

Economic Duress: A Poor Excuse for Non-Performance

George M. Walker and Robert S. Walker***

In commercial litigation it is often the case that a party has failed to meet or comply with some contractual requirement, causing the party serious annoyance or inconvenience in the litigation. In order to avoid the breach of contract or promise and the consequences of such breach to the rights and remedies available in the litigation, the breaching party sometimes invokes economic duress as a defense to the claim of breach of contract or other contention based on non-performance. While economic duress can be pled in an effort to avoid the requirements of any contract, it is most often invoked in efforts to avoid the effects of releases, arbitration agreements, loan and loan modification agreements, and employment agreements. Over the course of the defense's existence in Alabama, economic duress has been frequently invoked but only rarely found to be available as an excuse for non-performance. The cases analyzing invocations of economic duress point out why.

The Definition of Economic Duress

Economic duress has been described as “[a]n unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will.” *Black’s Law Dictionary*, p. 543 (8th ed. 2004). It has been similarly defined in the *Restatement (Second) of Contracts*, §175(1) (1979): “If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”

The Development of the Economic Duress Defense in Alabama

The concept of economic duress as a defense to a contract claim has been recognized in Alabama since as early as 1834. *See Hatter’s Ex’ors v. Greenlee*, 1 Port. 222, 225, 26 Am. Dec. 370 (Ala. 1834) (If a warrant of arrest is obtained by false pretenses, any act produced by the

arrest warrant will be void). While there were a few cases addressing economic duress over the following 150 years,¹ the real development of the law of economic duress in Alabama began in earnest in the 1980s.

In *Ralls v. First Fed. Sav. & Loan Ass'n of Andalusia*, 422 So. 2d 764 (Ala. 1982), the Court recognized economic duress as a valid defense to the bank's argument that it was entitled to 12% interest on a \$600,000 loan that it had initially committed to make with a 10% interest rate. Interest rates rose between the date the commitment was signed and the date that plaintiff was ready for the funds, and when the loan was provided a year later, it was at the 12% rate. *Id.* at 765-766. Ralls signed the loan agreement with the 12% interest rate in it because he had substantial financial commitments that he could meet only by obtaining the loan. The bank later contended the loan agreement was an accord and satisfaction, but Ralls argued that he signed the loan agreement under economic duress and was entitled to the 10% rate. The trial court directed a verdict for the bank, but the Supreme Court reversed, finding that economic duress could be invoked to avoid a defense of accord and satisfaction as well as to entirely vitiate a contract. *Id.* at 766. There was evidence from which the jury could have concluded that a bank representative misled Mr. Ralls about the availability of an extension of the commitment with the 10% interest rate, and there was also evidence that Mr. Ralls in reliance thereon committed himself financially to the point where he had no choice but to accept the loan at the higher rate to complete his project. The Court therefore concluded that there was a jury question presented as to economic duress requiring remand to the trial court. *Id.*

The first occasion the Alabama Supreme Court had to flesh out the elements of the economic duress defense was in *International Paper Company v. Whilden*, 469 So. 2d 560 (Ala. 1985). International Paper had entered into a series of contracts with Whilden for the cutting and

hauling of timber on a certain tract of land owned by the Loftin family. Only certain specifically marked trees were to be cut, but it developed that unmarked trees on the Loftin tract had also been cut. At the conclusion of the cutting, International Paper owed Whilden approximately \$7,000, but it refused to pay him the money unless he would, in return, execute a blanket indemnity agreement holding International Paper harmless against any claim made by the Loftins for the cutting of the unmarked trees. *Id.* at 561-562. Whilden signed the agreement after being told by International Paper that only about 30 unmarked trees had been cut (in fact the number was over 650), and he signed it because he needed the money to pay back a bank loan he had obtained to purchase logs from International Paper in a separate agreement. *Id.* at 562.

After International Paper was held liable to the Loftins for damages due to the cutting of the unmarked trees, it pursued a third-party claim against Whilden based upon the indemnity agreement. The trial court entered judgment for Whilden, concluding that he had executed the indemnity agreement under economic duress and that the agreement was therefore not enforceable. *Id.* The Supreme Court affirmed this judgment, concluding that “The trial court could reasonably have found that International Paper took unfair advantage of Whilden’s economic necessities to coerce him into making the agreement.” *Id.* at 564.

