Force Majeure

HURRICANE HARVEY MADE PERFORMANCE IMPOSSIBLE—NOW WHAT?

BY SEAN M. McCHRISTIAN

Hurricane Harvey may have been one of the United States' most costly natural disasters of all time, but it was not the first natural disaster to strike our state and it will certainly not be the last. Texas has seen property, businesses, and lives destroyed by hurricanes, floods, tornadoes, and fires. These terrible events have wide-ranging impacts, including rendering parties unable to perform their contractual obligations. For example, a residential builder may have contracted with a homeowner to complete construction of a house by a particular date, but may have been unable to work on the project for weeks due to a hurricane and subsequent flooding. If the builder is unable to deliver the completed house on time, is the builder liable for breaching the residential construction contract? Similarly, what happens if a roofer contracts with a homeowner to shingle the roof of a home, but when the roofer has completed part of the work, much of the house and the roof is destroyed by a wildfire? Does the roofer have a duty to shingle the roof when the home is eventually reconstructed and could the roofer be liable for breach of contract if he or she refuses to do the work? This article highlights certain issues that should be examined when assessing a party's liability for contract claims arising from the difficulties created by natural disasters.

Force Majeure Clauses

The general rule "is that an act of God does not relieve the parties of their obligations unless the parties expressly provide otherwise."[1] To avoid liability in these instances, "contracts frequently contain 'force majeure' clauses, which are enforceable under Texas law."[2]

The theory of force majeure has existed for many years. "Often likened to impossibility, it historically embodied the notion that parties could be relieved of performing their contractual duties when performance was prevented by causes beyond their control, such as an act of God."[3]

Today, "[t]he scope and effect of a 'force majeure' clause depends on the specific contract language, and not on any traditional definition of the term."[4] So, "when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of the force majeure provision' and reviewing courts 'are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended.'"[5]

Texas courts generally recognize that the purpose of a force majeure clause is to excuse non-performance of obligations only when caused by circumstances beyond the reasonable control of the party or by an event "which is unforeseeable at the time the parties entered into the contract."[6] However, contractual obligations cannot be avoided by a claim of force majeure "simply because performance has become more economically burdensome than a party anticipated."[7]

As a general matter, under Texas law, a party seeking to invoke force majeure to excuse its non-performance is not required to exercise reasonable diligence.[8] However, where a contract expressly includes this requirement, reasonable diligence must be shown in order to invoke a force majeure provision and excuse a party's non-performance.[9] The Texas Supreme Court has defined reasonable diligence as "such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances."[10] This term is highly subjective and is "incapable of exact definition."[11] Therefore, "[i]ts meaning must be determined by the circumstances of each case."[12]

Practitioners should be aware that while force majeure clauses are now commonly found in many forms of contracts, there are typically notice requirements and notice deadlines included in the provisions and the notice requirements may be a condition precedent to seeking relief under the force majeure provision. The force majeure provision may require that notice of the force majeure event be provided to a specific individual within a certain amount of time after the commencement of the force majeure event. Consequently, it is important to review the applicable contract near to the onset of the event in order to determine whether any immediate action must be taken to secure a party's rights.

A basic force majeure clause might state:

> Force Majeure. Any delay in or failure of performance by either party under this Agreement will not be considered a breach of this Agreement and will be excused to the extent caused by any occurrence beyond the reasonable control of such party including, but not limited to, acts of God such as fires, hurricanes, floods, or tornadoes.

In the above example of a residential builder whose performance was delayed by a hurricane and subsequent flooding, a clause like this would likely be outcome determinative. If this provision was included in the residential construction contract between the builder and the homeowner, then the builder's delay in completing the home would be excused to the extent that the delay was caused by the hurricane and subsequent flooding. If a similar provision was not included, then the builder may be exposed to liability, but there is a common law defense that may apply in the absence of a force majeure provision.

The Doctrine of Impossibility of Performance

If a contract does not contain a force majeure clause, all hope is not lost because a breaching party may assert that its failure to perform is excused by the doctrine of impossibility of performance. It should be noted, though, that the "impossibility defense has been referred to by Texas courts as impossibility of performance, commercial impracticability, and frustration of purpose,"[13] but there is no functional distinction between the doctrines.

