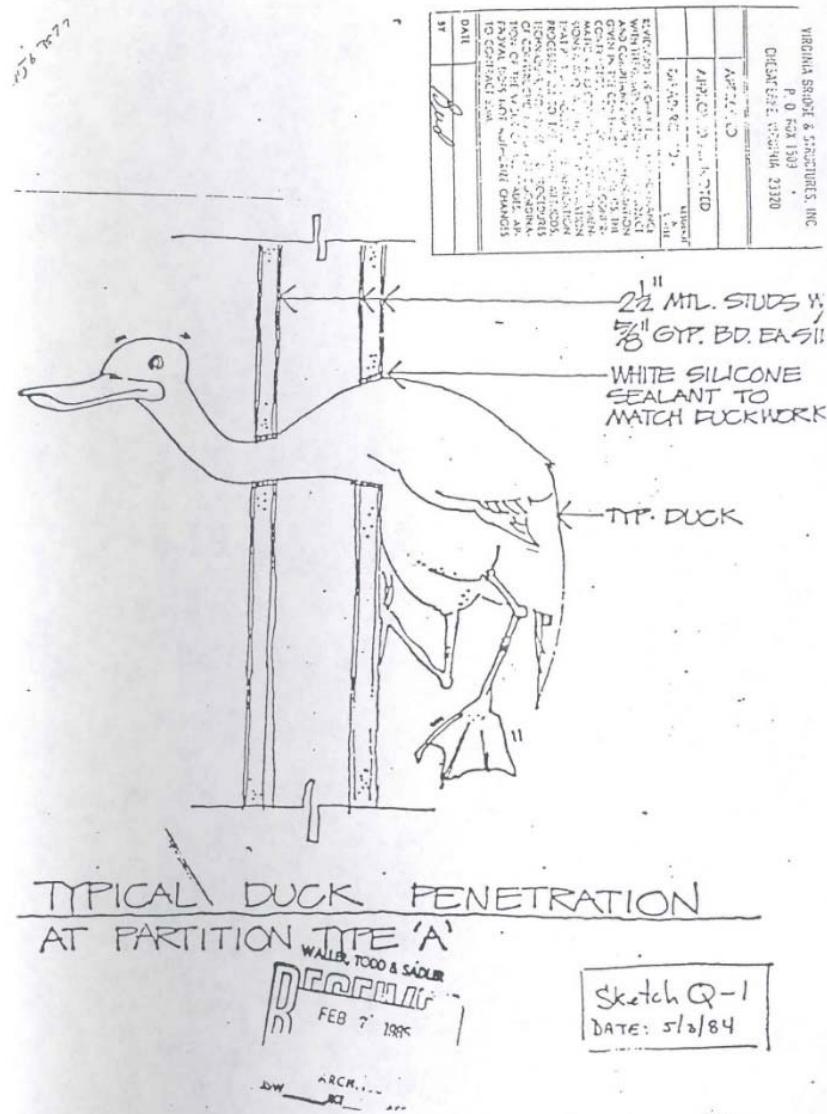


Defective Drawings

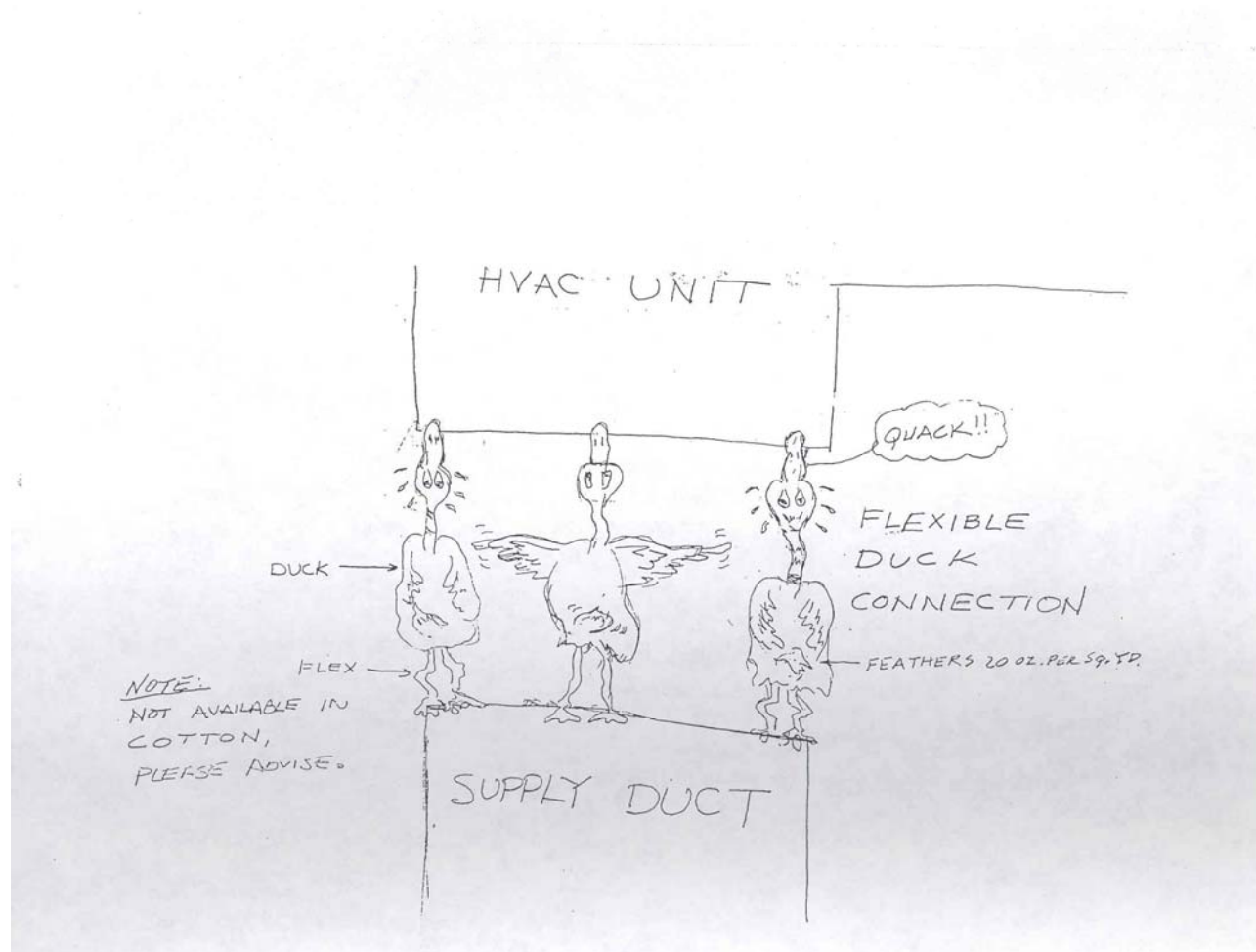
- Conflicts between the drawings and specifications
- Conflicts within the drawings



“Duck” Penetration



Supply Duct and “Duck” Connection



Changed Conditions

- Differing site conditions
 - Type I
 - Type II
 - Notice within the required deadline
 - Can be used for non-physical conditions as well

Acceleration

- Delayed for Reasons Not Your Fault
- Time Requests
- Time Denied
- Order to Accelerate
- Actual Acceleration

Delays

- Excusable / Non-Compensable Delays
 - Weather
 - Acts of god
 - Strikes
- Non-Compensable / Contractor-Caused Delays
- Excusable / Compensable Delays
 - Owner-Caused Delays

Excusable Weather Delays



Brand Name or Equal

- Warranty of availability
- Warranty of performance
- Substitution

Owner Interference

- Late Owner-Furnished Equipment
- Failure to Provide Access



Quantum

- Costs
 - Reasonable
 - Allowable
 - Allocable
- Example: Damages awarded as direct costs in Appeal of Worsham Constr. Co., 85-2 BCA P 18016, ASBCA No. 25907

A.	Direct Costs	Amount Awarded
1.	Agreed Direct Costs of Performance (finding 7)	\$85,814
2.	Compensation of Superintendent	
	a. Direct Job-Site Work	400
	b. Stand up Productivity Loss	0
3.	Special Insurance	1,600
4.	Fashion 'Claim' for Canopy Work	0
5.	Worsham Brothers' Compensation	0
6.	Additional Survery Costs	0
	Total Direct Costs	\$87,814

Cost Maintenance

- Failure of Proof
- False Claims Act
- Claim Certification

Daewoo Engineering & Constr. Co.

“The Court of Federal Claims held that the government ‘showed by clear and convincing evidence that [Daewoo] knowingly presented a false claim with the intention of being paid for it’ and thus that Daewoo's claims against the government were forfeited under § 2514. Daewoo itself concedes that if the \$ 50.6 million Contract Disputes Act penalty is correct, then the forfeiture of its \$ 13 million is also correct. Since we have upheld the \$ 50.6 million award, we also uphold the forfeiture under § 2514.”

-Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1341 (Fed. Cir. 2009).

