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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEFFENBAUGH INDUSTRIES, INC.,

Plaintiff/Counter Defendant - Appellant,

v.

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY, KANSAS CITY, KANSAS,

Defendant/Counterclaimant - Appellee.

No. 22-3147
(D.C. No. 2:20-CV-02204-EFM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

After new management began operating Deffenbaugh Industries' waste-collection services, residents of Wyandotte County, Kansas, often trudged to their curbs after trash-pickup day to find that trash and recycling remained in their bins—rotting, festering, and beckoning pests. Naturally, the residents called to complain.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The waste-collection contract between the Unified Government of Wyandotte County and Kansas City, Kansas (Unified Government) and Deffenbaugh allows the Unified Government to charge Deffenbaugh $200 per residential unit per day when a customer complains about a late pickup and Deffenbaugh fails to correct it. So from 2019 to 2020, the Unified Government charged Deffenbaugh over half a million dollars for complaints of late pickups. Deffenbaugh disagreed with the number of charges and the way the Unified Government calculated them, so it vaguely informed the Unified Government that it planned to terminate the contract based on the Unified Government's breach.

Deffenbaugh then sued the Unified Government for breach of contract and declaratory judgments, and the Unified Government counterclaimed, alleging that Deffenbaugh had also breached the contract. Though Deffenbaugh voluntarily agreed to the contract provision allowing charges in 1993 and again in 2012, it now claims that provision is an unenforceable penalty. Deffenbaugh also claims that its notices to the Unified Government were enough to terminate the contract. But the district court ruled at summary judgment that the contract remains in effect and that the $200 charge is enforceable as liquidated damages. We agree.

The district court properly certified its summary-judgment decision as a final, appealable judgment under Federal Rule of Civil Procedure 54(b). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

I. Factual Background

A. The parties enter a new waste-disposal contract.

In January 1993, Deffenbaugh contracted with the Unified Government to collect and dispose of residential waste until June 2013. Nearly two decades later, with the expiration of the 1993 contract looming, Deffenbaugh and the Unified Government entered a new contract. In the 2012 contract, the parties agreed that Deffenbaugh would exclusively collect and dispose of residential and municipal waste for the Unified Government from January 1, 2012, to December 31, 2032.

In the new contract, Deffenbaugh promised to "provide collection service for Waste which is placed Curbside by 7:00 a.m. on the designated collection day" and to complete its collections between 7:00 a.m. and 5:00 p.m. Monday through Friday. In return, the Unified Government promised to pay Deffenbaugh $9.67 per residential unit per month from January 2012 to January 2014, and $11.23 per residential unit per month in 2014. After 2014, the parties agreed to calculate the price per residential unit per month through a price index. Kansas law governed the contract.

Under the contract, Deffenbaugh assumed responsibility for receiving customer complaints. And it promised to provide a phone number for complaints to the Unified Government. Section 7.02(b) of the 2012 contract

allows the Unified Government to charge Deffenbaugh if Deffenbaugh fails to timely respond to certain customer complaints[1]:

> [Deffenbaugh] shall make and retain a record of each complaint received, including the name, address and telephone number of the complainant, date and time of the complaint, date and nature of the occurrence complained of and disposition of the complaint. Upon receipt of a complaint, [Deffenbaugh] shall promptly investigate. All complaints shall be resolved expeditiously within the 24 hour period following receipt. If the complaint involves a failure by [Deffenbaugh] to make a scheduled collection, and if [Deffenbaugh] fails to make such collection within 24 hours after receipt of the Complaint, [Deffenbaugh] shall be penalized two hundred dollars ($200.00) for each 24 hour period in which such failure continues, which amount shall be deducted from the [Unified Government's] next payment to [Deffenbaugh]. [Deffenbaugh] may appeal this penalty to the County Administrator whose decision on the matter will be final.

App. vol. 1, at 59. The 1993 contract contained a nearly identical provision, the only material change being the charge's increase from $100 in the 1993 contract to $200 in the 2012 contract.

A separate provision in the 2012 contract, § 3.07, allows the Unified Government to collect "liquidated damages" from Deffenbaugh if Deffenbaugh performs inadequately because of a lack of proper equipment. If Deffenbaugh fails to comply with the County Administrator's determination that it needs to use more vehicles or equipment, Deffenbaugh will "forfeit as liquidated damages the sum of one thousand dollars ($1,000) per item of equipment for

[1] The contract defines "customer" as "[a]n occupant of a Residential Unit who generates Waste."

each day that such failure continues." App. vol. 1, at 51–52. This liquidated-damages provision also appeared in the 1993 contract. Like § 7.02(b), the only material change to § 3.07 from 1993 to 2012 was the price—the 1993 contract charged only $300 per item per day.

The 2012 contract outlines events of default, which include either party's failure to "observe each and every term, covenant or agreement to be performed or observed by it." If one party defaults, the non-defaulting party can, under § 11.02, "terminate this Contract upon 30 days prior written notice to the defaulting party." *Id.* at 75. But the contract won't terminate if the defaulting party fully cures before the thirty days expire, or, for defaults that aren't reasonably curable within thirty days, if the defaulting party begins "diligent and good faith efforts to cure and continue[s] such efforts until the default is fully cured." *Id.*

B. Under new management, Deffenbaugh's performance declines.

In 2014, after entering its second contract with the Unified Government, Deffenbaugh was acquired by Waste Management and began doing business under that name. For continuity and clarity, as have the parties, we refer to Appellant as Deffenbaugh except when discussing the acquisition.

After Waste Management acquired Deffenbaugh, Deffenbaugh often missed collections at residential units, in part because it didn't have enough employees to consistently complete all its routes. Some of Deffenbaugh's managers internally acknowledged the downturn in service.

Missed waste collections pose more than a mere inconvenience: they threaten the health and safety of residents. When trash is left sitting on the curb for several days, the trash bags can deteriorate and expose the trash to the environment. Dogs, varmints, and wild animals can (and did) get into the trash—at least one Unified Government resident reported wild animals rifling through his trash within a day of a missed pickup. Loose trash can also threaten the health and safety of neighborhood children. And residents whose trash isn't picked up may be tempted to engage in illegal dumping.

In June 2018, to help Deffenbaugh improve its services and response times to customer complaints, the Unified Government gave Deffenbaugh access to its 311 system. And the Unified Government agreed to refer customer calls to that system. Deffenbaugh claims that the Unified Government also agreed that customers would use only the 311 system to report complaints. But Unified Government officials claim that the 311 system was never intended to be the sole avenue for customer complaints.

C. The Unified Government charges Deffenbaugh under § 7.02(b).

Unified Government staff began tracking 311 calls and investigating complaints by visiting residential addresses. Some complaints flagged that Deffenbaugh had missed pickups for entire streets, blocks, and neighborhoods. And some residents called to complain on behalf of their neighborhoods. But in other cases, the Unified Government—not a customer—called in a complaint. For example, at one point, four residents in the same neighborhood called 311

to complain about missed pickups, for which the Unified Government calculated a charge for 102 residential units after inspecting the site.

Unified Government employees followed a standard procedure by which they would visit the site of the complaint two days after the complaint was entered. If the waste bins remained by the curb, the employees would take photographs. But the employees didn't interview the residents or confirm that every bin still contained trash. Some pictures that the Unified Government relied on to charge Deffenbaugh depicted closed trash bins or improperly bagged trash.

By the time Deffenbaugh's May 2019 invoice was due, the Unified Government decided to charge Deffenbaugh under § 7.02(b). The Unified Government was partly seeking to motivate Deffenbaugh to "start performing according to the contract."

We first discuss the history of § 7.02(b) before describing how the Unified Government enforced it in 2019 and 2020.

1. Background on § 7.02(b)

Before the Unified Government imposed charges for May 2019, Deffenbaugh had at least three years' notice that the Unified Government planned to enforce § 7.02(b). As early as summer 2016, Deffenbaugh knew that the Unified Government was planning to charge for missed collections. And in June 2017, the Unified Government withheld $64,800 from its payment to Deffenbaugh for Deffenbaugh's failure to pick up trash for 162 homes. For that

same month, the Unified Government also invoiced Deffenbaugh $2,903.08 for manpower and equipment that the Unified Government had used to complete the overdue pickups. Deffenbaugh "acknowledged the failure and agreed to the fine."[2] Then, in 2018, when Deffenbaugh threatened to stop service because of a dispute over the house count, the Unified Government countered by threatening to charge Deffenbaugh under § 7.02(b).

Deffenbaugh didn't claim that § 7.02(b) was unenforceable when it entered the 1993 contract. Nor did Waste Management claim that § 7.02(b) was unenforceable when it acquired Deffenbaugh in 2014. It wasn't until August 2019 that Deffenbaugh first suggested internally that § 7.02(b) may be unenforceable as a penalty clause because Kansas law enforces liquidated-damages clauses but not penalty clauses. But Deffenbaugh has used the word "penalty" in other waste-collection contracts. And Deffenbaugh was represented by counsel in the 2012 contract negotiations.

