Absolute Nullities and its Effects

Contracts are absolutely null when formed in violation of prohibitory law. Louisiana Civil Code article 7 provides: "Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity." Louisiana Civil Code article 2030 provides, in pertinent part: "A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral."

Examples of contracts that are entered into in violation of rules of public order, a.k.a. prohibitory law, include contracts entered into in violation of the public bid law. See La. R.S. 9:2220; *Pittman Construction Company, Inc. v. Parish of East Baton Rouge*, 493 So.2d 178 (La.App. 1 Cir. 1986); *Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Authority*, 2004-0211 (La. 3/18/04), 867 So.2d 651; *Hamp's Construction, L.L.C. v. City of New Orleans*, 2005-0489 (La. 2/22/06), 924 So.2d 104. Also, contracts entered into in violation of the contractor's licensing statutes (as well as other professional licensing statutes) are also absolute nullities. La. R.S. 37:2150; *Maroulis v. Entergy Louisiana, LLC*, 2021-00384 (La. 6/8/21), 317 So.3d 316.

Both the public bid law and the contractor's licensing statute are intended to protect the public at large. The public bid law is a prohibitory law founded on public policy, "it was enacted in the interest to the tax paying citizens and has for its purpose the protecting of them against contracts of public officials entered into because of favoritism involving exorbitant and extortionate prices. It was not passed for the benefit of the officials and the entities which they represent." *Boxwell v. Dep't of Highways*, 203 La. 760, 14 So.2d 627 (1943).

Similarly, the contractor's licensing statute explains: "The purpose of the legislature in enacting this Chapter is the protection of the health, safety, and general welfare of all those persons dealing with persons engaged in the contracting vocation, and the affording of such persons of an effective and practical protection against the incompetent, inexperienced, unlawful, and fraudulent acts of contractors with whom they contract. Further, the legislative intent is that the State Licensing Board for Contractors shall monitor construction projects to ensure compliance with the licensure requirements of this Chapter." La. R.S. 37:2150. See *Hagberg v. John Bailey Contractor*, 435 So.2d 580 (La.App. 3 Cir. 1983).[1]

The causes of nullity arising in connection with public works contracts are not in dispute. The law is well settled that the violation of these prohibitory laws creates contracts that are absolutely null and void. In some cases, there are other provisions

[1] Other causes arising from prohibitory law exist including such issues as failure of a public entity to allocate funds for public contracts, but that is for an entire program.

scattered throughout the Louisiana Revised Statutes such as La. R.S. 9:2771, Design Sufficiency Law, La. R.S. 9:2780.1, Anti-Indemnity Statute, or La. R.S. 38:2216H, prohibiting no damage for delay clauses on public contracts, which provide for the *unenforceability* of particular clauses in construction contracts.

On the other hand, recent cases have raised issues with the proper scope and application of the law concerning the *effects of nullity*.

In Louisiana, law is defined as legislation and custom.[2] Any discussion of the law in Louisiana begins with the appropriate provisions of the Louisiana Civil Code.[3] Nullity and its effects were codified by the legislature in Articles 2029 – 2035. Enacted in 1984, these provisions were passed as part of an overall revision of the Civil Code on obligations generally. These provisions are broad and intended to be durable in their application, not limited solely to contracts, but to many other juridical acts.

The comments to the Code indicate these articles were not intended to change the law rather to clarify it. See *Rethinking the Doctrine of Nullity* ,74 La. L. Rev. 663, Spring 2014. We have enclosed as an attachment the articles of the Civil Code along with the comments to each of the Code articles. The language of the Code is the starting point to understand the proper scope and application of those laws to varied facts and circumstances giving rise to absolute nullities.

