IMPOSSIBILITY OF PERFORMANCE AND FORCE MAJEURE

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Long before phrases and terms such as "essential workers" and "social distancing" entered into the parlance of our times, the law has grappled with events and occurrences that impact a parties' ability to complete a contract or fulfill their obligations under an agreement.1

In the days after Governor Ivey's first Proclamation and the Order from the State Public Health Director, many lawyers were contacted by clients who were trying to navigate a business climate that had been fundamentally altered. While the drumbeats of concern for the Covid-19 virus had begun weeks earlier, few people envisioned that commerce would come to, if not a complete halt, at best a trickle. The effect of closing down retail commerce, coupled with the restrictions for essential workers and businesses, reverberated throughout the supply chain. This inevitably resulted in many attorneys, who may have only dealt with the concepts of Force Majeure and impossibility of performance in a law school final or bar exam question,

being forced to desperately root through contracts to determine if the term "pandemic" was contained somewhere in the document. While I am sure most, if not every, contract going forward will contain that term, many contracts executed prior to March of this year did not. Thus, the practitioner was confronted with a situation where either there was no provision concerning relief from performance due to impossibility of performance or, if there was a provision, the determination needed to be made whether the pandemic would be considered an "act of God."

The United States Supreme Court first examined the concept of impossibility of performance in *Viterbo v. Friedlander,* 120 U.S. 707 (1887), which concerned a contract to lease a sugar plantation adjacent to the Mississippi River and the effect of a flood on the ability to perform under the contract. Although the case focused upon civil law since the plantation was in Louisiana, in its Opinion the Court explained the genesis of Force Majeure not only in the context of civil law but also its common law roots. In deciding whether a flood could be the basis for the abatement of rent for the lease of the plantation, Justice Gray concluded that any flooding must be an extraordinary accident and not an ordinary infrequent accident which ought to be expected.[2] For it to be a Force Majeure, it must be a fact or an accident which human prudence can neither foresee nor prevent.[3]

When confronted with a situation where there is no express Force Majeure or impossibility of performance clause, the Restatement of Contracts allows for the discharge of performance as long as the event making performance impossible occurred after the making of the contract and there was no reason to anticipate the event occurring.[4] However, the Alabama Supreme Court has reiterated on a number of occasions that the strict rule of no discharge of performance will apply.

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In *Hawkins v. First Federal Savings and Loan Assoc.,* 280 So.2d 93 (Ala. 1973), the Alabama Supreme Court concerned itself with the construction of a hotel in Mobile. A financing agreement was entered into by Hawkins with First Federal Savings and Loan, wherein Hawkins placed money in escrow and the Savings and Loan committed to provide financing for the hotel as long as the loan was closed within a specific period of time. If the loan did not close, then the escrow was forfeited.[5] After the deal was struck, issues arose concerning the ability to construct a hotel on the property due to the Alabama Department of Transportation needing property to construct the interstate.[6] When the loan did not close within the specified period of time, the Bank kept the funds as an earned fee.[7] In the Opinion issued by Justice Faulkner, the Court concluded that Alabama had long applied the strict rule and concluded: "Indeed where the parties express without ambiguity their intention, of course, no court can alter the agreement and no room for judicial construction is left."[8] The Court continued that if a bargain is hard or unwise, the burden of performance or non-performance is on the party entering the bargain and in the absence of fraud or other vitiating circumstance, the contract stands.[9] The Court went on further to discuss that where the performance of the contract becomes impossible subsequent to the making of the contract, there is no discharge. While the *Hawkins* decision concludes with "[a]s a party binds himself, so shall he be bound," the Court did acknowledge the inequity of having an individual held responsible to perform an act which has since become illegal.[10] Based upon that inequity, the Court noted there is an exception where the performance becomes impossible by law due to a change in the law or by some action or authority of the government.[11]

The explanation of what appears on its face to be a very simple proposition of subsequent change in the law became the focus of significant analysis and interpretation with the advent of prohibition and the impact of the Great Depression. In *Greil Bros. Co. v. Mabson,* 60 So. 876 (Ala. 1912), the Alabama Supreme Court addressed the impact of the state's adoption of prohibition after a party had entered into a lease to rent the bar room and fixtures of the Windsor Hotel in Montgomery, Alabama. The parties had entered into a lease agreement and related promissory notes for the rental of a portion of the hotel and fixtures to be used as a "bar room and for no other purpose."[12] The agreement was entered in May of 1907 and in November of 1907 the General Assembly for the State adopted prohibition, which went into effect in January of 1909.[13] The lessee contended that they did not owe further rent for the remaining lease since they could no longer operate a bar room by operation of law. In the Opinion of the Court issued by Chief Justice Dowdell, the Court noted the express language in the Lease Agreement requiring the premises and fixtures to be used as a bar.[14] In scrutinizing the meaning and definition of the term "bar room", the Court differentiated between a bar room and a saloon as it concerns the requirement of availability of intoxicating liquors for sale.[15] After concluding a bar must provide and serve intoxicating liquors, the Court then turned to the strict application of holding a party responsible for performance and the exception for change in law. In discussing the exception, the Court stated "these exceptions are where the performance becomes impossible by law, either by reason of the change in the law, or by some action or authority of the government."[16]