According to the attorney who represented the Unified Government in the 2012 contract negotiations, Deffenbaugh never claimed that § 7.02(b) was unenforceable in those negotiations, either. Rather, the Unified Government's attorney explained that the Unified Government and Deffenbaugh had agreed to increase the charge from $100 to $200 based on a general understanding of

[2] Apparently, the Unified Government allowed Deffenbaugh to make a charitable contribution (and thus receive tax benefits) rather than pay the charge.

inflation. Similarly, the outside attorney who represented the Unified Government in the 1993 negotiations claimed that § 7.02(b) was "customary in the industry as a reasonable way to measure damages that would otherwise be very difficult to measure precisely." Yet the Unified Government didn't analyze § 7.02(b) to determine whether the charges were appropriate before finalizing either the 1993 or 2012 contracts.

Deffenbaugh interprets § 7.02(b) as requiring that all complaints must come from a resident to support a § 7.02(b) charge. And Deffenbaugh interprets the contract to mean that if an entire neighborhood or block is missed, Deffenbaugh must respond and resolve the complaint for only the complaining resident. But in his deposition, John Blessing, Deffenbaugh's Public Sector Manager, acknowledged that Deffenbaugh had never notified the Unified Government that it couldn't impose charges for a whole block or neighborhood when only one customer had complained.

2. Enforcement of § 7.02(b) in 2019 and 2020

In June 2019, the Unified Government notified Deffenbaugh that because Deffenbaugh had failed to timely resolve customer complaints, the Unified Government would deduct $229,700 from Deffenbaugh's check for its May 2019 services. Deffenbaugh calculated that it should owe less than a fourth of that amount, so it appealed the charges to the County Administrator.

In its June 2019 letter notifying the Unified Government of its appeal, Deffenbaugh claimed that the "penalty is not based on any complaints received

by [Deffenbaugh],” and it requested the information that the Unified Government had relied on to calculate the charges. Deffenbaugh claimed that “the single method of customer communication . . . outlined in the contract is the 311 system rendering any other method to track complaints as baseless.” In response, the Unified Government disputed that the 311 system “was the only avenue to communicate complaints.”

But two months later, in August 2019, Deffenbaugh rescinded its appeal of the $229,700 charge. In a letter to the County Administrator, Deffenbaugh explained that it “has decided to consider and potentially pursue alternative legal remedies, as permitted by section 12.05 of the parties’ Contract, for the [Unified Government’s] improper and unilateral short paying of [Deffenbaugh’s] invoices based on disputed penalty amounts.” Since August 2019, Deffenbaugh hasn’t filed another appeal with the County Administrator.

The Unified Government imposed charges on Deffenbaugh for the rest of 2019 and into early 2020, deducting tens of thousands of dollars from each month’s invoice. All in all, the Unified Government deducted $574,300 off Deffenbaugh’s invoices from May 2019 to February 2020. By comparison, Deffenbaugh invoiced the Unified Government over $15 million total in 2019 and 2020. And from January 2012 to May 2021 (the months available in the record to show the amounts invoiced over the life of the contract), Deffenbaugh invoiced the Unified Government over $64 million.

D. Deffenbaugh sends the Unified Government a notice of default.

Evidence in the record suggests that Deffenbaugh refrained from objecting to the charges as part of a longer-term strategy to exercise its right to terminate the contract. In November 2019, Blessing emailed other Deffenbaugh officials to ask whether their "plan on these [charges is] to continue to let them pile up and then use them as leverage in contract renegotiations in [late] 2019 and early 2020." App. vol. 4, at 58. Blessing noted that the "unexplained [charges] could provide [Deffenbaugh] the opportunity to terminate the agreement." Kent Harrell, Deffenbaugh's area director for public-sector operations in Illinois and Missouri, confirmed that this was Deffenbaugh's strategy, leaving only the question of when to act on it. Around the same time, the Unified Government scheduled at least two meetings to discuss the contract with Deffenbaugh, but Deffenbaugh canceled both meetings.

Then, on February 21, 2020, Deffenbaugh sent a notice of default, informing the Unified Government of its plan to terminate the contract on March 22, 2020, unless the Unified Government cured its defaults before that date. Deffenbaugh alleged these defaults in its notice:

- The [Unified Government] has imposed penalties on [Deffenbaugh] in a manner that is contrary to the Contract and without factual support. Additionally, the penalties imposed by the [Unified Government] are unenforceable contractual penalties under Kansas law.
- The [Unified Government] has failed to pay [Deffenbaugh] in accordance with Section 2.11 of the Contract and is otherwise improperly withholding monies due to [Deffenbaugh] under the Contract.

- The [Unified Government] has failed to adjust the number of residential units and/or compensate [Deffenbaugh] for the number of residential units served.
- The [Unified Government] has refused to abide by the Contract's requirement that "a telephone number" would be the sole method for customer communications.
- The [Unified Government] has failed to refer "calls received by the [Unified Government] concerning the services provided under this Contract" to the agreed upon telephone number.

App. vol. 1, at 213–14.

The Unified Government responded to Deffenbaugh's notice, objecting that the notice "only vaguely describes five categories of default" and "does not constitute adequate notice of default under Section 11.02 of the Contract, trigger any obligation to cure, or authorize termination of the contract." *Id.* at 215. The Unified Government assumed the first allegation of default "refers to charges imposed under Section 7.02(b) of the contract as a result of [Deffenbaugh's] failure to make customer collections." The Unified Government pointed out that Deffenbaugh had failed to appeal most of the charges and had withdrawn the only appeal it had filed. And the Unified Government emphasized that in the parties' nearly thirty years of contracting, Deffenbaugh had never contended that § 7.02(b) was unenforceable.

The Unified Government didn't pay Deffenbaugh the amounts that it had deducted from the May 2019 through February 2020 invoices. So on March 27, 2020, Deffenbaugh notified the Unified Government that because the Unified Government had "not cure[d] its defaults within 30 days," Deffenbaugh considered the contract "properly terminated." *Id.* at 218. Still, Deffenbaugh

promised to "continue providing the services described in the terminated Contract until there has been a judicial determination that the Contract was properly terminated or until the [Unified Government] acknowledges the termination and obtains a new service provider within a reasonable time." *Id.*

II. Procedural Background

Invoking diversity jurisdiction and relying in part on the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, Deffenbaugh sued the Unified Government in the United States District Court for the District of Kansas. The parties have complete diversity of citizenship, and the amount in controversy exceeds $75,000.

A. Claims & Counterclaims

Deffenbaugh pleaded three claims for relief. In Claim I, Deffenbaugh sought a declaratory judgment that Deffenbaugh had properly terminated the contract.[3] In Claim II, Deffenbaugh sought a declaratory judgment that § 7.02(b) is an unenforceable penalty under Kansas law. And in Claim III, Deffenbaugh sought damages for breach of contract. To support Claim III, Deffenbaugh offered three theories of how the Unified Government had breached the contract: (1) charging Deffenbaugh from May 2019 to December 2019 "based on penalties which included amounts that were contrary to the terms of the Contract"; (2) imposing penalties under § 7.02(b) that are

[3] Though the parties refer to their claims as "Counts," we use "Claims" and "Counterclaims."

unenforceable as a matter of law; and (3) "withholding and failing to pay amounts due and owing to Deffenbaugh under the Contract and the invoices Deffenbaugh submitted to [the Unified Government]."

The Unified Government then brought three counterclaims against Deffenbaugh. For its Counterclaim I, the Unified Government sought a declaratory judgment that "the Contract remains in full force and effect." The Unified Government also sought a declaratory judgment that it had not defaulted, or, alternatively, that Deffenbaugh's notice of default had failed to terminate the contract. For Counterclaim II, the Unified Government sought a preliminary injunction to force Deffenbaugh to continue performing under the contract during the litigation. And for Counterclaim III, the Unified Government sought damages for breach of contract, including contract-monitoring costs and § 7.02(b) charges it claims Deffenbaugh owes for 2018 through 2019. To support its Counterclaim III, the Unified Government alleged nine ways in which Deffenbaugh had breached the contract.

B. The Parties' Summary-Judgment Motions

Deffenbaugh moved for summary judgment on all its claims. First, Deffenbaugh argued that the Unified Government had breached the contract in many ways, including by charging Deffenbaugh in ways not allowed by § 7.02(b). For example, Deffenbaugh argued that the Unified Government had improperly charged it when no customer complaint had triggered those charges.

Deffenbaugh interpreted § 7.02(b) to mean that only a customer—not the Unified Government—can file a complaint to trigger § 7.02(b).