In general terms, an absolutely null contract may not be confirmed (meaning that nullity may not be waved or forgiven); it never prescribes[4]; it can be raised by any person or by the court on its own motion;[5] and it can be raised even when a party knew or should have known of the cause that gives rise to nullity.[6]

Louisiana Civil Code article 2033 explains that nullity means the contract is deemed never to have existed:

> An *absolutely null contract*, or a relatively null contract that has been declared null by the court, **is deemed never to have existed**. *The parties must be restored to the situation that existed before the contract was made. If it is* ***impossible or impracticable*** *to make restoration in kind, it may be made through an award of damages.*
>
> *Nevertheless, a performance rendered under a contract that is absolutely null because its object or its*

[2] La. C.C. art. 1.
[3] A discussion of the impact of case law is for another day and time.
[4] La. C.C. art. 2032.
[5] La. C.C. art. 2030.
[6] La. C.C. art. 2033.

> *cause is illicit or immoral* *may not be recovered by a party who knew or should have known of the defect* *that makes the contract null.* The performance **may be recovered**, however, **when that party invokes the nullity to withdraw from the contract before its purpose is achieved** and also in **exceptional situations when, in the discretion of the court, that recovery would further the interest of justice**.
>
> ***Absolute nullity may be raised as a defense even by a party who, at the time the contract was made, knew or should have known of the defect that makes the contract null.*** (Emphasis added.)

Before turning to the language of that article, let me say that the "effects" of nullity codified in Articles 2029 - 2035 are not meant to be the exclusive remedies or effects to be given to or arise from absolutely null contracts. Specific statutes that prohibit conduct such as contracting which violates public bidding or licensing statutes may also impose other penalties, whether civil or criminal; vest jurisdiction in both boards and courts for redress; and in some cases, impose limits to protect certain vulnerable parties upon whom the legislature finds that imposing the harsh effects of nullity to be unjust.

The Louisiana Supreme Court has consistently held that in the absence of any other remedy including where contracts are found to be unenforceable because null and void, the courts are to protect parties from *unjust enrichment*. See *Boxwell v. Dep't of Highways*, 203 La. 760, 14 So.2d 627 (1943) and *Hagberg v. John Bailey Contractor*, 435 So.2d 580 (La.App. 3 Cir. 1983). The Louisiana Supreme Court in *Boxwell* found that even though the contract was in violation of prohibitory law, there was "no fraud on part of either of the parties" and furthermore, both parties were "equally guilty in failing to respect the mandate of the statute and that in fact rendered the contract absolutely null and void." Further, the materials were "received and accepted by the Highway Department", and they were "used for the benefit of the people represented by the Highway Department."[7]

The Court in *Boxwell* goes on to reason:

> Under these circumstances it could clearly be unjust to remit the commission to reap the mentioned benefits and escape liability for them altogether. There is embedded deeply in our civil law the maxim that no one ought to enrich himself at the expense of another. Revised Civil Code, Article 1965 (which today is La C.C. art 2298). On the other hand, considering the laws expressed prohibition

[7] Boxwell v. Dep't of Highways, 14 So.2d 627, 772-775.

> for making the [contract] in the manner shown it would also be improper for the vendor to profit by the transactions.
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> Equity would favor, we think, the placing of the parties in the positions that they occupied prior to carrying out their engagements or in other words in status quo; but of course, this is impossible because the materials haven't been used. The only alternative is to compel payment by the vendee, or a successor, of an amount that represents the materials actual cost to the vendor, without allowing any profit on or expenses connected with the sales. (Emphasis added.)

The Court endorsed the concept of restoration in kind, but clearly made the observation that it is ***impossible*** in cases where the materials have been incorporated into work to do so.

The Court also distinguished between contracts that were *malum in se* and *malum prohibitum*. The Court, quoting from 443 American Juris Prudence (Verbo Public Works and Contracts), Section 97 stated:

> …it is well established that under a contract that is invalid, but not fraudulent or malum in se, pursuant to which the contractor has furnished to municipality or other political subdivision property, whether enhanced by its own labor or not, which the public fails to pay for, he may upon equitable terms recover in its species, if recovery may be had without material injury to other property and without causing the public any inconvenience other than results form depriving it of that to which it has no just claim, and in some instances contractors have, in addition to the recovery of the property itself been allowed to recover the reasonable value of its use while in the possession of the public. ***) When the materials cannot be restored in kind, as in ***, there seems to be no good reason why the method furnished by the above stated alternative should not be followed.

