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AND THEN THERE WERE TWO:

THE NEW AIA A201 VS. CONSENSUSDOCS 200

by Cheri Gatlin and John Lassiter

For almost a century, the American Institute of Architects (AIA) has offered model documents to parties contracting to complete a construction project. The AIA typically updates its documents only once every ten (10) years, giving those in the construction industry and the legal community time to fully assess the practical effect of added or changed terms.

The AIA's collection of form contracts has taken some criticism over the past decade. Most notably, the previous version of the AIA's A201 (1997) saw one of the more substantial modifications in the history of the documents when it featured a mutual waiver of consequential damages. Soon after the 1997 version's publication, the various construction associations became concerned over the uncertainties created by the mutual waiver provisions. Contractors in particular were concerned that they were required to waive all consequential damages for delay while Owners continued to be entitled to liquidated damages—the most common Owner remedy for Contractor-caused delay. As a result, Contractors increased prices due to their inability to plan for Owner-caused delay. Owners were also concerned that they had no remedy for Contractor-caused delay where liquidated damages were not an appropriate option. These uncertainties created by the waiver provisions threatened the most important purpose of clear contractual documents: accurate bids and contract prices that reflect the parties' confidence in the risk assumed.

In time, parties became more and more apt to modify the AIA documents to expand or preserve their interests. Fast forward to recent years, where severe modification of standard-form contracts by Owners and other associations created a "battle of the forms" approach to construction contracting. The proliferation of different modified standard-form contracts has frustrated the construction industry and the lawyers that serve them by defeating the very purposes for standard contracts—a fair balance of the risks associated with a project among the parties, predictability in carrying out the project, and predictability in litigation resulting from the project.

The year 2007 marked the unveiling of the AIA's newest collection of standard-form contracts, as well as the introduction of the widely-anticipated alternative to the AIA's collection of forms—ConsensusDOCS—published by the Associated General Contractors' ("AGC") and the Construction Owners Association of America ("COAA"). ConsensusDOCS is endorsed by more than twenty (20) construction associations. The AIA was conspicuously absent from the ConsensusDOCS drafting table and the endorsement

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And Then There Were Two: The New AIA A201 vs. ConsensusDOCS 200

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list. Similarly, AGC did not participate in drafting the 2007 version of AIA A201, as it had with every AIA version for more than five (5) decades. Needless to say, the lines have been drawn between Architects, Contractors and Owners with regard to these standard-form construction documents.

While opinions once abounded as to whether there was a market for a competing collection of standardized forms, ConsensusDOCS has made headway since its introduction in September. This momentum is due in large part to ConsensusDOCS's policy requiring each association that endorses ConsensusDOCS to discontinue its own standard form. The end result has been a significant reduction in the number of competing forms on the market.

In view of the AIA's tradition and the recent successes of ConsensusDOCS, Owners, Architects, Contractors, and Construction Lawyers should familiarize themselves with the variances between AIA A201 (2007) and ConsensusDOCS 200, and continue to monitor which form is more favorable to a party's specific work within a proposed project. A few of the more common differences between the competing forms are discussed below:

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Waiver of Consequential Damages

AIA A201 (2007) (§ 15.1.6) has kept its complete mutual waiver of consequential damages and continues the AIA's trend of significantly curbing the exposure of Owners to claims for delay damages.

ConsensusDOCS 200 provides only a "limited" waiver of consequential damages, the Owner and Contractor agree to waive the more volatile of consequential damages arising out of the agreement as a default position (6.6). For the Owner: loss of use of the project, any rental expenses incurred, loss of income, profit or financing related to the Project, loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to the project, loss of reputation, or insolvency. For the Contractor: loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to the project, loss of bonding capacity, loss of reputation or insolvency. The door is expressly left open for any and all consequential damages "excluded from [the] waiver as mutually agreed upon by the parties." The primary difference appears to be that the ConsensusDOCS would allow for certain delay damages.

Architects' Role vs. Contractors' Role

Even more so than the 1997 version of AIA A201, the AIA A201 (2007) provides the Architect (as chosen by an Owner) with more authority (§§ 3.12.7, 4.2, 7.4, 9.8, 9.10, *et al*) on the Project while lessening the Architect's potential liability for design errors or omissions (§§ 3.12.4, 3.12.8, 3.12.10, *et al*). In turn, Contractors (§§ 3.12.4, 3.12.8, 3.12.10, *et al*) bear much more responsibility and exposure on the project, including, potential liability for failure to discover non-obvious design flaws, potential liability for failure to maintain on the job-site safety, and exceeding liability in the handling of hazardous waste. Under the AIA, the Contractor and Owner may communicate only through the Architect as the Project unfolds.