Second, Deffenbaugh argued that it had properly terminated the contract according to the contract's terms. Deffenbaugh claimed that its "written termination notice identified the [Unified Government's] defaults, including the [Unified Government's] failure to pay Deffenbaugh's invoices in full and the improper imposition of penalties." Elsewhere in its briefs at summary judgment, Deffenbaugh also argued that its June 2019 appeal letter had notified the Unified Government of the Unified Government's defaults under the contract.

And third, Deffenbaugh argued that § 7.02(b) was an unenforceable penalty provision under Kansas law. Deffenbaugh also sought summary judgment on the Unified Government's counterclaims.

In turn, the Unified Government moved for summary judgment on many of Deffenbaugh's claims and theories. Most relevant here, the Unified Government moved for summary judgment on Deffenbaugh's Claim I, arguing that Deffenbaugh's notice of default was inadequate because it failed to provide the Unified Government a reasonable opportunity to investigate and cure the alleged defaults. And the Unified Government moved for summary judgment on

Deffenbaugh's Claim II, arguing that § 7.02(b) of the contract remained enforceable.[4]

C. The District Court's Decisions

At summary judgment, the district court held that § 7.02(b) of the contract was enforceable and that Deffenbaugh had failed to properly terminate the contract in 2020. *Deffenbaugh Indus., Inc. v. Unified Gov't* (*Deffenbaugh I*), No. 20-2204-EFM, 2021 WL 6072508, at *14 (D. Kan. Dec. 23, 2021).

1. Section 7.02(b)

First, the court addressed the enforceability of § 7.02(b) and explained that Kansas law analyzes alleged penalty provisions by considering the totality of the circumstances. Using the term "penalty" is not determinative. *Id.* at *17–18. Rather, Kansas courts consider (1) whether the amount of the alleged penalty is conscionable and (2) whether "the nature of the transaction is such that the amount of actual damages resulting from default would not be easily

[4] The Unified Government also moved for summary judgment on claims less relevant to this appeal, including Deffenbaugh's claims that the Unified Government had breached the contract by relying on its own staff reports to calculate charges and by withholding payment for Deffenbaugh's failures to collect waste for entire neighborhoods or streets. And the Unified Government moved for summary judgment on Deffenbaugh's claims that the Unified Government had breached an alleged agreement to use 311 as the sole reporting method for missed pickups and that it had breached the house-count provision of the contract. Moreover, the Unified Government sought summary judgment on Deffenbaugh's Claims I and III on the theory that Deffenbaugh had materially breached the contract before the Unified Government breached.

and readily determinable." *Id.* at *18 (quoting *Beck v. Megli*, 114 P.2d 305, 308 (Kan. 1941)).

For the first prong, the court acknowledged the Unified Government's argument that "the $574,000 in total penalties imposed . . . reflect[s] less than 1% of [Deffenbaugh's] income from the Contract." *Id.* (footnote omitted). But the court compared "the $200 charge for missing a pickup at a residence . . . against how much Deffenbaugh was paid for making such pickups." *Id.* Though the $200 charge greatly exceeded the $9 to $11 that Deffenbaugh earned per residence per month, the court still found that this amount was conscionable by examining factors for substantive and procedural conscionability. *Id.* at *18–19 & n.49 (citing *Wille v. Sw. Bell Tel. Co.*, 549 P.2d 903, 906–07 (Kan. 1976)). Because Deffenbaugh is a "sophisticated corporation" that was represented by counsel in the contract negotiations, the court found no inequality of bargaining power. *Id.* at *19. The court also noted the procedural safeguards that § 7.02(b) contains as preconditions to charging Deffenbaugh and that Deffenbaugh had voluntarily entered the contract. *Id.*

For the second prong, the court explained that "uncollected trash creates a public health hazard, which cannot be easily quantified or determined." *Id.* at *20 (footnote omitted). And it explained that public-service contracts are "appropriate vehicles" for liquidated-damages clauses because damages are difficult to assess. *Id.*

Ultimately, the court found that "both of the special weight considerations strongly support the enforceability of Section 7.02(b)." *Id.* at *21. To underscore its conclusion, the court pointed to "the lengthy, nearly three decades long, history of the contractual relations between the parties" and Deffenbaugh's failure to argue that § 7.02(b) is an unenforceable penalty until now. *Id.* at *22.

2. Contract Termination

The court then turned to whether Deffenbaugh had properly terminated the contract. *Id.* The court explained that Deffenbaugh's June 2019 appeal letter (as well as the Unified Government's response to the notice of default) showed "only a general knowledge that there was a dispute about the [charges], not the nature of the dispute." *Id.* at *23. Deffenbaugh's June 2019 appeal letter "did not advance any of the particular contract constructions" that Deffenbaugh argued at summary judgment. *Id.* And after withdrawing its appeal in August 2019, "month after month, Deffenbaugh remained silent and voiced no serious objections or raised specific challenges to the penalties." *Id.* at *24. The court also found Deffenbaugh's February 2020 notice of default insufficient to terminate the contract. Because Deffenbaugh "couched its [February 2020] complaint in only the most general terms," its "conclusory notice was not reasonably calculated to allow for a cure." *Id.*

3. Other Factual Questions

The court also addressed the parties' other arguments, granting partial summary judgment on some claims and denying it for claims requiring the jury's factual determinations. *Id.* at *24–34. For example, the court granted Deffenbaugh summary judgment on its argument that charges under § 7.02(b) "may only be imposed where there is a specific resident complaint as to a missed pickup of that resident's trash." *Id.* at *28. The court explained that "[r]eports by [Unified Government] staff or third persons of missed pickups would not form a proper basis for a penalty under Section 7.02(b)." *Id.* at *29. And "charges assessed on a neighborhood-wide basis also fall outside the scope of the penalty clause, as do charges which were imposed which did not allow for a timely cure by Deffenbaugh." *Id.* But the court left for the jury to determine whether the Unified Government had proved its claims for each of the § 7.02(b) charges and whether the Unified Government had defaulted by not using the 311 system as the exclusive method for reporting missed pickups.[5] *Id.* at *27–30, 34 & n.97.

* * *

[5] Though less relevant here, the district court also held that the Unified Government could not invoke the doctrine of prior material breach, recover damages for contract monitoring, or recover § 7.02(b) charges for missed pickups from 2018 to 2019. *Id.* at *26.

The parties filed a joint motion for entry of final judgment under Federal Rule of Civil Procedure 54(b), and the district court granted it. *Deffenbaugh Indus., Inc. v. Unified Gov't* (*Deffenbaugh II*), No. 20-2204-EFM, 2022 WL 2438382, at *3 (D. Kan. July 5, 2022). The court explained that its summary-judgment order was final as to Deffenbaugh's Claims I and II and the Unified Government's Counterclaim I. *Id.* at *2. The court reasoned that "[t]he general issue of the enforceability of [§ 7.02(b)] is distinct from how it was actually applied historically. The remaining, historical issue involves a series of specific factual questions as to the parties' damages." *Id.*

And the court found there was no just reason for delaying appellate review because its summary-judgment order "resolved the core of the dispute between the parties" and because "[a]ppellate review would resolve the issues of termination and enforceability." *Id.* Certifying the order as a final judgment wouldn't risk piecemeal appeals because all that remained for trial "is highly-particularized fact-finding as to historical missed trash pickups, and the proper penalty to be imposed." *Id.* The court stayed proceedings in the case pending appeal. *Id.* at *3. Deffenbaugh timely appealed.

DISCUSSION

We begin by addressing whether we have jurisdiction to review the district court's order. Then we turn to whether § 7.02(b) is enforceable and whether Deffenbaugh properly terminated the contract.

I. Do we have appellate jurisdiction?

On our own motion, we ordered the parties to brief whether we have appellate jurisdiction. We asked the parties to address whether the district court's Rule 54(b) judgment is final and whether the proper approach in this case would instead be for the parties to seek an interlocutory appeal under 28 U.S.C. § 1292(b).

Deffenbaugh argues that the district court correctly concluded that the parties' declaratory-judgment claims were distinct and separable from their breach-of-contract claims, and the Unified Government agrees. But even when the parties jointly seek certification under Rule 54(b), we must independently examine whether we have appellate jurisdiction. *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001) (citation omitted).

When an action involves more than one claim for relief or multiple parties, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). Rule 54(b) "promotes judicial efficiency, expedites the ultimate termination of an action[,] and relieves appellate courts of the need to repeatedly familiarize themselves with the facts of a case." *Bruner*, 259 F.3d at 1241. But district courts should not enter Rule 54(b) judgments routinely. *Id.* at 1242 (citations omitted). To certify a claim as final and appealable under Rule 54(b), a district court must make two express determinations: (1) the order is final, and (2) "there is no just

reason to delay review of the final order until [the court] has conclusively ruled on all claims presented by the parties to the case." *Id.* (citations omitted).

We apply a "two-tiered standard of review" to a district court's certification of a judgment as final under Rule 54(b). *Id.* We review de novo whether the certified order is final. *Id.* (citations omitted). But we review for abuse of discretion the district court's determination that there is no just reason for delay. *Id.* (citations omitted).