In *Hagberg*, concerning the contractor's licensing law, the court, citing *Boxwell* and *Manard v. Curtis Products, Inc.,* 251 La. 624, 205 So.2d 422 (La. 1967), found five factors necessary to support a claim for unjust enrichment:

> …1. There must be an enrichment, 2. There must be an impoverishment, 3. There must be a connection between

> the enrichment and the resulting impoverishment, 4. There must be an absence of justification or cause for the enrichment and impoverishment, and finally 5. The action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature.

The court goes on to explain that the fourth element, the absence of justification or cause, is also to be considered in light of the licensing rules and what those rules are intended to prohibit. The court said:

> [F]or us to mechanically apply the general rule will result in inequity. *If Hagberg had fraudulently obtained the contract, if he had been inexperienced at the work he performed, or if his work had been substandard our decision would be otherwise; but such is not the case* *** it would, therefore, *be unconscionable* to permit Bailey to deny payment to Hagberg because Hagberg did not have a valid Louisiana contractor's license when it was Bailey who had the correlative responsibility of confirming that Hagberg was a licensed subcontractor. This is especially unconscionable where Bailey has relied upon the work performed by Hagberg to secure payment for the job from Lake Arthur, and where Bailey did not raise the licensing issue until fifteen months after Hagberg had commenced work. (Emphasis added.)

The recovery of actual costs without overhead and profit is the standard to be applied in the appropriate cases under these factors. Louisiana case law today is still grappling with circumstances that arise and how best to apply these principles to new and unique fact patterns. In as much as this is heavily fact intensive, the case law will vary because of, among other things, the rule that prohibits courts from substituting their own judgement for the credibility determinations and the findings of facts of the lower courts. It is only for *manifest error* or when the findings of fact are clearly wrong that the court of appeals can reverse the factual determinations of the lower courts.

Moreover, it is also terribly important to understand the significance of the procedural context in which rulings are handed down and the extent to which those carry weight in future cases. Appellate decisions or decisions by the Louisiana Supreme Court after a full trial on the merits may carry substantially more weight than opinions that are imbued with procedural limitations such as rulings on summary judgment where the court denies the summary judgement requested.

Three recent cases were decided which have, as a common thread, the fact that in all three cases the parties knew or should have known of the impediment that gave rise to the nullity and the work was substantially completed but disputes arose concerning sums due or other matters flowing from the application of the aforementioned principles to those cases.[8] The courts balance the need for equity against the need to do justice and avoid a party raising their own turpitude or fault as the basis for obtaining a benefit.

In *Quaternary Resource Investigations, LLC v. Phillips*, 2018-1543 (La.App. 1 Cir. 11/19/20), 316 So.3d 448 and *Robinson v. Wayne and Beverly Papania and Pyrenees Investments, LLC*, 2022-1010 (La.App. 1 Cir. 3/6/23), ___ So.3d. ___ (2023 WL 2361125), the First Circuit dealt with the effects of contracts held to be absolute nullities because of violations of the contractor's licensing law. In both cases, the Court found that the owners knew of the violation but allowed the work to proceed to substantial completion. In both cases, the Court declined to return to the owner the payment or performance made by the owner to the contractor. The Court in *Quaternary Resource Investigations* ("*QRI*") found deficiencies in the work by the contractor and denied the contractor recovery for unjust enrichment, however, the Court also granted to the homeowner damages for the defective work performed. The First Circuit has held the New Home Warranty Act to be inapplicable in such cases. In *QRI* where the contractor attempted to use it to shield the contractor from liability because of the lack of the required notice, the Court of Appeal found that in order to apply the New Home Warranty Act they must first find that there was a valid enforceable contract which of course is absent where the contract is ruled to be absolutely null and void *ab initio*.