Some people say the ConsensusDOCS 200 seeks a more balanced approach to the Owner and Contractor's decision-making, responsibilities and exposure. (2.3, 3.3, 3.15, 4.3, *et al*). Specifically, ConsensusDOCS protects the Contractor in cases of non-obvious design defects, and allows for direct communication between Owner

and Contractor without an intermediary.

Owner's Financial Information

After commencement of the work, AIA A201 (2007) (§ 2.2.1) requires the Contractor to make an affirmative showing of need before the Owner is obligated to provide financial information.

ConsensusDOCS 200 (4.2) requires the Owner to provide the Contractor with evidence of project financing prior to commencement of the project, and at any time thereafter upon written request by the Contractor. Failure to provide evidence of project financing is *per se* grounds for the Contractor to stop work.

Dispute Resolution.

AIA A201 (2007) and ConsensusDOCS 200 differ in resolving deputes related to the Project. The AIA documents no longer require arbitration, and without the pre-project consent of all parties to arbitration, disputes must be litigated in court (§ 15.4.1). Importantly, the AIA precludes the joinder of any third parties without the third party's consent. (§ 15.4.4.2). Under these terms, the Contractor is given the task of instituting two separate proceedings against Owner and Architect.

ConsensusDOCS features an additional "Mitigation" provision which allows for the appointment of a Project Neutral or Dispute Review Board (12.3). The neutral's responsibilities and involvement are subject to the consent of all parties, to include the architect/Owner/Contractor. The neutral will issue non-binding findings of fact within five days of a dispute. While the neutral's decisions are non-binding, its findings of fact may be admissible as evidence in later dispute resolution proceedings—a clear incentive for the parties to act on the suggestions of the Neutral. If a dispute is not resolved in 15 days, the parties must mediate. If still unresolved, the parties submit to binding dispute resolution in the form of arbitration or litigation, whichever was decided during negotiations.

Also, ConsensusDOCS alleviates the need for a Contractor to initiate multiple proceedings against the Owner and Architect (12.6). The Architect's consent takes place on the front end. The applicable provision states that "*all parties necessary to resolve a claim shall* be parties to the same dispute resolution procedure. Appropriate provisions shall be included in all other contracts relating to the Project to provide for the joinder or consolidation of such dispute resolution procedures." (emphasis added).

There are other specific differences between the AIA and ConsensusDOCS (this article does not begin to discuss their variances related to Subcontractors). Their differences are noteworthy, but, in total, these two form-contracts are much more similar than different. This article should be taken as informative, and not as an endorsement of one set of forms over the other. For the foreseeable future, the construction industry has two primary choices in standard-form contracts. As to which form will be more widely purchased and implemented this election year and beyond—"too close to call."

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RECENT CHANGES TO GEORGIA MECHANICS AND MATERIALMEN LIEN LAW

by Zack Rippeon

Georgia mechanics and materialmen lien law, established in the early 1800's to protect the masons and carpenters of coastal Savannah, has experienced significant reform since its inception. What began as an effort to protect the workers of an emerging coastal city and

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Recent Changes to Georgia Mechanics and Materialmen Lien Law

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encourage further development has transformed into a potential procedural quagmire. To prevent project owners from facing the potential of paying twice for the same work Georgia lien law is strictly construed against lien claimants. Contractors, subcontractors and suppliers on private projects must comply with the statutory intricacies in order to protect their lien rights. Senate Bill 374, signed into law May 14, 2008, and becoming effective on March 31, 2009, is an attempt at simplifying and streamlining the lien process. Given that the construction industry is also experiencing the current economic "tightening" it is important that contractors and suppliers understand the new lien provisions to protect their interests.

One of the more common questions of the current law is the time period within which the claim of lien can be filed. Is it 3 months or 90 days, or isn't that the same? SB374 clarifies the allotted timeframe. Beginning March 2009 claimants will have 90 days from the completion of work or the date when materials or services were last furnished to the project to record the claim. Under the new law, an action to recover must now be brought within 365 days of the date of filing the claim, not the current 12 months from the time the claim becomes due (now recognized as the last day of "work"). Revising both timeframes to *days* instead of *months* makes them more consistent, and effectively extends the claimants time to file suit on the claim. Where the 12 month clock begins running under the current law from the last date of work on the project, the new 365 day clock won't start until the claim is filed, perhaps as much as 90 days later.