In its decision, the Court referred to a three-element *prima facie* case for economic duress:

In general, many courts have found that three essential elements, or a variation thereof, are necessary to a *prima facie* case of economic duress: (1) wrongful acts or threats; (2) financial distress caused by the wrongful acts or threats; (3) the absence of any reasonable alternative to the terms presented by the wrongdoer.

Id. at 562 (citing *Sonnleitner v. Comm’r*, 598 F.2d 464 (5th Cir. 1979)). Subsequent decisions have made clear that these are the elements for a *prima facie* claim of economic duress in Alabama. See *Penick v. Most Worshipful Prince Hall Grand Lodge F&AM of Alabama, Inc.*, 46

So. 2d 416, 431 (Ala. 2010); *Wright Therapy Equip., LLC v. Blue Cross and Blue Shield of Alabama*, 991 So. 2d 701, 707 (Ala. 2008); *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564, 567 (Ala. 1992).

While the economic duress defense is alive and well and recognized in Alabama by the appellate courts, there are difficulties of proof in the elements of the *prima facie* case that make it a very difficult defense to establish and to get past a summary judgment motion or motion for judgment as a matter of law. An examination of each of the elements, and the evidence required to meet each of the elements, demonstrates the extent of the difficulty in establishing economic duress as a legitimate excuse for non-performance.

A. Wrongful Acts

The *Whilden* Court had much to say about what constitutes a wrongful act sufficient to invoke the economic duress defense. First, quoting from the *Ralls* decision, which in turn quoted from 17 C.J.S. *Contracts* §177 (1963), the court stated that economic duress:

“applies only to special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract, as where extortive measures are employed, or improper or unjustified demands are made, under such circumstances that the victim has little choice but to accede thereto.”

469 So. 2d at 563. The Court appears to have intended to adopt the defense for only the most serious cases of misconduct.

Second, the Court emphasized that it is the conduct of the wrongdoer that must be the focus of the fact finder: “Tantamount to a claim of economic duress is the wrongful pressure exerted by one party which overcomes the will of another.” *Id.* at 563. Lest there be some confusion about the true nature or scope of the wrongdoing that would support invocation of economic duress as an excuse for non-performance, the Court quoted with approval language from an Alabama Court of Civil Appeals decision describing the wrongful act requirement:

‘It is said that economic duress must be based on conduct of the opposite party and not merely on the necessities of the purported victim. The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating the contract. Unless unlawful or unconscionable pressure is applied by the other party to induce the entering into a contract, there is not economic compulsion amounting to duress. *Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978).’

469 So. 2d at 573 (quoting from *Board of School Commissioners of Mobile County v. Wright*, 443 So. 2d 35, 38-39 (Ala. Civ. App.), rev’d on other grounds, 443 So. 2d 40 (Ala. 1983)). Accordingly, a “wrongful act” for economic duress purposes requires employment of unlawful or unconscionable pressure by a party to coerce the execution of a contract.

In modern times (since 1982), the Supreme Court of Alabama has found evidence of wrongful acts sufficient to create a jury issue on an economic duress defense in only three cases. In *Ralls, supra*, the Court concluded that a jury could conclude that plaintiff was a victim of economic duress based on the bank’s conduct in forcing him to accept the loan with a 12% interest rate after committing to loan the money at a 10% interest rate. *Ralls*, 422 So. 2d at 766. In *Whilden*, the court concluded that International Paper’s refusal to pay Mr. Whilden for the timber he cut unless he signed an indemnity agreement protecting the company amounted to a wrongful act. *Whilden*, 469 So. 2d at 563-64. And in *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849, 851 (Ala. 1995), the court held that a jury question existed relative to economic duress where the defendant truck dealer would not return plaintiffs’ truck to them after making repairs until they signed a general release of all claims they had against the defendant. *Id.* at 852. From these decisions, it is clear that a “wrongful act” consists of some act or conduct on the part of one party that it has no right to do that is intended to coerce, and does coerce, the other party to sign a document that he or she would not have signed but for the improper coercion.