Also, the contractor in *QRI* reasoned that applying unjust enrichment in the absence of a valid enforceable contract could mean that his recovery would exceed the amount of the contract sum which had been agreed to. In that case, the trial court agreed and applied the Interest of Justice Exception in the second paragraph on La. C.C. art. 2033 to allow recovery over and above the contract amount to the contractor because the contractor had established that his actual costs were over $389,000.00 even though the contract to do the work was for about $232,000.00. Thereby, the contractor would have benefitted from the nullification of its contract. However, the Court of Appeal disagreed and since the contractor had done defective work, the Court would not allow any further recovery to the contractor and reversed the ruling of the trial court. Moreover, reversing the award in favor of the contractor, the opinion turns the tide and finds that the owner is entitled to recover from the contractor for defective work.

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[8] *Robinson v. Wayne and Beverly Papania and Pyrenees Investments, LLC*, 2022-1010 (La.App. 1 Cir. 3/6/23), ___ So.3d. ___ (2023 WL 2361125); *Quaternary Resource Investigations, LLC v. Phillips*, 2018-1543 (La.App. 1 Cir. 11/19/20), 316 So.3d 448; and *Maroulis v. Entergy Louisiana, LLC*, 2021-00384 (La. 6/8/21), 317 So.3d 316.

Similarly, the court in *Robinson v. Wayne and Beverly Papania and Pyrenees Investments, LLC*, 2022-1010 (La.App. 1 Cir. 3/6/23), ___ So.3d. ___ (2023 WL 2361125) refused to allow any recovery to the owner, finding the owner knew about the lack of a license held by the contracting entity (even though the license was held by the principle owner of the contracting entity in his personal name only) but denied the owner any recovery for completion costs. The owner had refused to allow the contractor to address deficiencies and completion of the work despite achieving substantial completion of the work and moreover, had attempted to micro-manage the work thereby interfering with the contractor. The court did not, in that situation, apply unjust enrichment to allow any recovery by the owner nor allow the owner to recover for any claimed defective work or completion costs.

In a somewhat similar case, but under different facts and procedural posture, the Louisiana Supreme Court in *Maroulis v. Entergy Louisiana, LLC*, 2021-00384 (La. 6/8/21), 317 So.3d 316 considered a circumstance where the illegal contract had been fully performed and payment had been fully made however, because an employee of a subcontractor was seeking recovery against the owner for his injuries, the owner filed a third-party demand against the contractor seeking indemnity for that claim. The indemnity was included as a term of the contract which the owner and the contractor had already performed but was held to be null and void and thus unenforceable.

The trial court, despite the unenforceability of the contract, denied the motion for summary judgment in favor of the contractor who was seeking to be dismissed from the indemnity claim. The Fifth Circuit Court of Appeals on the other hand applied the rule of non-enforcibility and reversed, finding that the contractor was entitled to summary judgment dismissal. However, the Louisiana Supreme Court reversed the Court of Appeals and reinstated the trial court judgement. In the *per curium* opinion (one not signed by any of the judges of the court) in a very terse one-page decision, the court purported to apply the clean hands doctrine, which is said to be contained in the second paragraph and the comments to La. C.C. art. 2033. The court held that the contractor is not entitled to raise his own turpitude to deny the owner's claim of indemnity. The court reasoned:

> Further, 1984 Revision Comment (c) to La. C.C. art. 2033 states: "[A] party who knew or should have known at the time of contracting of a defect that made the contract absolutely null may not avail himself of the nullity when the purpose of the illegal contract has been accomplished. ... This conclusion flows naturally from the principle expressed in the traditional Roman maxim, nemo propriam turpitudinem allegare potest (no one may invoke his own

> turpitude), sometimes called the 'clean hands' doctrine. (Emphasis added.)[9]