Additionally, the March 2009 revisions maintain consistency by providing that the claim expires and is void if no action is commenced within 395 *days* from the date the claim is first filed, as opposed to the current 14 month period from the last date of work. Without explicitly stating this 395 days timeframe, and including an additional notice advising the owner of its right to contest, the claim is invalid and cannot be filed.

The March 2009 revisions also contain several changes to the lien filing procedure. Among them is a clarification that the lien claimant send the property owner notice of the claim filing specifically *within 2 business days*, not just "at the time of filing", by registered or certified mail. In addition, lien claimants required to provide a Notice to Contractor (including those not under contract with the general contractor that filed the project's Notice of Commencement) are specifically required to not just "give", but send such notice via certified or registered mail, or approved overnight delivery, to the contractor and owner.

Another significant revision involves changes made to the statutorily prescribed waiver forms. Currently, there is an "Interim Waiver And Release Upon Payment" and an "Unconditional Waiver And Release Upon Final Payment". Beginning in March 2009 there will no longer be an "unconditional" waiver form as the heading has been changed to "Waiver And Release Upon Payment". Under the current "unconditional" form language the waiver of rights is considered to be immediate regardless of whether payment has actually been received. Revised form language "conditions" the final waiver similar to that of the interim waiver, in that payment is now not presumed until 60 days after execution. The current interim form presumes payment within 30 days of execution but the revisions also extend this time period to 60 days.

Senate Bill 374, signed into law May 14, 2008, and becoming effective on March 31, 2009, is an attempt at simplifying and streamlining the lien process.

Waiver form formatting has also been revised. Not only will lien claimants be required to include substantially similar language, but now the statute requires boldface letters of at least 12 point font. It appears that the revisions are intended to ensure that the signors are made conspicuously aware of the rights being waived by execution of the forms. The new forms also add language waiving any rights claimants have against labor and/or material bonds on the project.

Current law allows 30 days after a waiver form has been executed for contractors to file an Affidavit of Nonpayment. The new law will extend that time period to 60 days but maintains the position that failure to file the Affidavit within that time period represents that payment has, in fact, been received. The new statutory affidavit form also includes additional required language stating the claimants obligation to forward a copy of the Affidavit to the owner (and contractor if a Notice of Commencement has been filed) via registered or certified mail, or approved overnight delivery. It is not clear if failure to include this language voids the Affidavit.

This is a brief summary of several of the more significant changes made to the Georgia lien law. For more detailed analysis of your particular situation feel free to contact us.

THE 2007 A201 GENERAL CONDITIONS: A WOLF IN SHEEP'S CLOTHING?

by L. Griffin Tyndall

Every ten years or so, the American Institute of Architects ("AIA") revises one of its most popular form contract documents, the A201 General Conditions of the Contract for Construction. As 2007 came to a close, the AIA issued its latest edition of the A201, containing modifications that have not been very well received by the construction industry. In fact, for the first time in over 50 years, the Associated General Contractors ("AGC") refused to endorse the latest edition of the A201, citing numerous significant although subtle changes that shift more risk to the contractor.

While many of the changes are clerical or grammatical in nature, there are significant substantive modifications from the 1997 edition. Some of the more notable modifications bolster the rights and protections given to the Owner and the design professional. Several of the more significant modifications are addressed below:

Owner's Evidence of Adequate Financing. Under the 1997 edition of the A201, the Owner was obligated to provide evidence to the Contractor that financial arrangements had been made to fulfill the Owner's payment obligations under the contract. Furnishing of such evidence was a condition precedent to commencement or continuation of the Work. *See* Section 2.2.1. Under the 2007 edition, the Contractor still possesses the right to request such information prior to commencement of the Work under Section 2.2.1, but he can only request such information thereafter if (1) the Owner fails to make payment; (2) a change in the Work materially affects the Contract Sum; or (3) the Contractor identifies in writing a "reasonable" concern regarding the Owner's ability to make payment when due.

As 2007 came to a close, the AIA issued its latest edition of the A201, containing modifications that have not been very well received by the construction industry.

Owner's Right to Make Payment Via Joint Checks. The 1997 edition of the A201 did not provide the Owner with any right to make payment jointly to the Contractor and a Subcontractor or material supplier. The 2007 A201, however, gives the

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The 2007 A201 General Conditions: A Wolf in Sheep's Clothing?

