

Saving The Commercial Bail Industry Through A Reliance Upon The Contract Clause: Can It Be Done?

Introduction

Of late, in various states in the Union, the subject of reforming the pre-trial detention of the accused has been broached. The subject has been brought to the forefront after a handful of defendants sought the Court's ear to complain that despite the fact they were solely responsible for their introduction into the criminal justice system, they were deserving of special treatment because of the financial position they occupied.

As I have written previously, bail bonds is the marriage of criminal and civil law.

This article will address the contractual relationships enjoyed between the many parties that participate in the commercial bail industry and whether or not the commercial bail industry can be met with its death without a Constitutional Contract Clause challenge and relieving of contingent liabilities in the form of final forfeiture judgments that may arise from an inducement of breach of the contract enjoyed between the State and bondsman.

Contracts: In General Terms

Contracts, written or oral, negotiated or adhesion in nature, all consist of four ingredients.

The first ingredient is that of an Offer. With the offer there is what has been termed a "meeting of the minds" as to the essential terms of the contract will be. When does the contract start and end? What of value will be exchanged for performance under the contract? What happens in the event of a breach of the contract? Will attorney fees be awarded? Have the parties contracted for the payment of liquidated damages?

Acceptance is the next ingredient and without it, there is no contract. The other party or parties to the contract must agree to the terms of the contract as set forth by the offeror. Should the offeree modify the original offer, a new contract has been formed.

Consideration is the third ingredient and involves the exchange of something of value as a result of performance under the contract. While the exchange of money is the most commonly relied upon form of consideration, consideration can take the form of the transfer of real property or anything else of value.

The fourth and last ingredient required for a contract's existence and enforceability is mutual intent to be bound by the contract. The desire to be bound by the terms of a contract can be written, spoken or through conduct. Obviously, it is the behavior demonstrated by the parties to a contract that best speaks to their intent to be bound to that which they promised to do.

Contracts: As They Relate To The Bail Bond Industry

When examining the contractual relationships that are formed as a result of bail bonds, there are both contracts of adhesion and those that have had their terms negotiated between or among several individuals.

It has been my experience that the only contract of adhesion that exists is between the bondsman and the state in which he or she operates their business. The contract is one considered to be adhesion in character due to the fact that the bondsman was not afforded an opportunity to participate in the negotiation of its terms.

In those states where the commercial bail industry is still recognized, the **offer** to enter into an agreement with the state to secure the release of those awaiting adjudication of their case can be found within the statutes enacted by the various state legislatures. The

statutes address: **1.** how a bondsman undertakes the responsibility of becoming licensed, if required, **2.** how the bondsman may collateralize the bonds that he or she posts on behalf of the defendant and the allowable amount of active liability, **3.** the allowed for percentage of premium that can be charged, **4.** that the bondsman will undertake the responsibility of ensuring the defendant's appearance whenever the defendant is called upon to appear, **5.** how long the bondsman has to cure an induced breach before having to pay liquidated damages equal to the face amount of the bond.

Acceptance of the State's invitation for a bondsman to operate within their jurisdiction is evidenced by the bondsman making application with their local jurisdiction and the deposition of money, encumbering of real property or presenting an instrument from an insurance company demonstrating that the insurance company is underwriting the bondsman's business.

Consideration comes in the form of the creation of a security interest in a bondsman's real property or through the deposition and the earning of interest of a certain amount of money, either determined by statute or by the bondsman. In certain jurisdictions, consideration can also be found in the payment of privilege taxes.

Mutual Intent can best be demonstrated through the performance of both parties to the contract of adhesion. The State demonstrates to the bondsman of their intent to be bound by the terms of the contract by allowing for the continued display of the bondsman's name and phone number within detention facilities. Evidence of the State's intent can also be found by allowing for future deposition of collateral so as to allow a bondsman to continue the obligation of additional liability.

The bondsman demonstrates through their behavior of ensuring the defendant's appearance in court and timely satisfaction of final forfeiture judgments of their intent

to be bound by the terms and conditions of the contract of adhesion that is formed as a result of a review of statutes *in pari materia*.

What happens when the State decides to repudiate the contract enjoyed between itself and the bondsman?

Repudiation amounts to one party to a contract noticing the other parties that they no longer plan on being bound by the terms of the contract.

Should a bondsman repudiate its contract with the State, the State can certainly avail itself of remedies available to it. In the event that final forfeiture judgments remain unsatisfied, the State can first exhaust the liquidation of all collateral pledged and then, if necessary, proceed against the bondsman to cure any deficiency.

Where can the bondsman turn when their ability to conduct their business is frustrated and are still held liable for contingent liabilities? The answer can be found within the Contract Clause of the Constitution of the United States and many, if not all, states within the Union.

Found within Article One, the Contract Clause states:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

In preparing for the penning of this post, I turned to many resources including various Supreme Court Decisions and finally, what I believe to be the authoritative source on Contract Clause interpretation: ***The Contract Clause, A Constitutional History*** by James W. Ely, Jr.