However, the Supreme Court in restoring the ruling of the trial court which denied summary judgement in favor of the contractor allowed the owner's claim to continue to trial. The denial of summary judgement is not in and of itself a ruling on the law applicable or a commentary on the facts. That procedural posture merely sends the matter back to the trial court for further consideration and leaves open the possibility of the application of the principles of unclean hands and unjust enrichment for the trial court to determine after a trial of the merits. As such, the Court appears to implicitly accept the principle or concept of contractual indemnity based upon unjust enrichment and in doing so, by applying the comments, suggests the possibility of relief beyond the language of the Civil Code itself. A few rulings of the Supreme Court have previously established the principle of implied contractual indemnity based upon unjust enrichment. The right of the owner to proceed against the contractor would have been foreclosed had the Court granted the summary judgement by upholding the Court of Appeal's ruling.[10]

Thus, in *Maroulis*, the procedural posture of the case is very important to understand how that decision could be applied going forward. It is not necessarily a commentary on the Clean Hands Doctrine as much as it is a practical recognition that there is the potential for other relief in favor of the owner which could be foreclosed by any other ruling.[11] Nevertheless, the Louisiana Supreme Court appears to maintain a consistent line of reasoning through the cases that it has considered the effects of nullity and that is to balance equity against justice as explained by the Court in *Boxwell* and other such matters, see also *Baker v. Maclay Properties Co.*, 94-1529 (La. 1/17/95), 648 So.2d 888 (*Baker* also contains an excellent summary of the distinction between *quantum meruit* in Louisiana and *quantum meruit* in common law, which concepts are distinctly different). Thus, the Louisiana Supreme Court appears settled in its reasoning to preclude unjust enrichment, apply the purpose and policy of the law that causes a contract to be absolutely null and void, but also to not allow a party to unjustly raise their own turpitude for their own profit or gain. In striking the right balance in any given case, the courts of Louisiana may well differ depending on the facts and circumstances of each unique case. In any event, when the contract entered into is found to be null and void *ab initio*, the party has a hard road ahead and should not expect recovery for profit and overhead to be part of any damage award.

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[9] *Maroulis v. Entergy Louisiana, LLC*, 2021-00384 (La. 6/8/21), 317 So.3d 316.

[10] See *Clean Hands Doctrine Prevents Contractor from Asserting Its Contract with the Owner was Void Because of the Contractor's Unlicensed Status*, 42 No. 12 Construction Litigation Reporter NL 4 (Dec. 2021).

[11] See *Palowsky v. Cork*, 21-435 (La.App. 5 Cir. 3/16/22), 337 So.3d 550.

Moreover, whether a party knew or should have known of the nullity has nothing to do with whether that party has the right to raise absolute nullity at any time. The question becomes what effects flow depending on the facts and circumstances of the case.

What about surety bonds? Surety bonds are often made a part of the public contract such as on DOTD projects where the surety bond is literally included as one of the items that form the contract documents. Further, surety bonds like other forms of security are generally considered an accessory contract. As such, if the principal obligation, the construction contract, is nullified, then so too would be the bond(s). Recent case law holds that in order to file a claim under the private works act, there must be a valid and enforceable contract. *Ilgen Construction, LLC v. Raw Materials, LLC*, 2020-0862 (La.App. 1 Cir. 4/16/21), __ So.3d ___ (2021 WL 1438726); *Leija v. Gathright*, 51,049 (La.App. 2 Cir. 12/21/16), 211 So.3d 592). However, in prior case law the award of damages for substandard work was rendered against both the contractor and its surety, but the issue of the extent of the surety's liability was not specifically raised by the parties in that case. See *Hagberg v. John Bailey Contractor*, 435 So.2d 580 (La.App. 3 Cir. 1983).[12]

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[12] For a scholarly discussion of nullity, see *Rethinking the Doctrine of Nullity*, Ron Scalise, 74 La. L. Rev. 663.

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