Claims Preparation

Introduction: Claims Preparation



Distinguishing REAs from Claims

- Request for Equitable Adjustment (“REA”)
 - Contractor’s entitled to its costs, reasonable profit, & overhead
 - Differing Site Conditions; Suspension of Work; T4C
 - Additional costs must be allowable, allocable, and reasonable
 - No interest accrues on the REA
 - Cost of pursuing REA = allowable contract administration cost
- Claim: Must be Certified if over \$100,000
 - Written demand for payment of money in a sum certain
 - Include statement of entitlement, payment *as a matter of right*
 - Best practice is to request the CO issue a decision on the claim
 - Interest begins to accrue when CO receives the claim
 - Cost of pursuing claim \neq compensable contract administration cost

The Contract

- Language to look for:
 - Changes clause
 - Differing-site condition clause
 - Termination (for cause or convenience)
 - “No damages for delay”
 - Liquidated damages
- Notice-of-claim provision
- Dispute-Resolution clauses
 - Litigation, arbitration, or mediation
 - Choice of forum
 - Governing-law clause

The Facts



The Damages

- Direct Damages
- Consequential Damages
- Delay Damages
- Impact Costs (labor, equipment, material)
- Job Site Overhead
- Home Office Overhead
- Lost Productivity
- Lost Profits
- Punitive Damages (rare for construction contracts; in contract cases, punitives usually only awarded if an independent tort occurred)

Sufficiency of Proof of Damages

- “A claimant need not prove his damages with absolute certainty or mathematical exactitude. It is sufficient if he furnishes the Court with a reasonable basis for computation, even though the result is only approximate. Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation, and resultant injury.”

Wunderlich Contracting Co. v. United States, 351 F.2d 956, 968 (Ct. Cl. 1965).

The Law

- The contract
- Substantive state law (if applicable)
- Substantive federal law (if applicable)
- Procedural law of the forum (e.g., Federal Rules)
- State trial court (e.g., county circuit court)
- Federal district court (e.g., U.S. District Court for E.D. Va.)
- Agency board of contract appeals (e.g., Armed Services Board of Contract Appeals)
- Arbitral forum (e.g., three-arbitrator panel operating under AAA's Construction Arbitration Rules)

Certified Claims

Federal – FAR 33.207 Contractor certification.

- (a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.
- (b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.
- (c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.
- (d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met.
- (e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.
- (f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment [. . .] the court or agency BCA shall require a defective certification to be corrected.

Election of Forum

Upon receiving a denial or deemed denial of the claim from the CO, the contractor *elects* to appeal the CO's decision to one of two forums:

- Appropriate Agency Board of Contract Appeals (“BCA”)
- Court of Federal Claims (“COFC”)

	Boards of Contract Appeals (BCA)	Court of Federal Claims (COFC)
Filing Deadline	90 Days from Receipt of CO's Final Decision	365 Days from Receipt of Final CO's Decision
Cost to Initiate Appeal	\$0	\$400.00
Attorney Needed?	No	Yes
Legal Fees Reimbursed?	If contractor prevails, maybe, 5 U.S.C. § 504	If contractor prevails, probably, 28 U.S.C. § 2412
Judges' Qualifications	5+ Years of Public Contracts Work	None
Number of Judges	Panel of Three	One at Bench
Party Authorized to Settle	Contracting Officer (Exclusively)	Department of Justice Attorney (Exclusively)
Owner's Representative	Agency Attorneys	Department of Justice Attorneys
Court of Next Resort	U.S. Court of Appeals for the Federal Circuit	U.S. Court of Appeals for the Federal Circuit

Notice

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Alternative Dispute Resolution (“ADR”)

Mediation

- The goal / settlement
- Parties' mindset
- Choosing a mediator
- Pre-mediation submissions
- The mediation itself
- Public contracts
- “Compulsory Mediation”

Arbitration

- Alternative to litigation
- Institution / Administrators (AAA, ICDR, ICC)
- The Rules
- Choosing the Arbitrators
- The Arbitration

Litigation

Introduction to the Litigation Process



Notice of Filing

- Have the proper mindset
- Different jurisdictions, different requirements
- Check the contract for any additional requirements or *conditions precedent* to initiating a lawsuit
- Service of process