The Alabama appellate courts have since the *Whilden* decision been far more active in identifying what is not a wrongful act for economic duress purposes than in describing or defining what is a wrongful act. In *Choksi v. Shah*, 8 So. 3d 288 (Ala. 2008), the Court held that instituting or threatening to institute civil suits or other court proceedings is not duress:

“[I]t is the well-settled general rule that it is not duress to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. *It is never duress to do that which a party has a legal right to do*, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud such as will avoid liability on a compromise settlement.”

Id. at 293-94 (emphasis added) (quoting *Neuberger v. Preferred Acc. Ins. Co. of New York*, 18 Ala. App. 72, 74, 89 So. 90, 92 (1921)). A party claiming economic duress based on threatened litigation will have difficulty overcoming the *Choksi* decision.

In *Wright Therapy, supra*, the Court found that an overbilling repayment agreement between Blue Cross and a medical equipment provider was not the product of a wrongful act such as to permit the agreement to be avoided based upon economic duress. The Court rejected plaintiffs’ argument that Blue Cross’ withholding of amounts necessary to recoup its overpayments was a wrongful act, since there was no allegation that Blue Cross was not entitled to do so under the contract between the parties. *Wright Therapy*, 991 So. 2d at 707. In addition, the Court found it significant that the 2004 agreement was a negotiated resolution of a business dispute:

[I]t appears that the 2004 repayment agreement was the result of a good-faith negotiation between the parties in compromise of a disputed debt. . . . The fact that Blue Cross may have had greater bargaining power than did Wright Therapy or that Wright Therapy may have executed the agreement out of financial necessity does not alone amount to economic duress.

Id. at 707-08. The fact that a claimed victim of economic duress had the benefit of legal advice makes it very difficult to make a persuasive economic duress argument. *See Wilson v. Southern Medical Association*, 547 So. 2d 510, 513 (Ala. 1989) (rejecting invocation of the economic duress defense where plaintiff acted on advice of legal counsel); *Anderson v. Amberson*, 905 So. 2d 811, 814 (Ala. Civ. App. 2004) (economic duress defense rejected where plaintiff's own attorney drafted and negotiated the release sought to be avoided).

In *Bama's Best Housing, Inc. v. Hodges*, 847 So. 2d 300 (Ala. 2000), plaintiff contended that an arbitration agreement he executed was signed under economic duress because defendants had delivered a mobile home he had agreed to buy but refused to set it up until he signed the arbitration agreement. *Id.* at 301-02. Since plaintiff had not made a down payment on the mobile home that he would forfeit if he failed to sign the arbitration agreement, the court concluded that he had not offered sufficient evidence to create a material factual dispute relative to his economic duress defense. *Id.* at 303-04. While the Court did not clearly say so, this decision establishes that economic duress cannot be established unless the claimed wrongful act caused financial distress to the claimed victim.

In *Ponder v. Lincoln Nat'l. Sales Corp.*, 612 So. 2d 1169 (Ala. 1992), the Court affirmed dismissal of a Complaint seeking an affirmative recovery based on a claim of economic duress predicated upon the refusal of a holder of a renewal option on a lease to exercise the option at the option price. The holder instead negotiated a lower, more favorable, rate. *Id.* at 1170. The Court noted that "merely taking advantage of another's financial difficulty is not duress," and affirmed the dismissal because the allegations of the Complaint "suggest nothing more than that the modification of the lease agreement occurred by mutual agreement of sophisticated parties engaged in an ordinary commercial real estate transaction." *Id.* 1171. The Court has to date

rejected invitations to adopt economic duress as a substantive tort, leaving it to be invoked only as an affirmative defense. See *Cahaba Seafood, Inc. v. Central Bank of the South*, 567 So.2d 1304, 1306 (Ala. 1990); *Guillot v. Beltone Electronics Corp. of Chicago*, 540 So. 2d 648, 650 (Ala. 1988).