No matter whether the defense is referred to as impossibility of performance, commercial impracticability, or frustration of purpose, the Texas impossibility defense is based on Section 261 of the Restatement (Second) of Contracts, which provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[14]

Texas has also enacted the Uniform Commercial Code, which contains a similar provision that states:

> Delay in delivery or non-delivery in whole or part by a seller … is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made[.][15]

While there is no definition of the term "impracticable" in the Restatement (Second) of Contracts or the UCC, the restatement does state that the impossibility defense generally applies in three instances: (1) the death or incapacity of a person necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) prevention by governmental regulation.[16]

There are two general types of impossibility: (1) objective and (2) subjective.[17] Objective impossibility relates solely to the nature of the promise.[18] Something is objectively impossible if "the thing cannot be done," such as an inability "to perform the promise to settle [a] claim by entering an agreed judgment in the lawsuit which had been dismissed" prior to the completion of the agreement.[19] Subjective impossibility is due wholly to the inability of the individual promisor.[20] Something is subjectively impossible if "I cannot do it," such as when a promisor's financial inability to pay makes it impossible for the promisor to perform.[21] "Objective impossibility can serve as a defense in a breach of contract suit."[22] However, a party cannot escape contract liability by claiming subjective impossibility; subjective impossibility does not discharge a duty created by a contract.[23]

Finally, in order for a party to assert that its performance was impossible or impracticable, the party must have used "reasonable efforts to surmount the obstacle to performance."[24] The restatement adds that "a performance is impracticable only if it is so in spite of such efforts."[25]

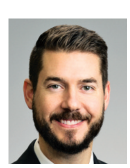
Given the foregoing, what happens to the roofer that contracted to shingle the roof of a house that burns partway through his or her performance? If both the homeowner and the roofer understood that the existence of the roof was necessary for the performance of the roofer's work and the destruction of the roof made the roofer's work impracticable, then the roofer's duty to shingle the roof is discharged so long as the roofer used reasonable efforts to surmount the obstacles to his or her performance.

Conclusion

When presented with a contractual dispute related to a natural disaster like the ones described above, the prudent practitioner should first determine whether the contract at issue contains a force majeure clause. However, even if the contract does not contain a force majeure clause, a breaching party may assert that its failure to perform is excused by the doctrines of impossibility of performance, commercial impracticability, or frustration of purpose, and thereby avoid liability for the alleged breach. **TBJ**

Notes

1. *GT & MC, Inc. v. Texas City Ref., Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Metrocon Constr. Co. v. Gregory Constr. Co.*, 663 S.W.2d 460, 462 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).
2. *Id.*
3. *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 282 (Tex. App.—Amarillo 1998, pet. denied).
4. *Virginia Power Energy Mktg., Inc. and Dominion Resources, Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).
5. *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.).
6. *Hydrocarbon Mgmt., Inc. v. Tracker Exploration Inc.*, 861 S.W.2d 427,435-36 (Tex. App.—Amarillo 1993, no writ).
7. *Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 1987, no writ).
8. *See Sun Operating*, 984 S.W.2d at 283–84.
9. *Cf. Sun Operating*, 984 S.W.2d at 283–84; *see also El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802, 808 (Tex. 2012).
10. *El Paso Field Servs.*, 389 S.W.3d at 808–09 (citations omitted).
11. *Id.* at 808 (citing *Strickland v. Lake*, 357 S.W.2d 383, 384 (Tex. 1962)).
12. *Id.*
13. *Key Energy Services, Inc. v. Eustace*, 290 S.W.3d 332, 339–40 (Tex. App.—Eastland 2009, no pet.) (citing *Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60, 64 n. 6 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).
14. *Tractebel Energy Mktg.*, 118 S.W.3d at 64.
15. Tex. Bus. & Com. Code § 2.615(1).
16. *Tractebel Energy Mktg.*, 118 S.W.3d at 65.
17. *Walston v. Anglo–Dutch Petroleum (Tenge) L.L.C.*, No. 14–07–00959–CV, 2009 WL 2176320, at *6 n. 2 (Tex. App.—Houston [14th Dist.] July 23, 2009, no pet.) (mem. op.); *Janak v. FDIC*, 586 S.W.2d 902, 906–07 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).
18. *See Janak*, 586 S.W.2d at 906–07.
19. *See Grayson v. Grayson Armature Large Motor Div., Inc.*, No. 14–09–00748–CV, 2010 WL 2361432, at *5 (Tex. App.—Houston [14th Dist.] June 15, 2010, pet. denied) (mem.op.).
20. *See id.*
21. *See id.*
22. *Janak*, 586 S.W.2d at 906–07.
23. *See Grayson*, 2010 WL 2361432, at *5; *Walston*, 2009 WL 2176320, at *6 n. 2; *Janak*, 586 S.W.2d at 906–07.
24. *Tractebel Energy Mktg.*, 118 S.W.3d at 68.
25. Restatement (Second) of Contracts, Sections 261, 264 (1981).



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