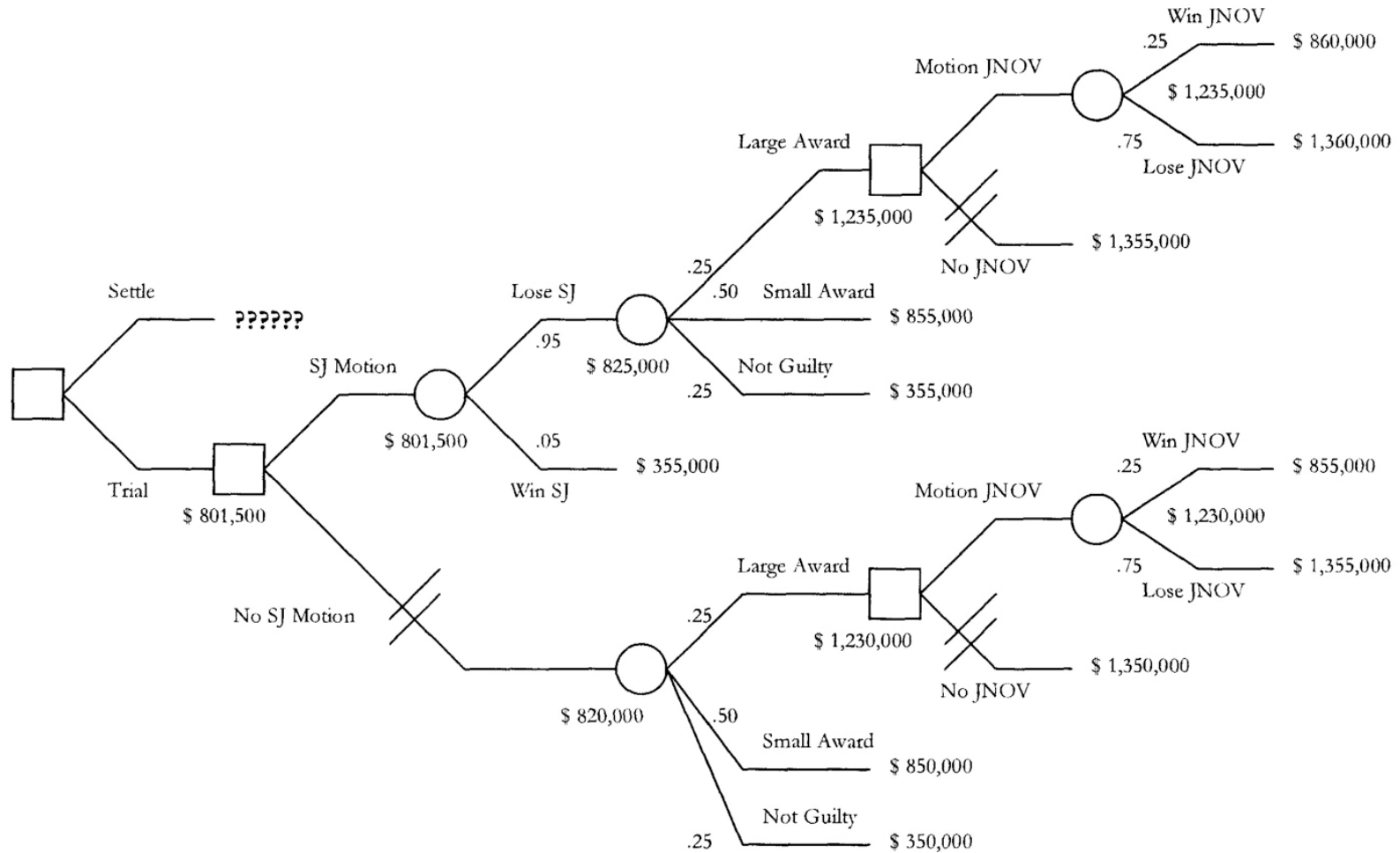
Arbitration or Litigation

- Check the contract's dispute-resolution provisions
 - Is there a choice-of-law or governing-law clause?
 - Is there a forum-selection clause?
 - If arbitration, is an institution (e.g., AAA or ICC) specified?
- Litigation
 - If there isn't a choice-of-law clause, and several states may have jurisdiction, where do you bring suit?
 - State court versus federal court
- Arbitration
 - Prior written agreement of the parties (i.e., arbitration clause)
 - Submission agreement executed by the parties

Costs of Litigation

- Indirect costs
 - Obtaining or compiling information and documents sufficient to state a legal claim or assert a defense to a legal claim
- Direct costs
 - Attorney's fees
 - Most courts do not allow corporations to appear *pro se*
 - Court costs
 - Filing fees
 - Cost to serve complaint on defendant(s)
 - Consultants and experts

Litigation Risk



Source: Douglas H. Yarn & Gregory Todd Jones, *Georgia ADR Practice & Procedure* § 5:3 Modeling decisions: decision trees (2014).

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Daniel is a shareholder at Carlton Fields, focusing his practice on construction and government contracts. His experience spans a wide variety of public and private projects, including commercial, residential, federal, airports, roads, hotels and resorts, hospitals and research facilities, and power and utility projects. Daniel has litigated before state and federal courts and national and international arbitration panels. His clients include owners, contractors, subcontractors, suppliers, architects, and sureties. Daniel received his undergraduate degree and his law degree from the University of Virginia.

James P. Carney

Jim is a shareholder at Carlton Fields, and concentrates his practice in the areas of construction law and government contracts. Jim's experience includes litigating complex construction matters as well as drafting and reviewing construction contracts, analyzing claims, and closing out projects. He has represented suppliers, subcontractors, general contractors, designers, and public and private owners on a wide range of projects, including: commercial, residential, federal, airport, road, hotel and resort, hospital and research facility, and power and utility projects. Jim received his undergraduate degree from Davidson College and his law degree from the Columbus School of Law at the Catholic University of America.