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Owner discretion to make payment via joint check. Under new Section 9.5.3, if the Architect withholds certification of an application for payment due to the Contractor's failure to make payments "properly" to a Subcontractor or material supplier, then the Owner may choose to issue a joint check payable to the Contractor and such Subcontractor or material supplier.

Careful review and consultation with your attorney prior to executing a contract that incorporates the 2007 A201 is advised.

Payment by Contractor to Subcontractors. The 1997 A201 provided no time frame within which the Contractor must pay its Subcontractors after receipt of payment from the Owner, which is reasonable considering that such a commercial term is best addressed in the subcontract agreement between the Contractor and the Subcontractor. The 2007 edition, however, obligates the Contractor to make payment to Subcontractors within seven (7) days after receipt of payment from the Owner.

Owner's Right to Evidence of Payment of Subcontractors. Another new right granted to the Owner under the 2007 A201 that did not exist in the 1997 edition is the right to request and receive evidence that the Contractor has properly paid Subcontractors and material suppliers for subcontracted Work. More importantly, if the Contractor fails to furnish such information within seven (7) days, the Owner shall have the right to contact Subcontractors directly to determine whether they have properly paid.

Submittals. While the Contractor's obligation to provide the Architect with a submittal schedule for review and approval remains in the 2007 A201, there is one significant addition. If the Contractor fails to submit a submittal schedule, the Contractor is prohibited from seeking any increase in the Contract Sum or extension of Contract Time associated with delays in the Architect's review of submittals. *See* Section 3.10.2. Furthermore, if there was ever any doubt as to whether the Contractor (as opposed to the Architect) was responsible for ensuring that submittals conform to the design, such doubt has been erased by the revisions to Section 3.12.5 in the 2007 A201, which provides that by submitting submittals to the Architect, the Contractor represents that it has reviewed and approved them.

Other notable changes include:

- *Rejection of Contractor's Superintendent:* The Owner now has the right in new Sections 3.9.2 and 3.9.3 to review and approve the Contractor's proposed superintendent for the Project.

- *Timeliness of Owner Decisions:* Whereas the Owner was previously obligated to take certain actions under the 1997 A201 "in sufficient time to avoid delay in the Work," under the 2007 A201, the Owner is obligated to take such actions "with reasonable promptness." *See, e.g.*, the Owner's obligation to select materials and equipment under allowances at Section 3.8.3.

- *Dispute Resolution:* A new player, the "Initial Decision Maker" (or "IDM"), is introduced in the 2007 A201. Prior to submitting a claim to mediation or arbitration, the IDM must conduct its review and make a decision thereupon. If no specific person is named as IDM, the Architect serves in this role. *See* new Article 15 of the 2007 A201.

As mentioned above, there are many other changes throughout the 2007 A201 that, while subtle, can significantly affect the parties' relative risk under the contract. Careful review and consultation with your attorney prior to executing a contract that incorporates the 2007 A201 is advised.

NEW TENNESSEE RETAINAGE LAWS: EFFECTIVE SINCE JULY 1, 2008

VIOLATORS FACE MISDEMEANOR CHARGES AND FINES

by Jodi M. Dixon

Last year the Tennessee legislature enacted two code sections affecting the process of withholding retainage under construction contracts, as well as mandatory accounting principles required to account for the withheld funds. Tenn. Code Ann. §§ 66-24-103; 66-11-144 (2008). This year the legislature amended those statutes, clarifying certain previously held misconceptions, and imposing a criminal penalty for noncompliance. Briefly stated, under the new laws the maximum retainage that can be withheld for payment on any construction contract is 5% of the contract price. As written, the statute requires that the retained portion of the payment must be held in a separate interest bearing account. The retainage, and all interest accrued on the retained funds, must be released 90 days after completion of the work, *not* completion of the project. Failure to comply will result in the commission of a misdemeanor, and the imposition of a fine that accrues each day of noncompliance. The new laws took effect July 1, 2008. If you have any upcoming jobs in Tennessee, you may wish to contact us so that we can advise you on how to make your retainage and accounting policies compliant.

SPOTLIGHT ON JODI DIXON

Jodi Dixon joined the Atlanta office as an Associate in the Construction practice group in May 2008. Jodi's practice concentrates on defending companies in civil litigation, with a focus in the construction industry. She has experience in every aspect of litigation including jury trial, arbitration, depositions, and settlement negotiations. She also has experience providing coverage opinions to insurance companies analyzing Commercial General Liability, and Director and Office Liability insurance policies.