In *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564 (Ala. 1992), Clark sought to avoid the terms of his agent agreement with Liberty National because it contained a non-compete agreement that he conceded he had violated after terminating his relationship with Liberty National. *Id.* at 565. The court rejected this invocation of the economic duress defense, stating:

The fact that Liberty National required Clark to sign the new contract in order to continue his employment at Liberty National does not amount to economic duress. Liberty National did not apply any unlawful or unconscionable pressure to force Clark to sign the contract.

Id. at 567. The Court also could have noted that Liberty National did not take advantage of any financial distress into which it had placed Mr. Clark in order to coerce him to sign the contract.

In *Rose v. Delaney*, 576 So. 2d 232 (Ala. 1991), the court rejected defendant's argument that an indemnity agreement could not be enforced against him because defendant "took advantage of the fact that he was unemployed and had no money, to coerce him to enter into the indemnity agreement." *Id.* at 233-34. The evidence was to the contrary, and the court affirmed the judgment against defendant.

In *Wilson, supra*, plaintiff sought to avoid the terms of a resignation letter he had written, contending that he was coerced to sign it by his employer's threat to forestall and withhold payments of funds from an escrow account if he did not sign it. *Id.* at 513. Noting the statement in *Whilden* that "mere withholding of payment of a debt, without more, is insufficient to constitute economic duress," 469 So. 2d at 563, and noting that Wilson acted on advice of

counsel in accepting the terms of the resignation letter, the Court affirmed summary judgment enforcing the terms of the resignation letter. 547 So. 2d at 513.

These decisions make clear the difficulty in establishing the first element of a sustainable defense of economic duress. There must be a “special, unusual, or extraordinary situation[],” and there must have been “unjustified coercion,” or “extortive measures, “ or “unlawful or unconscionable pressure” employed to induce the execution of the challenged contract before the wrongful act element is established. It is a very rare occasion indeed when a signature on a contract is obtained under such circumstances.

B. Financial Distress

In *Ralls*, the financial distress was the debt incurred by Mr. Ralls in reliance upon the bank’s promise to loan him \$600,000 at 10% interest. In *Whilden*, it was Mr. Whilden’s inability to pay back his bank loan if he was not paid the \$7,000 that International Paper owed him. In *Newburn*, it was the risk that the Newburns would breach delivery contracts if they could not get their truck back from defendant. In each of those cases, the parties seeking to avoid the contract had signed the contract under financial distress caused by the misconduct of the party who later sought to enforce the contract.

While there does not yet appear to be an Alabama appellate court decision rejecting invocation of the economic duress defense solely on the basis of the failure to establish this second element of the defense, a few of the decisions referenced above provide some guidance. In *Bama’s Best Housing, Inc.*, the court rejected defendant’s invocation of the economic duress defense seemingly upon the basis that, because he had not made a down payment or other payment for the mobile home that plaintiff initially refused to install, he was not in financial distress caused by the plaintiff at the time he executed the arbitration agreement that he later

sought to avoid. *Bama's Best Housing, Inc.*, 847 So. 2d at 304. In *Ponder*, the court rejected invocation of the economic duress defense and stated specifically that "taking advantage of another's financial difficulty is not duress." *Ponder*, 612 So. 2d at 1169. Finally, in *Rose*, the court rejected defendant's contention that he was the victim of economic duress based on the fact that he was unemployed and had no money, presumably because there was no evidence that plaintiff had committed some wrongful act that caused him to be unemployed and have no money. *Rose*, 576 So. 2d at 233-34.

Perhaps there will be further development of this issue in future decisions. For now, it appears very clear that a party invoking economic duress as a defense will be able to establish the second element of the defense only by showing that he or she signed the challenged contract as a result of some existing financial distress that the offending party both wrongfully created and took advantage of. It is certainly not enough simply to demonstrate a party's own "exigent financial circumstances." See *Haston v. Crowson*, 808 So. 2d 17, 23 (Ala. 2001).