A. Finality

To be final, an order must dispose "of an individual claim entered in the course of a multiple claims action." *Id.* (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980)). A claim includes "all factually or legally connected elements of a case." *Id.* (citations omitted). And a judgment is final under Rule 54(b) only if "the claims resolved are distinct and separable from the claims left unresolved." *Id.* at 1243. Rule 54(b) certification isn't appropriate when a case involves a single legal theory with multiple prayers for relief. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742–43 (1976); *see also Baca Land & Cattle Co. v. N.M. Timber, Inc.*, 384 F.2d 701, 702 (10th Cir. 1967) (holding that Rule 54(b) certification was inappropriate when "[t]he complaint contains three separate counts, but only one claim").

We have "no bright-line rule to distinguish multiple claims, which may be appealed separately, from multiple legal grounds in a single claim, which may not." *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005) (citation

omitted). Rather, we "consider whether the allegedly separate claims turn on the same factual questions, whether they involve common legal issues, and whether separate recovery is possible." *Id.* (citation omitted). We also consider "whether a subsequent appeal of the claims before the district court will require [us] to revisit the same issues decided in the first appeal." *Id.* In general, "[i]nterrelated legal claims and alternative theories for recovery should be litigated together and appealed together." *Id.* at 829. A final judgment must also completely dispose of at least some of the parties' prayers for relief. *Liberty Mut. Ins. Co.*, 424 U.S. at 742.

To guide our inquiry, we briefly revisit the parties' claims for relief. For its Claim I, Deffenbaugh sought a declaration that the contract was properly terminated, and for Claim II, it sought a declaration that § 7.02(b) is an unenforceable penalty under Kansas law. For Claim III, it sought breach-of-contract damages for charges that it alleged the Unified Government had improperly imposed. On the other hand, for its Counterclaim I, the Unified Government sought a declaration that Deffenbaugh's notice of default was invalid and that the contract remains in effect.[6] For Counterclaim II, it sought a preliminary injunction to prevent Deffenbaugh from stopping service under the Contract. And on Counterclaim III, it sought damages for breach of contract,

[6] On Counterclaim I, the Unified Government sought alternative declarations if the court did not find Deffenbaugh's notice of default invalid.

including alleged defaults from May 2018 through May 2019 and contract-monitoring costs. The court certified its summary-judgment order as final for Deffenbaugh's Claims I and II and the Unified Government's Counterclaim I. *Deffenbaugh II*, 2022 WL 2438382, at *2.

We easily conclude that the court's order was final for Deffenbaugh's Claim II—whether § 7.02(b) is enforceable. If the court had held that § 7.02(b) was an unenforceable penalty, Deffenbaugh may well have been entitled to the full $574,300 it sought in damages on Claim III. But once we decide whether § 7.02(b) is enforceable, Deffenbaugh can't raise that same issue again at a jury trial or in a later appeal. Rather than bringing one legal theory and seeking multiple claims for relief, Deffenbaugh mounts multiple legal theories to support its claim for damages under the contract. *Cf. Liberty Mut. Ins. Co.*, 424 U.S. at 743 (holding that Rule 54(b) certification was improper when the plaintiffs brought a single legal theory but sought multiple forms of relief). On remand, Deffenbaugh will have to rely on its other breach-of-contract theories for Claim III, and these involve highly fact-specific questions. *See Deffenbaugh I*, 2021 WL 6072508, at *34 & n.97; *Deffenbaugh II*, 2022 WL 2438382, at *2.

Deffenbaugh's Claim II turns on different factual questions than the parties' surviving breach-of-contract claims. *Jordan*, 425 F.3d at 827 (citation omitted). Whether § 7.02(b) is enforceable depends on the subject matter of the contract, the total contract value, and the difficulty of calculating actual damages. *See infra* Section III. By contrast, whether individual charges violate

the contract depends on hundreds of pictures of trash cans and thousands of missed-pickup complaints. *Deffenbaugh II*, 2022 WL 2438382, at *2 ("What remains for trial is highly-particularized fact-finding as to historical missed trash pickups, and the proper penalty to be imposed."). There's no risk of piecemeal appeals because Deffenbaugh's Claim II is distinct and separable from the factual issues that remain for the jury. *Bruner*, 259 F.3d at 1243. We hold that we have jurisdiction to review whether § 7.02(b) is enforceable.

The second issue on appeal—whether Deffenbaugh properly terminated the contract—poses a closer question for finality. That's because the first step of Deffenbaugh's contract-termination theory on Claim I requires the district court to find that the Unified Government defaulted on the contract. This default inquiry overlaps factually with the inquiries of material breach and damages on Claim III and Counterclaim III. Deffenbaugh acknowledges this factual overlap, but it explains that the issue of contract termination need be decided only once. And the Unified Government echoes that this issue won't be revisited in a later appeal. Ultimately, we agree with the parties that Claim I and Counterclaim I are distinct and separable from the remaining breach-of-contract claims, so the district court's order was final on the issue of contract termination.

Though Claim I, Counterclaim I, Claim III, and Counterclaim III all involve the concepts of default or breach, only Claim I and Counterclaim I involve whether Deffenbaugh provided the Unified Government an adequate

opportunity to cure its defaults. The Unified Government's default alone doesn't terminate the contract. Rather, to formally terminate the contract, Deffenbaugh must provide the Unified Government notice of default and an opportunity to cure. The district court held that Deffenbaugh failed to do so and that the contract remained in effect. *Deffenbaugh I*, 2021 WL 6072508, at *24, 34. At trial, the jury will revisit the question of whether either party breached the contract, but it won't revisit the determinative issue on Claim I and Counterclaim I—whether Deffenbaugh provided the Unified Government sufficient notice and opportunity to cure. What's more, the question of whether the Unified Government defaulted isn't before us on appeal because the Unified Government doesn't appeal the district court's rulings.

To calculate damages for breach of contract on Claim III and Counterclaim III, the jury will have to pore over hundreds of pages of missed-pickup complaints and pictures of trash cans in various stages of disarray—none of which are relevant to the issues currently on appeal. The jury will then determine for how many days and at how many residences Deffenbaugh failed to timely respond to customer complaints and whether the Unified Government improperly charged Deffenbaugh for unsubstantiated complaints. *See id.* at *34 & n.97. Then, the jury will determine whether either party materially breached the contract, and if so, what damages these breaches caused. At no point will the jury or judge revisit whether the contract was properly terminated because the contract preserves the right for the non-defaulting party to pursue remedies

in law or equity without terminating the contract. The trial will proceed subject to the court's conclusion that the contract remains in effect and that § 7.02(b) is enforceable.

Unlike in *Bruner*, in which the appellant sought identical relief for four tracts of land but the district court issued a final judgment for only two of the tracts, the two legal issues that Deffenbaugh has appealed won't recur at trial or in any later appeal. *See* 259 F.3d at 1243 (explaining that the appellant's four claims were "so intertwined ([with] so much factual overlap) as to be inseparable"). And unlike in *Jordan*, in which the plaintiff's facial-vagueness and overbreadth claims were too closely related to be separately appealable, the parties' claims resolved at summary judgment don't involve the same legal theories as the claims remaining for trial. *See* 425 F.3d at 827–29 (explaining that the plaintiff's vagueness and overbreadth claims were "two alternative theories for recovery on the same claim"). Rather, the two issues that Deffenbaugh raises on appeal are "isolated and strictly legal issue[s]" independent from the legal and factual issues that remain in the parties' breach-of-contract claims. *Curtiss-Wright Corp.*, 446 U.S. at 11. And the district court's judgment completely disposed of both parties' prayers for relief for declaratory judgments. *Liberty Mut. Ins. Co.*, 424 U.S. at 742. Because neither of the legal issues on appeal will be relitigated at trial, we will not be asked to revisit the same issues we decide here. *Jordan*, 425 F.3d at 827.

We hold that the district court's order was final.

B. No Just Reason for Delay

With our in-depth review of the finality prong satisfied, all that remains is our deferential review of the second prong, "no just reason for delay." When weighing this second prong, "a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp.*, 446 U.S. at 8. Here, the district court didn't abuse its discretion in ruling that there was no just reason for delay. The court properly ruled that immediate appellate review of the two legal issues before us would promote judicial economy and hasten the termination of the case—two of the purposes of Rule 54(b). *Deffenbaugh II*, 2022 WL 2438382, at *2; *see Bruner*, 259 F.3d at 1241 (discussing the policies behind Rule 54(b)). The second prong of Rule 54(b) is satisfied.

* * *

The district court correctly made both determinations that Rule 54(b) requires: (1) its summary-judgment order was final on Deffenbaugh's Claims I and II and the Unified Government's Counterclaim I, and (2) there is no just reason to delay appellate review until the other claims are decided. *Bruner*, 259 F.3d at 1242 (citations omitted). We have jurisdiction over Deffenbaugh's appeal.