Jodi was involved in the Atlanta Volunteer Lawyers Foundation in 2006, where she represented victims before the Fulton County Domestic Violence Court in obtaining Protective Orders. She is also a member of the Atlanta Bar Association, Construction section, the Georgia Bar Association, the American Bar Association Construction Forum, and the National Association of Women in Construction.

Jodi received her J.D. in 2006 from Georgia State College of Law. She was on the Georgia State Law Review from 2004-2006, and served as the Symposium Editor for 2005-2006. Jodi received her B.A. in Psychology, magna cum laude, from Agnes Scott College in 2003.

SPOTLIGHT ON DANIELLE J. COLE

Danielle J. Cole joined Burr & Forman LLP in December 2007. Danielle's practice focuses on advising

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and representing general contractors, subcontractors, developers and design professionals through all manner of issues related to the construction process. Her practice activities include drafting, review and negotiation of various contract documents prior to project launch; providing counsel, representation and dispute resolution throughout the course of a project; and representation in complex litigation, mediation, and arbitration proceedings.

Danielle is a member of the National Association of Women in Construction (NAWIC) for which she serves on the Board of Directors for the Atlanta Chapter. She was also appointed to, and serves on, the Board of Directors for the Construction Law Section of the Atlanta Bar Association. In addition to her Board duties, Danielle is a member of the American Bar Association where she is actively involved with the Forum on the Construction Industry. Danielle was also chosen as a "2009 Georgia Rising Star" by *Super Lawyers* Magazine. Among other things, Danielle's work with the Forum includes her participation on the Steering Committee of Division 5 (Contract Negotiation , Performance and Administration) and her involvement in the Working Committee for Division 8 (International Contracting) which includes her position as Co-Chair along with a construction attorney from Mexico City of "The Americas Group" whose purpose is to facilitate communications and the development of relationships between and amongst construction attorneys throughout the Americas and surrounding island nations. Danielle is currently participating as a contributor to a construction law book currently in production by the Young Lawyers Division of the Forum, as well as in the development of a book for construction industry professionals regarding the undertaking of construction projects throughout Latin America.

Danielle received her J.D. in 1994 from Washburn University School of Law and her B.A. in 1991 from the University of Missouri.

BURR & FORMAN EXPANDS TO BETTER SERVE OUR CLIENTS

Burr & Forman LLP is pleased to announce the addition of a Mobile, Alabama office and a Winter Park, Florida office. With these mergers, we welcome the addition of 36 attorneys and look forward to serving our clients throughout the Southeast.

In February 2008, the Mobile-based firm of Bowron, Latta and Wasden, P.C. joined the firm bringing 18 attorneys practicing in the areas of admiralty and maritime, appellate, banking and finance, bankruptcy, business law, commercial transportation, construction, employment, governmental, insurance, litigation, real estate, and subrogation and recovery.

In January 2009, the Winter Park, Florida based firm of Graham, Builder, Jones, Pratt & Marks, LLP joined with Burr & Forman LLP. The Central Florida office brings 18 attorneys to the firm, practicing in the areas of banking and finance, bankruptcy, business law, construction, employment, land use, estates and trusts, litigation, and real estate.

We welcome the following attorneys to the Construction Practice Group: Doug Anderson, Jeff Beaverstock, John Browning, Bill Daniels, Keith Rivers, Thomas Wood, Sam Nelson, Douglas Gartenlaub, Abbye Alexander, Lisa Geiger and Christy Nash.

The opening of the offices in Mobile and Central Florida continues to strengthen Burr & Forman's presence in the Southeast adding to our office locations in Birmingham and Montgomery, Alabama; Atlanta, Georgia; Jackson, Mississippi; and Nashville, Tennessee.

FORCE MAJEURE:

WHAT HAPPENS WHEN THE PARTIES FAIL TO EXPECT THE UNEXPECTED

by Cameron T. Earnhardt

Construction contracts typically require a contractor or subcontractor to diligently perform certain duties pursuant to specific plans and specifications in an express amount of time. Sometimes, however, an event makes performance of the contract impossible or extremely impracticable. Hurricane Katrina was such an event for builders in New Orleans, Louisiana.

In many cases, the construction contract between the parties contains a "force majeure" clause which specifies the types of events that will excuse performance and how that performance will be excused (how long, what notice must be given, etc.). Construction contracts typically specify the events that would qualify as force majeure events. For example, in most force majeure clauses, an act of God, such as a hurricane, qualifies as a force majeure event. On the other hand, contracts often differ on whether a labor strike might qualify as a force majeure event.