After concluding that a bar could not be legally operated, the Court analyzed legal impossibility case law from other jurisdictions and noted that it must be a change in the law and not the unforeseen application of an existing law for impossibility to serve as relief from performance.[17] The Court analyzed the Texas decision of *Houston Ice & Brewing Co. v. Keenan,* 88 S.W. 197 (Tex. 1905), wherein a lessee had rented a building for the operation of a saloon. After the parties had entered into the lease, the County held an election to determine whether or not it would be a dry county. The election was held pursuant to a "local option" statute that had been in place prior to the execution of the Lease Agreement. In the *Greil Bros.* decision, the Alabama Supreme Court noted that while the election occurred after the Lease Agreement, the possibility of a local option election existed prior to the Lease Agreement and that as such, the lessee should have protected himself by clause in the lease against the contingency of a local option election. As such, there was no relief from the contract.[18]

This same reasoning was the basis for the Court upholding the fee assessed in the *Hawkins* decision since the inability to begin construction of the hotel, and thus closing on the loan, was based upon the denial of the building permit by the building official. In *Hawkins,* the Court stated "the distinction clearly established is between illegality created by change in the law subsequent to the contract, which serves as an excuse, and illegality due to an unfavorable exercise of discretion by governmental officials acting under existing law, which is no excuse.[19] It is this issue of illegality which will most likely be the focus of Covid related actions wherein parties are seeking to avoid or excuse performance based upon a proclamation from Governor Ivey issued pursuant to authority granted to her by the Alabama Emergency Management Act of 1955, Alabama Code § 31-9-1 *et seq.*[20] and related orders of the State Health Officer or other applicable health officials authorized pursuant to State Code provisions including Alabama Code § 22-2-2.

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Assuming you are approached by a client who couldn't perform under a contract and you hurriedly scan the agreement and find a clause which would excuse performance in certain instances, you must then determine if the events that unfolded rise to the level of excuse under the language of the contract. It is a basic tenet of Alabama law that a contract must be construed pursuant to a plain meaning of the words and if the terms are unambiguous, the parties have to comply with the letter of the contract.[21] The Supreme Court in the *Horne v. TMG Assoc., L.P.* decision concerned itself with an apartment lease agreement for apartments on Mobile Bay that incurred devastating damage during Hurricane Katrina.[22] The apartment complex, Harbor Landing, consisted of thirteen (13) two-story apartment buildings with common areas. Seven (7) of the thirteen buildings were condemned as a result of the Hurricane. After the apartment owner decided to close the entire complex, several individuals who had leases in the six (6) buildings that were not condemned sued for breach of the lease agreement.[23] While the apartment owner asserted that Hurricane Katrina was a catastrophic event which resulted in the destruction of the apartment complex, the Supreme Court looked to the early termination provisions of the lease agreement and noted that they only allowed for early termination if the leased premises or the building in which the leased premises is located is damaged. Since the six (6) buildings where the apartments were located did not suffer injury and damage, the Court applied the literal reading of the clause and determined that a partial destruction of the apartment complex could have served as a basis for early termination but only if that language was inserted into the early termination provisions. Since the buildings and the apartments themselves were still functional, the early termination clause did not become effective under a strict interpretation of the lease agreement, even though the Court recognized Katrina's scale and damage.[24]

Absent a specific provision excusing performance based upon a pandemic, counsel is forced to determine if the event that occurred can fit within the term "act of God." The matter of *Louisville & N.R. Co. v. Finlay,* 185 So. 904 (Ala. 1939)[25], is instructive on how the phrase "act of God" is construed. The case concerned a flood that occurred in Brewton on March 14, 1929 and damage that occurred to a shipment of sugar on a railroad car as a result of the flood. The ultimate flood stage reached 33.3 feet and the prior highest flood stage ever recorded for the area was 22.9 feet. Noting that the railroad car containing the sugar would not have been submerged had the flood not reached unprecedented levels, the Court reversed the case since the trial court had failed to submit a general jury charge of act of God.[26] The subsequent appellate case was as a result of the retrial of the case. During the retrial counsel for the defendant argued that the flood was not an act of God. Testimony was provided from two (2) individuals in their late 80s. One man testified that the "Lincoln flood" in 1864 was equal to or greater than depth than the 1929 flood.[27] That testimony was controverted by another gentleman of equal advanced age who as a youth recalled flooding during the Lincoln flood not being as extreme as what was incurred in 1929.[28]

The Court in *Louisville & N.R. Co.* discussed the phrase "act of God" and whether or not such an act must be unprecedented. It stated the phrase "act of God" is founded upon reason and justice that one should not be held responsible for that which could not have been reasonably

anticipated.[29] The Court positively cited *Southern Railway Co. v. Cohen Weenen & Co.,* 157 S.E. 563, 564 (Va. 1931) for the proposition that "'an act of God' as the term is known to the law is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected."[30] This language from *Louisville & N.R Co.* was echoed by the Court again in *Bradford v. Universal Constr. Co.,* 644 So.2d 864 (Ala. 1994). While the Court construed "act of God" in reference to a negligence defense, the Court cited the *Louisville* decision for the proposition that such an act requires "the intervention of such an extraordinary violent and destructive agent, as by its very nature raises a presumption that no human means could resist its effect."[31]