II. Standard of Review

"We review grants of summary judgment de novo, 'applying the same legal standard used by the district court.'" *Terra Venture, Inc. v. JDN Real Est.*

Overland Park, L.P., 443 F.3d 1240, 1243 (10th Cir. 2006) (quoting *Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1013 (10th Cir. 2003)). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). And we construe the evidence and draw all reasonable inferences in the light most favorable to Deffenbaugh, the nonmoving party. *Terra Venture, Inc.*, 443 F.3d at 1243 (citation omitted).

Because this is a diversity action, we apply the choice-of-law rules of Kansas, the forum state. *Emps. Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1170 (10th Cir. 2010) (quoting *Pepsi-Cola Bottling Co. of Pittsburg v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005)). Kansas courts generally enforce choice-of-law provisions. *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1194 (10th Cir. 2004) (citing *Brenner v. Oppenheimer & Co.*, 44 P.3d 364, 375 (Kan. 2002)). And the contract here chooses Kansas law to apply, so we apply Kansas law. "The interpretation and legal effect of a contract is a question of law for the court to decide . . . ." *Wolfe Elec., Inc. v. Duckworth*, 266 P.3d 516, 534 (Kan. 2011) (citation omitted).

III. Is § 7.02(b) an unenforceable penalty?

Kansas courts enforce liquidated-damages provisions but not penalty provisions. *Carrothers Constr. Co. v. City of South Hutchinson*, 207 P.3d 231, 241 (Kan. 2009) (collecting cases). A liquidated-damages provision allows parties to "protect themselves against the difficulty, uncertainty, and expenses

that necessarily follow judicial proceedings when trying to ascertain actual damages" and serves as an "advance settlement of the anticipated actual damages arising from a future breach." *Id.* (citations omitted). By contrast, a penalty clause serves as a "security for performance." *Id.* (citation omitted). Kansas courts examine "the reasonableness of a liquidated damages clause as of the time the contract was executed, not with the benefit of hindsight." *Id.* at 241.

Kansas courts apply a two-pronged test to determine whether a contractual provision is an enforceable liquidated-damages clause or an unenforceable penalty: (1) whether "the amount stipulated is conscionable" and (2) whether "the nature of the transaction is such that the amount of actual damages resulting from default would not be easily and readily determinable." *Id.* (quoting *Beck*, 114 P.2d at 308). The Kansas Supreme Court formally adopted this test in *Beck v. Megli*, so we refer to it as the *Beck* test.

A. Burden of Proof

The district court placed the burden of proof on Deffenbaugh to show that § 7.02(b) is unenforceable, relying on language from *Carrothers* that "[t]he burden of proving a liquidated damages clause is an unenforceable penalty falls on the party challenging the provision." *Deffenbaugh I*, 2021 WL 6072508, at *21 (quoting *Carrothers*, 207 P.3d at 241). But as Deffenbaugh notes, the contract in *Carrothers* used the term "liquidated damages" rather than "penalty." *See Carrothers*, 207 P.3d at 241 (citations omitted). Because

§ 7.02(b) uses the term "penalty," Deffenbaugh contends that the Unified Government should bear the burden to show that § 7.02(b) is an enforceable liquidated-damages clause rather than an unenforceable penalty.

We know that Kansas courts impose the burden of proof on the party challenging a liquidated-damages provision when the provision includes neither the terms "liquidated damages" nor "penalty." *TMG Life Ins. Co. v. Ashner*, 898 P.2d 1145, 1158–59 (Kan. Ct. App. 1995). Yet we have found no Kansas case specifying who should bear the burden of proof when the contract uses the word "penalty" rather than "liquidated damages."

But under more general contract-law principles, Kansas courts apply a rule that "[c]ontracts are presumed legal; the burden to prove otherwise . . . rests on the party challenging the contract." *First Sec. Bank v. Buehne*, 501 P.3d 362, 365–66 (Kan. 2021) (citation omitted). Given this principle and given language in binding caselaw explaining that the terms "penalty" and "liquidated damages" aren't dispositive, *Kansas City v. Indus. Gas Co.*, 28 P.2d 968, 971–72 (Kan. 1934) (quoting Restatement (First) of Contracts § 339(1) cmt. b (Am. L. Inst. 1932)), we hold that the district court didn't err by placing the burden of proof on Deffenbaugh.

B. Deffenbaugh's Textual Argument

To distinguish between a liquidated-damages clause and a penalty clause, Kansas courts "look behind the words used by the contracting parties to the facts and the nature of the transaction." *Beck*, 114 P.2d at 308. The terms

"penalty" or "liquidated damages" hold "evidentiary value only." *Id.* They are "given weight and [are] ordinarily accepted as controlling unless the facts and circumstances impel a contrary holding." *Id.* (citations omitted). A "payment promised may be a penalty, though described expressly as liquidated damages, and vice versa." *Indus. Gas Co.*, 28 P.2d at 972 (quoting Restatement (First) of Contracts § 339(1) cmt. b). For example, in *Unified School District No. 315 v. DeWerff*, a contract required public-school teachers to pay $400 if they resigned during the contract term, and the contract described this payment as a "penalty." 626 P.2d 1206, 1207 (Kan. Ct. App. 1981). The contract also charged a "penalty of $75.00 . . . for each full or part of a month remaining on [the] contract." *Id.* at 1208. But the Kansas Court of Appeals still found the charges enforceable as liquidated damages because of the difficulty of calculating actual damages and the contract's impact on the public interest. *Id.* at 1209–10.

To show that § 7.02(b) is unenforceable, Deffenbaugh relies primarily on its textual argument that the terms "penalty" and "liquidated damages" in the contract should determine whether § 7.02(b) is enforceable. Because the parties used "penalty" in § 7.02(b) and "liquidated damages" in § 3.07, Deffenbaugh argues that the parties intended for the charges in § 7.02(b) to be unenforceable while intending the charges in § 3.07 to be enforceable. Deffenbaugh's textual argument fails for two reasons.

First, Deffenbaugh misconstrues Kansas law about the weight that courts give to the contractual terms "penalty" and "liquidated damages." Kansas courts accept these terms as controlling "*unless* the facts and circumstances impel a contrary holding." *Beck*, 114 P.2d at 308 (emphasis added). For example, the teachers' contract in *DeWerff* used the word "penalty," but the Kansas Court of Appeals still found it enforceable. 626 P.2d at 1208–10.

Deffenbaugh tries to distinguish *DeWerff* by pointing out that non-lawyers negotiated that contract, but sophisticated lawyers negotiated the contract between Deffenbaugh and the Unified Government. True, the court in *DeWerff* noted that the "penalty" provision "was drafted by nonlawyer negotiators who were not trained in the intricacies of the law." 626 P.2d at 1209. But that fact alone wasn't determinative. Rather, the court used the *Beck* test to hold that the clause was a liquidated-damages provision. *Id.* at 1209–11. The Kansas Supreme Court has repeatedly stated that the terms "penalty" and "liquidated damages" no longer control when the facts demonstrate that the parties intended something different. *Beck*, 114 P.2d at 308 (citations omitted); *Carrothers*, 207 P.3d at 241 (citation omitted). In *Beck* and *Carrothers*, the court didn't limit this rule to contracts negotiated by nonlawyers.

Second, as the Unified Government points out, Deffenbaugh's textual argument implies that the parties' counsel intentionally drafted § 7.02(b) to be unenforceable and superfluous. We agree with the Unified Government that it "is unreasonable . . . to suggest that counsel for both the [Unified Government]

and Deffenbaugh in 1993 and again in 2012 would intentionally use the terms 'liquidated damages' and 'penalty' in a contract to distinguish between a provision that is enforceable and one that is not." Resp. Br. 41. Such an interpretation could also invalidate "penalty" provisions that Deffenbaugh has willingly agreed to in other residential-waste contracts. That similar "penalty" provisions are often used in the industry—even by Deffenbaugh itself—suggests that § 7.02(b) is more likely to be enforceable. *See DeWerff*, 626 P.2d at 1209.

All in all, Deffenbaugh's textual argument fails because it overstates the weight Kansas courts give to the term "penalty" when other facts suggest that the "penalty" functions more like a liquidated-damages clause. We can't stop at the terms "penalty" and "liquidated damages" to determine whether § 7.02(b) is enforceable. Rather, we must apply the *Beck* test to determine whether the charges in § 7.02(b) are reasonable and whether actual damages would be difficult to determine.

C. Applying the *Beck* Test

1. Conscionability & Reasonableness

For the first step of the *Beck* test, Kansas courts consider whether the amount "is reasonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach." *Carrothers*, 207 P.3d at 241 (quoting *Beck*, 114 P.2d at 308). For example, in *Beck*, the Kansas Supreme Court held a $500 liquidated-damages clause to be reasonable when

the total value of the ten-year installment contract was $10,000. 114 P.2d at 308.

a. Did the district court apply the correct conscionability standard?

