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Post-Katrina Louisiana Contracts and the Doctrine of Impossibility

By Eric Lockridge and Dean Cazenave

Many businesses in Louisiana are now assessing how Hurricane Katrina and Hurricane Rita have affected and will continue to affect their contracts with clients, vendors, partners, and others. This article provides some general guidelines that businesses can use to determine if and how their contracts' terms or Louisiana's commercial law may affect contractual rights and obligations in light of the hurricanes.

Always Read the Contract First!

The first step in assessing how the rights and duties in a given contract may be affected by Hurricane Katrina is to review the contract itself. Does the contract contain a provision that states if and how the parties' obligations change in the event of a hurricane or flood? If the answer is yes, then a party should follow the terms provided in the contract. If a party is unable or unwilling to abide by the contract's terms, it should contact the other parties as soon as possible about amending the agreement to avoid potential liability for breach.

We never thought about a hurricane . . . . Now what?

Many contracts, however, do not have a hurricane or force majeure clause. Business looking for guidance about their contractual rights and obligations in light of Hurricane Katrina and Hurricane Rita should consult with legal counsel about how Louisiana Civil Code Articles 1873—1878 ("The Articles") apply to their particular situation. The Articles provide the default rules about how contractual obligations may be modified or extinguished due to a "fortuitous event" that has made performance of a contract "impossible," either in part or in whole. The Articles only apply, however, if the parties themselves did not address how a hurricane or other *force majeure* would affect their obligations to each other.

What happens to my contract if we [or they] cannot perform because of Katrina or Rita?

Under the Articles, when a fortuitous event makes the entirety of a party's owed performance impossible, the contract is dissolved. If the fortuitous event makes a party's owed performance impossible in part, a court may either reduce the counterperformance proportionally, such as by a reduction in the contract price, or it may declare the contract dissolved, according to the circumstances. The court should uphold the contract if one party's partial performance will still be of value to the other party after a reduction in the other's counterperformance.

For example, assume Seller contracted to deliver 1000 widgets to Buyer. If Seller is able to deliver only 500 widgets because part of its inventory was destroyed in the hurricane, and Buyer is willing to accept 500 widgets at the agreed per-widget price, then the contract should be reformed and upheld to allow the sale. If partial performance by one party would be of no value to the other party, however, the court should dissolve the contract. In our example, if Buyer needs a minimum of 1000 widgets for the cost and hassle of shipping to be worthwhile, then the contract should be dissolved.

Am I liable for breach if I do not deliver as promised? [Or: Is my supplier liable for breach if he does not deliver as promised?]

An obligor is not liable for its failure to perform an obligation when the failure is caused by a fortuitous event that makes performance impossible. If the fortuitous event has made impossible the entire performance owed by at least one party, the contract is dissolved by operation of law. When a contract is so dissolved, a party who has partially performed its obligations may recover any performance that it has already rendered. If a contract is dissolved because of a fortuitous event that occurred after an obligor rendered partial performance, the obligee is bound only to the extent that he was enriched by the obligor's partial performance. For example, where a land owner agreed to pay a set price for having his acreage mowed regularly, but soon thereafter much of the acreage flooded and could not be mowed, the contractor was entitled to receive payment in proportion to the acreage that he mowed during the time period established by the contract, but he was not entitled to receive the contract's stated price for mowing the entire property. See *McQuillin v. Meier*, 27,099 (La. App. 2nd Cir. 6/21/95), 658 So. 2d 238.

Is Hurricane Katrina a "Fortuitous Event" under The Articles?

A fortuitous event is one that could not have been reasonably foreseen at the time the contract was made. Conflict will occur when parties disagree over whether the flooding or other damage from Hurricane Katrina and Hurricane Rita was reasonably foreseeable when they made their contract. There is some authority stating that hurricanes are, ipso facto, fortuitous events, and therefore not reasonably forseeable.

See *Popich v. Fidelity and Deposit Co. of Maryland*, 231 So. 2d 604, 613 (La. App. 4th Cir. 1970), *jdgmt amended*, 258 La. 163, 245 So. 2d 394 (1971) (the court states that damage to a house from Hurricane Betsy was a fortuitous event). It seems unlikely, however, that such an across-the-board rule will apply in every case. If the parties' agreement indicates that they foresaw the risk of a hurricane or flooding, then Katrina was not a fortuitous event as to that contract. In such a situation, the parties' contract will not dissolve and the obligor will remain liable for damages arising from its failure to perform. That the obligor's performance is now impossible due to the hurricane will not relieve it of liability for breach.