Some construction contracts do not contain a force majeure clause. In such an instance, contractors and owners are often surprised to learn that the law does not automatically excuse performance even after that performance has become impossible. This article looks at instances in which performance has been rendered either extremely impracticable or impossible in three jurisdictions—Alabama, Georgia and Mississippi—and how the courts in those jurisdictions handle those situations when the contract between the parties does not contain a force majeure clause.

Alabama

Generally in Alabama, if a contractor undertakes an obligation in a contract, that contractor is expected to perform it even if performance becomes impossible or highly impracticable. The Alabama courts have stated that where one party undertakes an obligation of the contract, he is required to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship.

The Alabama courts have found an exception to this rule. An exception may exist when the performance becomes impossible by law, either because there has been a change in the law or because of an action of government. The standard to meet this exception is fairly high. An illegality created by a change in the law subsequent to entering into a contract may excuse performance but an illegality resulting from an unfavorable exercise of discretion by government officials acting under existing law does not excuse performance.

When events make performance of a contract difficult, Alabama courts will sometimes extend the amount of time that the performing party has to perform. The expanded time for performance must be both reasonable and substantially in accordance with the party's agreed time for performance. For instance, if the original contract gave one party 60 days to perform, the court will not extend the amount of time that party has to perform by several years because a time extension of that nature would not be in substantial accordance with the contract. Additionally, if the contract contains a statement that "time is of the essence" or otherwise makes time material to the contract, the court will not give the performing party additional time.

Georgia

In Georgia, if the contract does not provide otherwise, the courts will excuse performance of a duty if such performance becomes impossible as a result of an act of God. An "act of God" means an accident produced by physical causes which are irresistible or inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. Even though performance of a contract may become

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Force Majeure: What Happens When the Parties Fail to Expect the Unexpected

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impossible as a result of an act of God, an act of God will not excuse the failure to perform if the promisor could have avoided the result by the exercise of ordinary diligence. Similarly, Georgia law will not excuse the promising party's failure to perform if the opposing party offers to remove the factor which makes the performance impossible.

In the construction context, the duties set forth in the contract may dictate when the destruction of the premises makes performance impossible so as to excuse the performance. In a contract for *repair* of a structure, destruction of the premises to be repaired justifies the failure to perform and will allow the contractor to receive payment for the repairs he had performed immediately prior to the destruction. On the other hand, if the contract is for the *construction* of a structure, the law puts the risk of destruction on the contractor. As a result, if the structure is destroyed, the destruction will not excuse the contractor's failure to construct the structure. The owner, then, has no duty to pay for work performed prior to the destruction.

Likewise, when both parties enter into an agreement knowing that performance of a duty will be impossible, the Georgia courts will not enforce the contract.

Mississippi

The Mississippi courts have consistently held that, when a party enters into a contract and promises performance pursuant to that contract, he is obligated to perform even though the duty he has obligated himself to perform becomes extremely burdensome or even impossible. The courts have reasoned that the parties could have put a provision in the contract to deal with impracticability or impossibility and they will not insert this concept into the contract for the parties.

The courts have recognized, however, three traditional exceptions to this general rule. These exceptions will usually excuse performance of a contract because the parties could not have contemplated these events at the time that the parties entered into the contract. First, performance will be excused when a subsequent change in the law occurs so that performance of the contract becomes unlawful. Second, performance will be excused when, through no fault of either party, something essential to the performance of the contract is destroyed. Third, performance will be excused if the contract calls for a specific person to render personal services under the contract and that person dies or develops an incapacitating illness.

In a recent decision, a Mississippi court hinted that, under extreme circumstances, the court might relieve a contractor from its contractual obligations under the doctrine of commercial impossibility. In considering a contractor's claim that the materials called for in the plans and specifications did not exist, the court considered: (1) whether any contractor could comply with the designs and specifications for the project, and (2) the degree of effort exerted by this contractor to comply with the designs and specifications for the project. In short, the court implied that it might excuse a contractor from its obligations if the contractor could establish that no contractor could perform the work according to the required specifications. The court in this case, however, found that the contractor did not meet this burden and rejected the contractor's claim.

Each of these exceptions is fairly narrow. Generally, the courts of Mississippi will not step into a freely negotiated contract and relieve a party of the burdens of a provision which becomes more onerous than it had originally anticipated.

Conclusion

In conclusion, neither party to a contract expects at the outset that an event beyond the control of the parties, such as a hurricane or fire, will prevent the performance of the contract. Both parties should, however, plan for these events from the beginning of the project by including a carefully crafted force majeure clause in the contract.

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