As an initial matter, Deffenbaugh argues that the district court erred by "fram[ing] its analysis in terms of standards of substantive and procedural unconscionability." Deffenbaugh insists that "unconscionability is never available to sophisticated commercial parties like Deffenbaugh and the [Unified Government] who have equal bargaining power." Though we disagree with this characterization, we do agree with Deffenbaugh that the test for reasonableness of a liquidated-damages clause differs from the test for procedural and substantive conscionability.

As we read it, Kansas law has two separate lines of conscionability caselaw: one examining procedural and substantive conscionability under the factors in *Wille*, 549 P.2d at 906–07,[7] and one examining the reasonableness of liquidated-damages clauses under the two-pronged *Beck* test. The court in *Wille* adopted a multifactor test for substantive and procedural unconscionability to guard against "one-sided, oppressive and unfairly surprising contracts" and to "police the excesses of certain parties who abuse their right to contract freely."

[7] The *Wille* factors for procedural and substantive conscionability include inequalities in bargaining power, excessive prices, undue surprise to one party, and exploitation of an unsophisticated or uneducated party. 549 P.2d at 906–07.

549 P.2d at 907 (citation omitted). But in *Carrothers*, the Kansas Supreme Court used the terms "reasonable" and "conscionable" interchangeably in applying prong one of the *Beck* test. 207 P.3d at 241–43. Unlike in *Wille*, the court in *Carrothers* focused on discerning the intent of the parties in estimating damages in advance—not on unfair surprise or oppression. *See id.*

The Unified Government cites four cases to support its position that Kansas courts analyze "whether a provision in a commercial contract is an unenforceable penalty using the *Wille* factors." But we agree with Deffenbaugh that these cases are distinguishable and don't alter the definition of "conscionability" for liquidated-damages provisions under the *Beck* test.

In urging us to apply the *Wille* test, the Unified Government cites *TMG Life Insurance*, in which the Kansas Court of Appeals mentioned the "shocks the conscience" standard of substantive conscionability before discussing the two prongs of the *Beck* test for a liquidated-damages clause. 898 P.2d at 1159–61 (citations omitted). Yet the court neither cited the *Wille* factors nor addressed them in its conscionability analysis on the first prong of *Beck*. *See id.* The Unified Government also points to *Santa Rosa KM Associates*, in which the Kansas Court of Appeals cited both *TMG Life Insurance* and the *Wille* factors to determine whether to uphold a liquidated-damages provision—but the court analyzed these cases in different sections of the opinion. *Santa Rosa KM Assocs., Ltd. v. Principal Life Ins. Co.*, 206 P.3d 40, 47, 50 (Kan. Ct. App. 2009) (citations omitted).

The other cases that the Unified Government cites don't involve liquidated-damages clauses, much less overlap the *Wille* and *Beck* tests. In dictum in *Topeka Datsun Motor Co. v. Stratton*, the Kansas Court of Appeals cited *Wille* to note that the *Wille* factors can help determine whether a contract for a sale of goods is unconscionable under the Uniform Commercial Code (UCC). 736 P.2d 82, 90–91 (Kan. Ct. App. 1987) (citing *Wille*, 549 P.2d 903). *But see Wahlcometroflex, Inc. v. Westar Energy, Inc.*, 773 F.3d 223, 229–30 (10th Cir. 2014) (applying Kansas law and relying on a test more like *Beck* than *Wille* to determine whether a liquidated-damages clause in a contract for the sale of goods was a penalty under the UCC). And in *Adams v. John Deere Co.*, the Kansas Court of Appeals cited *Wille* to address the procedural and substantive conscionability of a contract provision that barred either party from collecting lost profits upon termination. 774 P.2d 355, 357–62 (Kan. Ct. App. 1989) (citations omitted). The Unified Government cites no case showing that we should apply *Wille* instead of *Beck* when analyzing the reasonableness of a liquidated-damages clause.

When applying Kansas law, we have cited *Wille* only when examining whether a contract is unenforceable because of substantive and procedural unconscionability. *See, e.g.*, *Frost v. ADT, LLC*, 947 F.3d 1261, 1267–68 (10th Cir. 2020) (citations omitted); *White v. Gen. Motors Corp.*, 908 F.2d 669, 673 (10th Cir. 1990) (citations omitted); *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 764 (10th Cir. 1983) (citations omitted). We have never done so to

determine whether a liquidated-damages clause in reality imposes an unenforceable penalty. Rather, in that context, we have applied the *Beck* test. *See Nat'l Coop. Refinery Ass'n v. N. Ordnance, Inc.*, 238 F.2d 803, 805 & n.1 (10th Cir. 1956) (citations omitted).

Cases descending from *Wille* rarely cite *Beck,* and vice versa. Indeed, *Wille* itself didn't cite *Beck* or its two-pronged test. Nor did *Carrothers* cite *Wille* or its factors. Instead, *Beck* provides its own definition of conscionable: "reasonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach." 114 P.2d at 308 (citations omitted).

As in *Santa Rosa KM Associates*, a party may argue both the *Beck* and *Wille* tests as separate avenues for holding a liquidated-damages provision unconscionable. 206 P.3d at 47–51; *see also John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1574–75 (D. Kan. 1986) (applying Kansas law) (citing the *Wille* factors to hold a liquidated-damages clause procedurally unconscionable and citing *DeWerff* to hold the same clause substantively unconscionable as an unenforceable penalty (citations omitted)). But in arguing that § 7.02(b) was unenforceable, Deffenbaugh presented an argument only under the *Beck* test, much like the commercial contractor in *Carrothers*. *See Carrothers*, 207 P.3d at 240–41.

Because of the lack of overlap between the *Beck* and *Wille* lines of caselaw and because Deffenbaugh presented only a *Beck* argument, the district

court didn't need to evaluate the *Wille* factors—it needed to address conscionability and reasonableness only under the *Beck* test. But though the district court erred in applying the *Wille* factors, it still reached the correct conclusion. Section 7.02(b) is conscionable and reasonable under *Beck*.

b. Does § 7.02(b) satisfy prong one of *Beck*?

Because Deffenbaugh earned between $9 and $11 for each residence per month (thus earning between $1 and $1.50 for each individual collection of trash and recycling), it argues that the $200 charge is "grossly disproportionate" and unconscionable under prong one of *Beck*. But Kansas Supreme Court precedent demonstrates that the proper comparison is between the amount of the charges and the total value of the contract, as viewed from the time the contract was executed. *Beck*, 114 P.2d at 308; *Carrothers*, 207 P.3d at 241–42.

In *Carrothers*, a construction company contracted with a city to build a wastewater-treatment facility for over $5 million. 207 P.3d at 235. The parties agreed that the company would pay the city $600 for each day that the company started the construction late, and $850 for each day that it surpassed the substantial-completion deadline. *Id.* at 236. The company completed the work nearly six months late, so it owed the city over $145,000 in liquidated damages under the contract. *Id.* at 237–38. When the company challenged the enforceability of the liquidated-damages provision, the Kansas Supreme Court explained that the proper test is to "determine the reasonableness of a

liquidated damages clause as of the time the contract was executed, not with the benefit of hindsight." *Id.* at 241. The court then endorsed the Kansas Court of Appeals' analysis comparing the total value of the contract to the total amount of liquidated damages for the six-month delay and holding that the "$850 per day is reasonable when viewed prospectively." *Id.* at 241–42 (citation omitted).

The parties in *Carrothers* could not have known at the time of contracting that the construction company would complete the facility six months late. But they knew that in the event of a six-month delay, liquidated damages would amount to over $145,000, "less than 3% of the total contract amount." *Id.* at 241 (citation omitted). The Kansas Supreme Court endorsed the Kansas Court of Appeals' reasoning that this amount was prospectively reasonable because of the "potential actual expenses" that a late completion could cause the city. *Id.* at 242 (citation omitted). Likewise, here, the parties didn't know when they agreed to the 2012 contract that Deffenbaugh's rate of missed pickups would dramatically increase and result in substantial charges under § 7.02(b). But they knew that if Deffenbaugh's service downturned significantly, it could be liable for hundreds of thousands of dollars in § 7.02(b) charges over the course of several months, and that these late pickups could harm the Unified Government and Wyandotte County residents.

