

**SUPREME COURT OF LOUISIANA**

98-C-1122, 98-C-1133, and 98-C-1134

SENATOR J. LOMAX “MAX” JORDAN

versus

LOUISIANA GAMING CONTROL BOARD and  
MURPHY J. “MIKE” FOSTER

Consolidated With

SENATOR RONALD C. BEAN

versus

LOUISIANA GAMING CONTROL BOARD and  
RIVERGATE DEVELOPMENT CORPORATION

KNOLL, J., Dissenting.

Finding that the operating contract approved by the Board on January 28, 1998, is a new contract, I dissent from the majority opinion. Because of this finding, all other issues are pretermitted in this discussion.

The majority totally ignores the laws of obligations and cloaks its position in terms of a renegotiation of a contract placed in bankruptcy to create a legal fiction as though this bankruptcy status immunizes the original contract from the Louisiana law of obligations. A simple application of our contract law demonstrates that the contract at issue is a new contract.

La.Civ. Code art. 1756 defines a legal obligation:

An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something.

In the proposed contract, HJC, the original obligor, is released and forever

discharged from any and all matter of claims, and all of its debt under the original contract with the State is extinguished. A new obligor, JCC, will be legally bound to perform under new terms and conditions. The new obligee is the Board, which was created by Act 7 of 1996 and who replaces the old obligee, the self-funded LEDGC which was created under Act 384 of 1992. The terms of performance required of JCC are not simply the assumption of the obligations of HJC; those claims for performance will be released and forever discharged by the State, not the trustee in bankruptcy. Simply, the State has negotiated with a new party for better conditions and more onerous terms of performance in its favor. However, whether this new contract with a new party, new terms, and new assurances of completion is acceptable to the State of Louisiana is an issue which requires legislative approval.

The proponents of the “renegotiated” operating contract assert that the casino operator remains unchanged, since JCC is merely the successor in interest to HJC under the contract. This is incorrect. JCC is only the successor in interest to HJC’s rights under the original agreement. JCC has in no way assumed any responsibility for HJC’s obligations under the original agreement. As far as JCC is concerned, the obligations of HJC under the original contract are extinguished. No assumption of the prior obligations will occur, and JCC is not HJC’s full successor in interest under the original contract. Instead, the original obligations have been extinguished, and new obligations have been created under the new operating agreement. As JCC is not a full successor, JCC is a different obligor under the “renegotiated” operating contract.

Such a change in obligors constitutes a subjective novation which is a new contract. La.Civ. Code art. 1882 provides:

Novation takes place when a new obligor is substituted for a prior obligor who is discharged by the obligee. In that case, the novation is accomplished even without the consent of the prior obligor, unless he had an interest in performing the obligation himself.

In the instant case, a subjective novation has clearly occurred. A new obligor, JCC, has been explicitly substituted for HJC, the original obligor. In addition, under the terms of the new operating agreement, HJC has been released from its obligations under the original contract. In the “State Release Agreement,” attached to the new contract, the State agrees to:

release and forever discharge [HJC, JCC, and any or all their Affiliates, successors and assigns ] . . . of and from any and all matter of Claims . . . by reason of any matter, cause, or thing whatsoever to the extent such Claims arose prior to the effective date, including, but not limited to any Defaults (as defined in the Original Casino Operating Contract) under the Original Casino Operating Contract.

Under the release agreement, HJC’s obligation is *extinguished*. Simultaneously, JCC has agreed to perform the obligations previously owed by HJC, namely the construction and operation of a casino at the Rivergate site under the new operating agreement. The State is agreeing to release HJC only because JCC has promised to fulfill the new agreement.

The proponents of the renegotiated contract, namely Harrah’s Jazz Company, LLC., has asserted that novation cannot occur because “there has been no release or discharge by [the Board] of HJC from the contract.”<sup>1</sup> This assertion is manifestly incorrect. As noted above, the State has explicitly and comprehensively expressed its intent by releasing HJC from its obligation. The State has also consented to the new

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<sup>1</sup>Counsel for HJC cites a provision of the State Release Agreement which provides:

Notwithstanding the foregoing, nothing contained in this Agreement shall release or waive any rights or obligations of the parties pursuant to the Casino Operating Contract or any other document executed or delivered pursuant to the plan.