From the sale of slaves to controversies surrounding the building of bridges and railroads, after reading Ely's thorough analysis, it is more than apparent that the Contract Clause enjoys a storied past that goes as far back as when our country was founded.

Just as with any other justiciable issue before the Court, the interpretation of the Constitution and laws varies with the times. The Contract Clause was originally believed to only apply to those contracts entered into between private parties. Later, it was read to also prevent the impairment of contracts deemed public in nature, to which the State is a party.

As made evident by Ely, the import given to the Contract Clause is not what it once was.

Chief Justice Taney, who replaced John Marshall, in a Supreme Court decision stated that

When a contract is made, the Constitution of the United States acts upon it, and declares that it shall not be impaired, and makes it the duty of this Court to carry it into execution.

In *Knox v. Lee* (1871), Justice Field set about to brighten the light contract impairment is illuminated by. He opined that

A law which changes the terms of the contract, either in time or mode of performance, or imposes new conditions, or dispenses with those expressed, or authorizes for its satisfaction something different from provided, is a law which impairs its obligations, for such a law relieves the party from the moral duty of performing the original stipulation of the contract, and prevents its legal enforcement.

It does not appear that the Court set forth a test upon which one could rely to determine whether the Contract Clause had been offended until the *Blaisdell* case made its way to Washington, DC.

That Court recognized the following as being required in order for legislation to not be deemed as impairing private or public contracts.

1. An Emergency Must Exist That Furnishes A Proper Occasion For The Exercise Of The Reserved Power Of The State To Protect The Vital Interests Of The Community.

2. The Legislation Must Be For The Protection Of A Basic Interest Of Society, Not For The Mere Advantage Of Particular Individuals.

3. The Relief Must Be Appropriate To The Character Of The Emergency That Existed

4. The Conditions Of The Legislation Must Be Reasonable

5. The Legislation Must Be Temporary And Limited To The Exigency That Called It Forth.

The Blaisdell test was relied upon by the Court until *Energy Reserves Group v. Kansas Power and Light Company* which was heard during the 1983 term.

The *Energy Reserves Group* Court reduced the test to rely upon to just three considerations that would lead one to the conclusion that a contractual relationship has been molested to the point of impairment.

1. Has a change in state law operated as a substantial impairment of contractual relationship (This inquiry in turn has been subdivided into three components-Is there a contract? Has a change in law impaired that contract? Is the impairment substantial?)
2. If the impairment is substantial, does the law serve a legitimate public purpose, such as remedying a broad social or economic problem?

3. Are the means selected to accomplish this purpose reasonable and appropriate to the public purpose.

The perturbation of the commercial bail industry through the enjoining of various jurisdictions across this country from making use of monetary conditions to ensure a defendant's appearance in court has most definitely satisfied the first prong of the test above.

Bondsman, who have been in the business for any period whatsoever, can estimate the number of bonds they will post during the weekend or during a holiday like the Forth Of July when alcohol consumption is greater than usual. There is a certain expectancy of premium they will earn based upon the average bond amount given for certain offenses. The impairment of the contract of adhesion has led to a loss of business expectancy.

What makes the impairment even more substantial is the fact that the State has failed to provide an adequate remedy for the escaping of contingent liabilities in the event the State no longer wants to recognize the commercial bail industry. The decision to pretermite language that speaks to the bondsman's relief should be read against the State, applying the legal principle of contra proferentum.

The abolition of the commercial bail industry **does not** serve a legitimate public purpose. The inability of a certain class of individuals to escape pre-trial detention does not qualify as a broad social or economic problem. Before the commission of the crime, the individual now complaining was well aware of the financial position they occupied as well as those who they might call upon to assist in their pre-trial release. The fault of the accused's introduction into the criminal justice system rests solely at their feet.

There is in fact a more overriding legitimate public purpose to save the commercial bail industry at all costs. The bail bondsman has a financial incentive to quickly cure any

breach a defendant may induce. This incentive is absent from all other forms of release during the pendency of a defendant's case. Uncured forfeitures result in hundreds of thousands of dollars that can be made use of to pay for essential services and the like, saving this burden from being placed on the shoulders of taxpayers. Police departments can focus their attention on the investigation of new crimes and protection of victims.

The impairment of the contract enjoyed between bondsman and State is not reasonable and appropriate to the public purpose. The impairment is not reasonable due to the fact that the bondsman is without an appropriate remedy for the repudiation of its contract. Instead, the bondsman, without the ability to earn future premium, must resign themselves to an unpalatable and more than likely, unavoidable fate of financial ruin and property disseizement.

Conclusion

Regardless of the test relied upon to determine if the contract of adhesion has been impaired, the answer will be the same.

In closing, I will borrow from the words of Charles A. Beard who opined

Contracts are to be safe, and whoever engages in a financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played.