In *Beck*, the Kansas Supreme Court compared the amount of liquidated damages to the total value of a ten-year installment contract and concluded that liquidated damages for 5% of the total contract value were reasonable. 114 P.2d

at 308. Then in *Carrothers*, the Kansas Supreme Court noted the total contract value compared to liquidated damages for a six-month delay and held that liquidated damages for "less than 3% of the total contract amount" were reasonable. 207 P.3d at 241–42 (citation omitted). Under *Beck* and *Carrothers*, we compare the charges that the parties could reasonably foresee at the time of contracting to the total value of the contract. *See also Wahlcometroflex*, 773 F.3d at 225–26, 229 (evaluating the reasonableness of liquidated damages for a sale of goods under the UCC and holding that a charge of 1.5% of the total contract price for each week of a late delivery was an enforceable liquidated-damages provision). The district court erred by comparing § 7.02(b)'s $200 charge to the amount the Unified Government paid Deffenbaugh for collecting one residential unit of waste. But it still reached the correct conclusion: the charges were reasonable liquidated damages.

Over the life of the 2012 contract, Deffenbaugh has invoiced the Unified Government over $64 million for its waste-collection services. And in that time, the Unified Government has levied only $574,300 in § 7.02(b) charges—less than one percent of the total contract value. This is a much smaller ratio of charges to total contract value than the Kansas Supreme Court held reasonable in *Beck* and *Carrothers*. *Beck*, 114 P.2d at 308 (upholding charges of 5% of the

total contract value); *Carrothers*, 207 P.3d at 241–42 (upholding charges of 3% of the total contract value).[8]

Still, we don't stop at a simple ratio of charges to total contract value; at the time of contracting, the charges must bear a "reasonable relationship . . . to damages which might be suffered." *Nat'l Coop. Refinery Ass'n*, 238 F.2d at 804, 807 (applying Kansas law) (holding that a $55,000 charge was an unenforceable penalty in a $2 million contract when the "$55,000 bore no reasonable relationship whatever to damages which might be suffered").[9] But we find that standard is met here. Just as the late completion of the wastewater-treatment facility could cause the city financial harm in *Carrothers*, late waste collections can cause significant financial, hygienic, and aesthetic harm to the Unified Government and Wyandotte County residents. And just as the $850 charge per day for late completion was reasonable in *Carrothers*, the $200 charge per residence per day for a late collection in the 2012 contract is

[8] Even if we compare the charges only to the amount Deffenbaugh invoiced the Unified Government in 2019 and 2020, the charges still add up to less than 4% of the total contract value for those two years.

[9] Our requirement that the charges bear a prospectively reasonable relationship to potential damages prevents the scenario that Deffenbaugh describes in its reply brief, in which "Section 7.02(b) could have provided for a $1,120,000 penalty for a single missed collection . . . and that amount would be reasonable if only one penalty was imposed." A million-dollar charge for a single missed pickup wouldn't be a reasonable estimation of potential damages at the time of contract formation.

"reasonable when viewed prospectively." *See* 207 P.3d at 241–42 (citation omitted).

The amount of the § 7.02(b) charges here was reasonable given the total value of the contract and the likely damages to the Unified Government and Wyandotte County residents. Section 7.02(b) meets prong one of the *Beck* test.

2. Difficulty in Determining Actual Damages

For prong two of the *Beck* test, Kansas courts consider whether, as part of the drafting process, the parties tried to estimate actual damages in the event of a breach. *Id.* at 242. Courts also consider the public or private nature of a contract when assessing whether a liquidated-damages provision is enforceable. Contracts for public utilities pose unique difficulties in calculating damages to the public interest, so the public nature of a contract "weigh[s] favorably in finding a liquidated damages provision to be reasonable." *Id.* Kansas courts have upheld large amounts of liquidated damages in public-works contracts because in such a contract, the municipality "acts not only for itself as a corporate entity, but [also] . . . for the benefit of its inhabitants." *Indus. Gas Co.*, 28 P.2d at 972.

To refute the district court's finding that damages would be difficult to calculate, Deffenbaugh points to the Unified Government's failure to calculate actual damages in advance and the lack of recitals in § 7.02(b) about the difficulty of calculating actual damages. True, many of the liquidated-damages provisions upheld by Kansas courts have included recitals about the difficulty

in calculating actual damages. *E.g.*, *Carrothers*, 207 P.3d at 236. But these recitals aren't necessary for a liquidated-damages provision to be enforceable; the contract in *Beck* contained no such recital. 114 P.2d at 306.

On the other hand, the parties' failure to estimate actual damages before adopting § 7.02(b) initially favors construing § 7.02(b) to be an unenforceable penalty. *Gregory v. Nelson*, 78 P.2d 889, 892 (Kan. 1938). But we still must evaluate the totality of the circumstances—especially the public harm from late waste collections. *See id.*

As Deffenbaugh sees it, the Unified Government can easily calculate actual damages by relying on its own cost to pick up missed waste collections, like it did when it invoiced Deffenbaugh for the manpower and equipment needed to remedy Deffenbaugh's missed pickups in June 2017. But Deffenbaugh understates the harm from an overdue waste collection. Late collections not only harm the Unified Government financially, but they also harm the public hygienically and aesthetically. Trash left to rot on the curb can invite dogs, varmints, and wild animals and can threaten the health and safety of unwitting children playing in their yards. Liquidated damages are more likely to be enforceable in public-works contracts because of the difficulty in calculating damages to the public interest. *Carrothers*, 207 P.3d at 242; *Indus. Gas Co.*, 28 P.2d at 972. The hygienic and aesthetic harms that rotting garbage causes to Wyandotte County residents aren't easily reduced to a mathematical

formula, so we conclude that Kansas courts would enforce the $200 charge per day for a late collection.

Moreover, the complex nature and broad scope of Deffenbaugh's waste-collection services make it difficult for the parties to compute actual damages on a house-by-house basis. *See Carrothers*, 207 P.3d at 242 (explaining that complex projects can present "significant difficulties in trying to calculate actual damages"). And the difficulty in calculating damages caused by untimely performance favors enforcing § 7.02(b). *See St. Louis & S.F. R.R. Co. v. Gaba*, 97 P. 435, 436–37 (Kan. 1908) (upholding a contractual charge of $10 per day (the equivalent of over $300 per day in modern currency) for a subcontractor's failure to promptly deliver goods when actual damages were difficult to calculate). Overall, the public nature of the contract, its complexity, and the difficulty in calculating damages from delayed performance favor enforcing § 7.02(b).

Finally, Deffenbaugh points to the Unified Government's acknowledgment that it enforced § 7.02(b) partly to "ensure performance." True, "the characteristic of a penalty is that it is designed to secure performance rather than to estimate reasonable damages in case of breach." *DeWerff*, 626 P.2d at 1209. But even a stated purpose to secure performance "is not necessarily controlling where the stipulated sum is reasonable and the amount of actual damages for breach would be difficult to determine." *Id.* Because the $200 charge is reasonable given the public-works subject matter

and the difficulty of calculating the harm from late trash collections, the Unified Government's statement that it enforced § 7.02(b) to ensure performance doesn't render § 7.02(b) an unenforceable penalty.

* * *

Section 7.02(b) satisfies both prongs of the *Beck* test. Though the district court erred in applying the first prong of the *Beck* test by analyzing the *Wille* factors and by failing to compare the total charges to the total value of the contract, it still reached the right conclusion. "To prevent cases from needlessly bouncing back and forth between district and appellate courts, [we are] entitled to affirm a district court on alternative grounds that court didn't consider if those grounds are adequate, apparent in the record, and sufficiently illuminated by counsel on appeal." *Walton v. Powell*, 821 F.3d 1204, 1212 (10th Cir. 2016) (citing *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011)). That standard is met here. We conclude from the record that the charges imposed are reasonable compared to the total value of the contract. And the difficulty in calculating actual damages to the public supports upholding the provision. Despite the use of the word "penalty," we hold that § 7.02(b) is an enforceable liquidated-damages clause.

IV. Did Deffenbaugh properly terminate the contract?

Last, we turn to whether Deffenbaugh properly terminated the contract with the Unified Government. Under § 11.02 of the contract, the non-defaulting party can terminate the contract by giving the defaulting party thirty days'

written notice. App. vol. 1, at 75. But in those thirty days, the defaulting party has an opportunity to cure and save the contract from termination. *Id.* The Unified Government argues that Deffenbaugh failed to provide it a meaningful opportunity to cure because Deffenbaugh's allegations of default were too vague.

On appeal, Deffenbaugh no longer argues that its February 2020 notice of default alone was enough to notify the Unified Government of its default and to provide a reasonable opportunity to cure. Rather, Deffenbaugh argues that "[t]aken together," its June 2019 appeal letter and its February 2020 notice of default gave the Unified Government "notice of the nature of its default in imposing penalties based on reports from [Unified Government] staff rather than only on reports from customers." We begin by confirming that Deffenbaugh's argument is properly before us; we then address the merits.

A. Did Deffenbaugh waive its argument that its June 2019 appeal letter provided notice and an opportunity to cure?

The Unified Government contends that Deffenbaugh failed to preserve its argument that its June 2019 appeal letter provided notice and an opportunity to cure. For support, the Unified Government points to Deffenbaugh's factual admissions at summary judgment and its cursory briefing about the June 2019 appeal letter at the district court. But we need not dwell on whether Deffenbaugh preserved these arguments at the district court because the district

court addressed the arguments Deffenbaugh now makes on appeal. *Deffenbaugh I*, 2021 WL 6072508, at *23.