One leading case on the forseeability of a natural event involves a contract dispute between the Sewarage & Water Board of New Orleans ("the Board") and a contractor hired by the Board to expand a pumping station in New Orleans. See *Farnsworth v. Sewarage & Water Board of New Orleans*, 173 La. 1105, 139 So. 638 (1932). The contract stipulated a date certain for the project to be completed. The contract also provided for delay damages of $25 per day if the project was not completed on time. The project was delayed due, in part, to excessive and unprecedented rainfall in New Orleans. The Board charged delay damages as stipulated in the contract. The contractor argued that the unprecedented rainfall was a fortuitous event, and that he should not be penalized for any delay due to the rain and subsequent flooding. The Louisiana Supreme Court found that the rainfall during the 10 month period for completion of the work was "abnormal;" the opinion refers to newspaper photographs of canoes in flooded streets with a caption stating, "It looks like Venice, but it's New Orleans." *Farnsworth*, 130 So. at 641. The Court distinguished between the 10 months of excessive rainfall and the few days of actual flooding in the city. The Court found that the contractor assumed the risk of the excessive rains, presumably by agreeing to the completion date and delay damages stated in the contract (although the court's rationale is not explicitly stated). The contractor could not avoid delay damages by claiming that the rains were a fortuitous event. The contractor, however, did not assume the risk of floods. The Court held that the floods were a fortuitous event, and that the contractor was not liable for any delay due to floods that made it impossible to work in New Orleans. The Court's distinction between the rains and the flood caused by the rains may be useful for business seeking analogies for their particular situations.

When is Performance of an Obligation "Impossible?"

A fortuitous event will only relieve a party of its obligation when the obliged performance is truly impossible. A fortuitous event that makes an obligation more difficult or more burdensome does not qualify. See *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, 161 La. 1077, 109 So. 844 (La. 1926). If a party cannot satisfy an obligation as anticipated due to a fortuitous event, it should seek substitute goods or services in the market that it can use to render the obliged performance. For example, in the *Dallas Cooperage* case, the defendant was contractually obligated to deliver coiled elm hoops to the plaintiff. The defendant admitted its obligation and that it defaulted

on that obligation. The defendant argued, however, that it was prevented from fulfilling its obligation by a fortuitous event: unfavorable weather conditions that made it impossible to obtain elm logs and manufacture hoops. The Court disagreed:

> "*The contract was not impossible of fulfillment, and, if defendant was unable to manufacture the hoops at its own mill, it should have procured them from other manufacturers or dealers in the same line of business. The nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time that the contact was entered into.*"

As another example, the above language was cited in a recent case where a limousine service attempted to avoid liability for failing to pick up a bride on her wedding day by claiming that its failure was the result of a fortuitous event. *West v. Central Louisiana Limousine Serv., Inc.,* 2003-373 (La. App. 3rd Cir. 10/1/03), 856 So. 2d 203, 205. The court noted that the Code places a high standard on an obligor and requires an obligor to search for alternatives that will satisfy its obliged performance when its anticipated method of performance becomes impossible. The court upheld the trial court's determination that defendant failed to meet its burden of proving impossibility because the limousine service failed to present evidence that it took any action to locate a substitute limousine for the plaintiff after it knew that it would not be able to provide its own limousine for the plaintiff. In sum, if a party does not at least attempt to locate a substitute good or service that could fulfill its contractual obligation, it may be unable to prove that a fortuitous event made performance of the obligation impossible.

Importantly, mere "economic impossibility" arising from a fortuitous event will not extinguish an obligation. For example, a homeowner in St. Bernard Parish hired a contractor to construct an addition to his home. Before substantial work had been done on the addition, Hurricane Betsy hit the area. The home was "inundated by flood waters to a height of approximately 5 feet 7 inches." *Schenck v. Capri Constr. Co.,* 194 So. 2d 378, 379 (La. App. 4th Cir. 1967). The homeowners sought to cancel the contract. They argued that Hurricane Betsy was a fortuitous event that made their obligation to pay the amount owed under the contract "economically impossible." The record, however, showed that the house was still structurally sound and that the addition was possible from a structural, engineering, and architectural standpoint. The Court found that the hurricane damage made the homeowners' obligation to pay the contractor more difficult, but not impossible. Accordingly, the doctrine of impossibility was not available to the homeowners, and the Court enforced the contract.

Conclusion

Businesses should review any contracts that may be affected by Hurricane Katrina to see what their respective rights and obligations are in light of the storm. If a contract does not contain a *force majeure*, hell-or-high-water, or other clause addressing the given situation, then The Articles discussed above will apply. Whether Hurricane Katrina was

a "fortuitous event" vis-à-vis a given contract, and whether performance of a contractual obligation is truly "impossible," will vary from situation to situation.

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