

# PUBLICATION

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## Force Majeure in Louisiana in the Wake of Hurricanes Katrina and Rita

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In addition to the personal tragedies suffered by the victims of Hurricanes Katrina and Rita, the storms greatly affected the commercial environment of Louisiana and the rest of the Gulf coast. Property destruction, mandatory evacuations, a displaced labor force, and eroded customer base halted operations of many businesses, some temporarily and others permanently, while costs skyrocketed. Given these changes to the business landscape, many companies are strained by contractual obligations established before these hurricanes.

Generally, contractual disputes arising out of a failure to perform in connection with Hurricanes Katrina and Rita falls into two categories: (1) efforts to set aside a contract, or (2) attempts to alter contract terms as to compensation, time to perform, or otherwise. The purpose of this article is to outline the basic legal principles guiding business decisions on the first option – asserting the doctrine of force majeure or impossibility to excuse the nonperformance of contractual obligations.

Parties to an agreement are free to allocate the risks of unforeseeable events and to consent to any number of provisions that govern the right to dissolve, terminate, or suspend the obligations in an agreement. When such provisions are in place, the terms are generally enforced as written. It is only in the absence of such provisions that the general rules of Louisiana's Civil Code control.

The doctrine of force majeure excuses the nonperformance of a contractual obligation when an unforeseeable event makes performance of that obligation “impossible.” Article 1873 of the Louisiana Civil Code provides the basis for the force majeure doctrine in Louisiana: “[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible.” “Fortuitous event” is used interchangeably by Louisiana courts with “force majeure,” and is defined as an event “that, at the time the contract was made, could not have been reasonably foreseen.”

This determination is based on the reasonableness of the actual parties' foresight, as opposed to an objective review of foreseeability by a “reasonable person.” Fortuitous events in Louisiana have included a hurricane, a break in the levees of the Mississippi River, excessive rainfall, and abnormal flood conditions, but fire and fluctuations in the market price of oil do not qualify.

Because the Louisiana Civil Code's definition of a fortuitous event centers on the foreseeability of the fortuitous event to the parties at the time of contracting, the determination of whether the hurricanes were foreseeable will vary according to the facts and circumstances of each case. Regarding Hurricane Katrina in particular – which may fairly be characterized as one of, if not the, worst natural disaster in the history of the United States – it might be “unreasonable” to conclude that parties to a contract should have foreseen, at the time of contracting, the Hurricane, the scope of its damage, or its effects. Such a conclusion of unforeseeability is also logical for Hurricane Rita, which ravaged large parts of Western and Central Louisiana four weeks after Katrina. But simply categorizing Hurricanes Katrina and Rita as “fortuitous events” does not end the inquiry.

In addition to meeting the definition of fortuitous event, a force majeure claim/defense must be supported with a showing that the fortuitous event has made performance “impossible.” Impossibility of performance is a

stringent standard that is not equivalent to the common law doctrine of commercial frustration. An allegation of force majeure will not succeed simply because performance is inconvenient, difficult, undesirable, or even unprofitable. Instead, the law imposes a much higher standard. For guidance on this topic, we can look to how courts handled cases arising out of Hurricane Betsy in 1965 – a storm causing catastrophic effects similar to the more recent hurricanes.

In *Schenck v. Capri Constr. Co.*, 194 So.2d 378 (La. App. 4th Cir. 1967), homeowners signed an agreement with a contractor for the construction of an addition to their house in St. Bernard Parish. Before the contractor poured the concrete slab for the addition, Hurricane Betsy struck and inundated the house with almost six feet of flood water, causing the need for repairs and the loss of many personal possessions. The homeowners sought to cancel the contract and brought suit against the contractor for the return of their deposit. The homeowners argued that Hurricane Betsy was a fortuitous event that made rendering payment for the construction impossible. The Court disagreed and found that, although performance was not feasible economically, it was not impossible:

Our settled jurisprudence is that the obligor is not released from his duty to perform under a contract by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event or an irresistible force. Here, as we have pointed out, performance was not rendered impossible but only more difficult or more burdensome. *Id.* at 379-80.