> *'[A]n act of God,' as the term is known to the law, is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected.*

As we enter the eighth month of the pandemic, courts across the country are beginning to see Covid-related litigation specifically associated with non-performance.[32] Lawsuits have been filed against educational programs and institutions related to campus closures.[33] Airlines face lawsuits concerning flight cancellations.[34] Cases have been filed against event and ticketing companies seeking the refund of payments for theatrical, musical and sporting events.[35] Class actions are pending against fitness clubs, ski resorts and amusement parks demanding refunds for membership fees and annual passes.[36]

While it would seem that the manifestation of a virus that causes an upheaval of global proportions would logically be considered an act of God, the fact that the term "pandemic" could have been included in the contractual provision concerning the release of performance is an argument that will be made and has some legal support based upon Alabama's strict construction of performance contracts. However, the way the phrase has been defined and applied in common carrier and negligence cases appears to support the conclusion that the Courts will apply a heavy dose of common sense and logic when faced with litigation stemming from the pandemic.

Endnotes

[1] 1 This article is a general discussion of Force Majeure and impossibility of performance for contracts being construed under Alabama law. Depending upon the type of contract or the focus of the contract, special provisions and exceptions may apply which would alter the general analysis. *See, e.g., Code of Alabama,* § 7-2-615 (concerning delay or non-delivery of a sale covered by the commercial code). Other transactions such as ones concerning the interstate transportation of goods may also have a different analytical structure.

[2] *Id.* at 715.

[3] *Id.* at 728.

[4] *Restatement of Contracts* (1932), § 457.

[5] *Hawkins,* 280 So.2d at 93.

[6] *Id.* at 94.

[7] *Id.* at 93. *See also Silverman v. Charmac, Inc.,* 414 So.2d 92 (Ala. 1982) ("This Court has not recognized the defense of impossibility or impracticability"); *but see Jewell v. Jackson & Whitsitt Cotton Co.,* 313 So.2d 157 (Ala. 1975) (in dicta the Court states performance can be excused by an act of God, by law, or by act of the other party).

[8] *Id.* at 95, *citing Lee v. Cochran,* 47 So. 581, 582 (Ala. 1908).

[9] *Id.*

[10] *Id.* at 97.

[11] *Id.* at 96.

[12] *Greil Bros.,* 60 So. at 876.

[13] *Id.* at 877.

[14] *Id.* at 877.

[15] *Id.*

[16] *Id.* at 878 (citations omitted).

[17] *Id.*

[18] *Greil Bros.,* 60 So. at 879.

[19] *Hawkins*, 280 So.2d at 96.

[20] *See also Slaughter v. C.I.T. Corp.,* 157 So. 463 (Ala. 1934) (A party could not make installment payments on a truck due to bank being closed by federal and state action during the depression. It was undisputed the debtor had sufficient funds in the bank and it was undisputed he could not access those funds. The change in law defense did not apply because the inability to pay was due to the ability of the performer and not the nature of the performance that had become impossible.) *Emergency Management Act of 1955,* Alabama Code § 31-9-1 *et seq.*

[21] *Horne v. TGM Assoc., L.P.,* 56 So.3d 615, 622 (Ala. 2010).

[22] *Horne*, 56 So.3d at 618.

[23] *Id.* at 620.

[24] *Id.* at 623-24.

[25] The Appellate Record of the *Louisville & N.R. Co.* matter actually began in 1936, when the same parties were involved with the first appeal. 170 So. 207 (Ala. 1936). In that first decision, the Court outlined the facts of the suit. *Louisville & N.R. Co. v. Finlay,* 185 So. 904 (Ala. 1939).

[26] *Louisville & N.R. Co.,* 170 So. at 210.

[27] *Louisville & N.R. Co.,* 185 So. at 905.

[28] *Id.*

[29] *Id.* at 905.

[30] *Id.* at 905-06.

[31] *Bradford,* 644 So.2d at 866.

[32] The National Law Review, *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases,* July 17, 2020, https://www.natlawreview.com/article/class-action-litigation-related-to-covid-19-filed-and-anticipated-cases-updated-July.

[33] *See Bailey v. Auburn University,* No. 20-cv-00456 (M.D. Ala. June 30, 2020).

[34] *See Polk v. Delta Airlines, Inc.,* No. 20-cv-02461 (N.D. Ga. June 9, 2020).

[35] *See Hernandez v. Ultra Enterprises, Inc.,* No. 1:20-cv-22185 (S.D. Fla. May 26, 2020).

[36] *Leon v. Disney Destinations, LLC,* No. 20-cv-01227 (M.D. Fla. July 10, 2020) (amusement parks); *McKenna v. Vail Corp.,* No. 20-cv-01881 (D. Colo. June 25, 2020) (ski resort); *Holloway v. Planet Fitness Franchising, LLC,* No. 1:20-cv-01868 (N.D. Ga. April 30, 2020) (fitness club).

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