This citation is blatantly misleading. The Recitals of the State Release Agreement specifically state that “Casino Operating Contract” only refers to the *proposed* contract between the State and JCC. The original plan, executed by LEDGC and HJC is specifically distinguished as the “Original Casino Operating Plan.” Plainly, by its very terms, the citation has no effect on the comprehensive release of all obligations arising under the original contract. In fact, the cited language applies only to a release of an obligation which arises under a contract *that has not even been created*.

obligor's performance. JCC has expressed its intent by simultaneously agreeing to undertake the new contract.<sup>2</sup> The parties have clearly and explicitly consented to the novation. In short, the proposed contract awards the right to operate the casino to a new party. It is a new contract.

HJC claims that the contract at issue is not a new contract because the fundamental terms are the same. While the fundamental terms are the same, this does not support HJC's argument because the fundamental terms are dictated by law. There can be no change to the underlying cause of the contract, namely the development of a land based casino at the site of the Rivergate Convention Center in Orleans Parish. That provision is already required by La.R.S. 27:203 and La.R.S. 27:241(A). The twenty year term with a ten year option is likewise specifically statutorily required, as is the minimum annual payment of \$100,000,000, and the minimum size of 100,000 square feet. See La.R.S. 27:241. The requirements for suitability and the minimum standards required of the operator are dictated by La.R.S. 27:234 and 235. It is therefore not surprising that these fundamental provisions remain unchanged in the new contract; *they could not be changed*. Any new land casino contract awarded by the board will necessarily contain all of these provisions.

In order to satisfy all parties interested in the bankruptcy, significant changes had to be made to the agreement itself. A comparison of the two contracts reveals that of the negotiable provisions, several have been significantly changed. As noted above, the casino operator is changed from HJC to JCC. The original guarantors of the Completion Guaranty will be released and new guarantors, namely, Harrah's

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<sup>2</sup>Note that subjective novation pursuant to Art. 1882 does not require the consent of the original obligor when that obligor has no interest in performing the obligation himself. Such a situation arises when the original obligor's credit standing, professional reputation, or social prestige would be affected by his failure to personally perform the obligation. See Litvinoff, Obligations §17.31

Entertainment, Inc., and Harrah's Operating Company will be substituted. Additional sureties, namely Reliance Insurance Company and United States Fidelity and Guaranty Company will be added. Furthermore, under the new contract, the State of Louisiana agrees to release and forever discharge its claims under the original operating agreement. Additionally, there are major changes concerning the lease of the second floor level of the casino, a compromise concerning dockside riverboat gambling, and minors' access to the second floor level. I find that these are significant changes to the substance of the negotiable provisions of the contract. These changes directly affect the interest of the citizens of this state. In effect, the State is recognizing that its relationship with HJC has failed, and it is beginning a new relationship with JCC.

Because the operating agreement with JCC is a new contract rather than a renegotiated one, it is subject to legislative approval under La.R.S. 27:224(E), which provides:

*The governor by executive order or the board overseeing the operation of the casino subject to legislative approval either by vote or by mail ballot, or the legislature by Act or Resolution may negotiate a new casino operating contract.*

The inherent weakness in the majority opinion is its failure to address this contractual issue under Louisiana contract law. If the issue would have been analyzed under our laws of obligations, the inescapable conclusion is that the original contract was novated, thus, the contract at issue is a new contract. Instead, the majority turns to statutory interpretation dealing with the authority of the Board and the Legislature. It finds that the Board can renegotiate the contract. That was never the issue. The real issue is whether the revisions of the original contract render it a new contract or "merely an amended version of the original contract." This issue should be determined by applying Louisiana laws of obligations. The majority opinion clearly skips this step and makes a quantum leap to find the Board is merely renegotiating the original

contract because HJC is in bankruptcy court. For the reasons assigned above, I find the operating contract approved by the Board is a new contract, hence legislative approval of the proposed new operating agreement is required. I therefore respectfully dissent.