C. Reasonable Alternatives

This is another element of a *prima facie* claim of economic duress that Alabama's appellate courts have not had many occasions to address. In *Penick v. Most Worshipful Prince Hall Grand Lodge F&AM of Alabama, Inc.*, 46 So.3d 416, 431-32 (Ala. 2010), the outcome was in fact based on this third and final element as the court noted that "Penick cites no evidence in the record showing that his only reasonable alternative to the allegedly wrongful foreclosure was to sign the modification agreement as it was presented to him." *Id.* at 431-32. See also, *Brown v. First Federal Bank*, ___ So. 3d ___, ___, 2012 WL 415568, *12 (Ala. Civ. App., Feb. 10, 2012)(finding insufficient evidence of economic duress where plaintiff had "reasonable alternatives" to refinancing her home loan). In affirming the trial court's rejection of Penick's invocation of the economic duress defense, the Court also made it clear that, because duress is an

affirmative defense under Rule 8(c) of the *Alabama Rules of Civil Procedure*, the burden of establishing economic duress, and the risk of non-persuasion, falls to the party invoking it. *Id.* at 432 n.14.

Although not clearly articulated, in two other decisions where the courts rejected invocation of the economic duress defense and mentioned the fact that the proponents of the defense were represented by counsel at and prior to the execution of the challenged agreements, it appears implied that plaintiff had failed to establish the lack of reasonable alternative as required by the third element. *See Wilson v. Southern Medical Ass'n*, 547 So. 2d 510, 513 (Ala. 1989)(reiterating that “the victim must show that he had no reasonable alternative but to agree to the other party’s terms or face serious financial hardship.”); *Anderson v. Amberson*, 905 So. 2d 811, 819 (Ala. Civ. App. 2004). In rejecting Anderson’s challenge to a release that he had signed, the court noted that:

Further, the record indicates that Anderson’s own attorney allegedly drafted and negotiated the release. At the time he signed the release, Anderson was aware of the claims he now brings against the defendants. Anderson could have executed a release with more favorable terms, perhaps reserving certain claims against the defendants, or he could have abstained from signing the release altogether; however, he chose to sign the release and waive his claims against the defendants. Given the foregoing, we cannot say that Anderson has demonstrated error with regard to this issue.

Id. at 819. It appears clear from these decisions that in any case in which a party seeking to void a contract has had the benefit of advice of counsel at the time of or prior to execution of the contract, satisfaction of the third element of the economic duress defense is quite unlikely.

CONCLUSION

Any party inconvenienced by a prior release or other troublesome document that he or she signed prior to litigation will naturally wish to avoid the consequences of the

signed document and any unfulfilled promises included therein. Economic duress is an initially attractive option, since it is generally the case that such a document was executed out of economic necessity in an effort to avoid or delay some economic misfortune. The option is only available, however, in very limited circumstances where the party can demonstrate by substantial evidence that he or she would not have signed the document but for the unlawful or unconscionable pressure applied by the other party that caused the signing party financial distress and left him or her with no reasonable alternative except to sign. Since the Supreme Court of Alabama has been unwilling to find the existence of economic duress except in the most egregious cases, parties should generally look elsewhere in seeking a lawful excuse for non-performance of their promises in litigation.



**George M. Walker is a member of Hand Arendall, LLC, in its Mobile office, where he serves as head of its Product Liability Practice Group. He is a Director of the Defense Research Institute, is the Immediate Past President of the Association of Defense Trial Attorneys, is a Sustaining Member of the Product Liability Advisory Council, and has been recognized as an Alabama Super Lawyer and as one of the Best Lawyers in America for the past ten years. In addition to trying cases and worrying about issues such as economic duress, Walker serves as President of the Alabama Golf Association.*



***Robert S. Walker is a third year student at Cumberland School of Law, where he has been on the Dean's List in each of his first four semesters. He is a 2010 Cum Laude graduate of Birmingham Southern College, where he obtained his degree in History.*

¹ For example, in *Sterling Oil of Oklahoma, Inc. v. Pack*, 291 Ala. 727, 745, 287 So. 2d 847, 862 (1973), the Alabama Supreme Court noted that “This Court apparently has not heretofore expressly applied the [economic duress] doctrine in the context of business compulsion. . . .” The Court did not apply the doctrine in that case either, deciding to “deter fuller treatment to a more appropriate case.” *Id.* n. 7.