We can consider issues "pressed *or* passed on by the courts below." *United States v. Williams*, 504 U.S. 36, 42 (1992) (citation omitted). "A court 'passes upon' an issue when it applies 'the relevant law to the relevant facts.'" *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 992 (10th Cir. 2019) (citation omitted). We can review "an issue not pressed so long as it has been passed upon." *Id.* (quoting *Williams*, 504 U.S. at 41).

Regardless of whether Deffenbaugh pressed its argument about its June 2019 appeal letter at the district court, the district court passed on the issue by addressing the June 2019 appeal letter and Deffenbaugh's rescission of its appeal. *Deffenbaugh I*, 2021 WL 6072508, at *23. The court concluded that these communications between Deffenbaugh and the Unified Government "show only a general knowledge that there was a dispute about the fines, not the nature of the dispute." *Id.* Then the court found that Deffenbaugh had failed to provide adequate notice and an opportunity to cure. *Id.* at *23–24. Because the district court passed on this issue by applying "the relevant law to the relevant facts," we will address it on appeal. *Tesone*, 942 F.3d at 992 (citation omitted).

B. Did Deffenbaugh provide the Unified Government notice and a reasonable opportunity to cure?

To interpret written contracts, Kansas courts focus on the parties' intent. *Carrothers*, 207 P.3d at 239 (citation omitted). When the contract terms are clear, courts look only to the language of the contract without applying rules of construction. *Id.* (citation omitted). "Ambiguity in a contract does not appear until two or more meanings can be construed from the contract provisions." *Id.* (citation omitted). Though the 2012 contract doesn't specify how much detail the notice of default must include, *see* App. vol. 1, at 75, courts "should not look for ambiguities or uncertainties where common sense tells us there are none," *Eggleston v. State Farm Mut. Auto Ins. Co.*, 906 P.2d 661, 662 (Kan. Ct. App. 1995) (citations omitted). Common sense tells us that to provide the defaulting party a meaningful opportunity to cure, a notice of default under § 11.02 must adequately describe the nature of the alleged default.

Neither party cites controlling precedent that explains what counts as adequate notice of default under Kansas law. Though Kansas law requires notice and an opportunity to cure before a buyer can recover for breach of warranty in a sale of goods, Kan. Stat. Ann. § 84-2-607(2)–(3) (2023), little binding authority exists defining adequate notice of default in other types of contracts.[10] But persuasive authority supports our conclusion that to have a

[10] In one case, the Kansas Supreme Court addressed the issue in passing and suggested that a non-defaulting party provides adequate notice to a

(*footnote continued*)

meaningful opportunity to cure, a defaulting party must know how it defaulted. *See In re Valley View Shopping Ctr., L.P.*, 233 B.R. 120, 124 (Bankr. D. Kan. 1999) (discussing notice of default in a Kansas commercial lease). Without knowing how to correct the default, "the right to cure the default becomes a meaningless guessing game." *Id.* (citation omitted); *see also Am. Outdoorsman, Inc. v. Pella Prods., Inc.*, 144 P.3d 81, 2006 WL 3000779, at *6 (Kan. Ct. App. 2006) (per curiam) (unpublished table decision) (explaining that when deficient performance by one party is "a matter peculiarly within the knowledge" of the other party, the non-defaulting party must give the defaulting party an "adequate opportunity to cure" in its notice of default).

The more detailed the notice of default, the more likely that it will provide the defaulting party a reasonable and meaningful opportunity to cure. Still, a notice of default need not specify a contractual provision that was breached if the notice is detailed enough to inform the defaulting party how to cure. We agree with the district court that "termination provisions based on a

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defaulting party by complaining repeatedly and specifying the nature of the alleged default. *City of Topeka v. Watertower Place Dev. Grp.*, 959 P.2d 894, 899 (Kan. 1998) ("The City repeatedly complained to Watertower as to the lack of commitment and the particulars of the deficiency. This was acknowledged more than once by Watertower. Only after the contract was terminated did Watertower complain about the lack of particularity in the City's complaints."). Though this case appears in a record citation in Deffenbaugh's reply brief, Deffenbaugh doesn't discuss it.

failure to cure a default contain an implicit requirement to give enough detail to allow cure." *Deffenbaugh I*, 2021 WL 6072508, at *22.

In its opening brief, Deffenbaugh relies exclusively on *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1997), a Second Circuit case applying New York law, to argue that it provided the Unified Government sufficient notice and an opportunity to cure between its June 2019 appeal letter and its February 2020 notice of default. In *Contemporary Mission*, as required by contract, Contemporary Mission sent a letter notifying Famous that Famous had materially breached the contract between them. *Id.* at 921. Contemporary Mission's notice directed Famous's attention to a paragraph in the contract that "was not the basis for Contemporary's ultimate recovery." *Id.* at 925. Yet the Second Circuit held that Contemporary Mission had satisfied the contract's notice requirement because its notice "was sufficient to place Famous under a duty to communicate immediately with [its assignee] and to [e]nsure that the contract was being performed according to its terms." *Id.* The Second Circuit "decline[d] to construe the notice provision as if it were a common law pleading requirement under which every slip would be fatal." *Id.*

On the other hand, the Unified Government relies heavily on an unpublished district-court case applying Colorado law to argue that Deffenbaugh's notice of default is inadequate. *Pivotal Colo., II, LLC v. Triple M Beteiligungs-GMBH*, No. 07-cv-01991-WDM-KLM, 2009 WL 1174463, at *3–4 (D. Colo. Apr. 29, 2009). In *Pivotal*, the defendant sent the plaintiff a

notice of default that "gave only alternative theories of breach in the most general terms without any explanation or detail." *Id.* at *4. The district court held that the notice of default was insufficient because "[e]ven though the contract does not prescribe the contents of the notice of breach, [the defendant] had a good faith duty to provide sufficient detail to make the opportunity to cure a meaningful contract right." *Id.* (citation omitted).

Though the court in *Pivotal* applied Colorado law, the facts in *Pivotal* mirror the facts here. Like the deficient notice in *Pivotal*, Deffenbaugh's notice was too vague to alert the Unified Government of the nature of its default. *See Pivotal*, 2009 WL 1174463, at *4. On the other hand, *Contemporary Mission* is distinguishable from Deffenbaugh's case because Famous didn't investigate the alleged breach or respond to Contemporary Mission's notice. *See* 557 F.2d at 925. Unlike Famous, the Unified Government corresponded with Deffenbaugh about the February 2020 notice of default and asked for more information so that it could adequately cure the nebulous allegations of default. Then, it was Deffenbaugh—not the Unified Government—who failed to respond before the time to cure had lapsed.

Neither Deffenbaugh's June 2019 appeal letter nor its February 2020 notice of default provided the Unified Government an adequate opportunity to cure the defaults that Deffenbaugh alleges on appeal. In June 2019, Deffenbaugh alerted the Unified Government to its belief that the 311 system should be "the single method of customer communication." But Deffenbaugh

didn't communicate its belief that complaints should come only from residents—not from Unified Government workers visiting the sites of missed pickups and inputting whole neighborhoods into the 311 system. Deffenbaugh's one-time appeal in June 2019—which it soon rescinded—was too vague to provide a meaningful opportunity for the Unified Government to cure its alleged defaults.

Likewise, in February 2020, Deffenbaugh vaguely admonished the Unified Government that it had "imposed penalties on [Deffenbaugh] in a manner that is contrary to the Contract and without factual support." Deffenbaugh also vaguely referenced the Unified Government's failure to abide by contract terms to refer calls to a single phone number. But again, Deffenbaugh didn't specify that it believed the Unified Government had defaulted by allowing its employees to input 311 reports from their own investigations. So the Unified Government was left to engage in a "meaningless guessing game" as to how its § 7.02(b) calculations violated the contract. *In re Valley View Shopping Ctr.*, 233 B.R. at 124.

At bottom, Deffenbaugh failed to provide the Unified Government adequate notice of a default and a reasonable opportunity to cure. So Deffenbaugh didn't comply with § 11.02 as a matter of law, and the contract remains in effect.

CONCLUSION

We have jurisdiction to review the two issues on appeal because the district court properly certified its summary-judgment order as final under Rule 54(b). We hold that § 7.02(b) is enforceable as a liquidated-damages clause because the charges are reasonable compared to the total value of the contract and because the damages to the public interest are difficult to calculate. And we hold that Deffenbaugh failed to properly terminate the contract because its notice of default didn't give the Unified Government a reasonable opportunity to cure. We affirm the district court's decision on the two issues on appeal and remand for further proceedings consistent with this order.

Entered for the Court

Gregory A. Phillips
Circuit Judge