Similarly, in *Popich v. Fidelity and Deposit Co. of Maryland*, 245 So.2d 394 (La. 1971), the Louisiana Supreme Court found that the scarcity of labor induced by Hurricane Betsy did not excuse the builder's failure to complete construction of a house. Instead, the Court held that scarcity of labor, while an effect of the hurricane, was not itself a force majeure event: "scarcity of labor during the many months that passed after the hurricane is not the same thing as an irresistible force or an act of God, like the hurricane."

These cases are particularly relevant to Louisiana's construction industry, and the principles espoused apply to every contract in place prior to the storm lacking a force majeure provision. Hence, parties to agreements appear to be foreclosed from setting aside contracts based on drastic changes in the ability to satisfy an obligation economically, or in a manner contemplated prior to the storm.

Despite the foregoing decisions, there is some authority that the onerous standard of impossibility of performance may be relaxed in some cases. Citing the need for a common sense approach to alternative satisfactory performances, at least one court of appeal requires a party to "pursue reasonable alternatives to render performance in a different manner before he can take advantage of the defense of impossibility." *West v. Cent. La. Limousine Serv.*, 856 So.2d 203,205 (La. App. 3rd Cir. 2003) (emphasis added). Left unanswered is whether the absence of reasonable alternatives is equivalent to impossibility of performance. Stated another way, it is unsettled in Louisiana whether force majeure can be invoked when the obligor has, due to a fortuitous event, only unreasonable alternatives which would satisfy performance.

One can expect analysis of reasonable alternatives to be very fact-intensive. For instance, regarding the current skilled labor shortage, might it be possible (but not reasonable) for a contractor to secure trailers (i.e., temporary housing) and import workers from other markets? Could a Louisiana supplier be required to purchase inventory from its competitors to make scheduled deliveries to its customers? Or, is it unreasonable to expect the supplier to do so?

If force majeure is established, the issue then becomes the appropriate remedy. Generally, Louisiana law dissolves the contract following such a finding, and the parties are restored to their positions prior to the agreement. This remedy would include the return of any performance rendered by the party whose obligation was not excused, such as a deposit. However, it is unsettled in Louisiana whether a fortuitous event that

makes performance impossible for a period of time, but not indefinitely, gives rise to dissolution, merely suspends the time to perform, or is better categorized as something other than a force majeure event (because performance is possible at some point in the future). Dissolution in such a case may be supported by Article 1873 of the Louisiana Civil Code, because the express language of that article draws no distinction between an indefinitely impossible performance and a temporarily impossible performance, but the “common sense” approach adopted by some courts may suggest modification of the terms is a more appropriate solution.

Similarly, when a fortuitous event has made a party's performance impossible in part, but partial performance would be of no value to the obligee, the appropriate remedy is to restore each party to their prior position. Alternatively, when a fortuitous event has made a party's performance impossible in part, the court may reduce the performance required of the other party, such as a reduction in the contract price. Finally, if a contract is to be dissolved because of a fortuitous event occurring after an obligor has rendered partial performance, the obligee is liable for damages to the extent that he was enriched by the obligor's partial performance.

Most contractual disputes arising from Hurricanes Katrina and Rita will turn on courts' interpretation of the Louisiana Civil Code provisions concerning force majeure as well as any relevant provisions in the contracts at issue. Exactly how the courts will choose to interpret those provisions, particularly in the face of the most significant natural disaster in Louisiana's history, remains unknown. What is certain is that the disputes will create a new, evolving body of law.\*

*\*There are other laws in Louisiana which may afford relief in certain fields (i.e., construction contracts or leases) or under peculiar circumstances (i.e., delays in performance instead of an inability to perform at all). Further, it is possible that certain vices of consent, such as error or mistake could provide additional grounds through which parties can attempt to avoid contractual obligations. Finally, in recent special sessions the Louisiana Legislature has considered revisions to the Louisiana Civil Code provisions outlined in this article, but no such bills have been enacted as of the date of this writing. You are encouraged to contact an author of this article or a member of this firm to discuss the options best suited to your situation and any relevant Legislative Acts impacting your decisions.*