

Contract Excuse and Enforcement in the Age of Pandemic

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Commercial Frustration

Elements

- Party's principal purpose frustrated
 - Mere economic harm typically not enough
- Without party's fault
- Occurrence/non-occurrence of event that was basic assumption
 - Strict unforeseeability not required
- Remaining duties discharged unless language or circumstances indicate to the contrary

Resources

- Key Cases
 - *Perry v. Champlain Oil Co.*, 101 N.H. 97, 98 (1957)
 - *Bower v. Davis & Symonds Lumber Co.*, 119 N.H. 605, 609 (1979)
 - *General Linen Services, Inc. v. Smirnioudis*, 153 N.H. 441, 443 (2006)
- Restatement (Second) of Contracts § 265

Impracticability

Elements

- Performance has become impracticable
 - Mere economic harm typically not enough
- Without party's fault
- Occurrence/non-occurrence of event that was basic assumption
 - Strict unforeseeability not required

Resources

- *Fuller Ford, Inc. v. Ford Motor Co.*, 2001 DNH 144, 2001 WL 920035, at *9 (D.N.H. Aug. 6, 2001)
- Restatement (Second) of Contracts § 261; see also UCC § 2-615
 - Temporary Impracticability – Restatement (Second) of Contracts § 269
 - Performance only excused as long as temporary emergency

Impracticability – Government Regulation / Order

- Specific form of impracticability where the regulation or order either:
 - Makes compliance impracticable; or
 - Is an event the non-occurrence of which was a basic assumption
- Resources
 - *Twombly v. Assoc. of Farmworker Opportunity Programs*, 212 F.3d 80, 85 (1st Cir. 2000)
 - Restatement (Second) of Contracts §§ 264, 266(1)
 - *See also* Restatement (Second) of Contracts § 178 regarding enforcement excusable on the grounds of public policy

Impossibility

Elements

- Version of Impracticability
- Performance has become impossible
- Due to unforeseen events, though strict unforeseeability not required

Resources

- Key Cases
 - *Perry v. Champlain Oil Co.*, 99 N.H. 451, 453 (1955)
 - *Bower v. Davis & Symonds Lumber Co.*, 119 N.H. 605, 609 (1979)
 - New Hampshire courts now analyze as part of the doctrine of impossibility. See *Appeal of Vicon Recovery Sys. Inc.*, 130 N.H. 801, 805 (1988)
 - This implies elements of impracticability must be satisfied as well: lack of fault, basic assumption of contact, economic harm not enough
- Restatement (Second) of Contracts § 261 cmt. d

Other Concepts to Remember

- Unjust enrichment may still apply
 - *Axenics, Inc. v. Turner Constr. Co.*, 164 N.H. 659, 672 (2013) (setting forth elements of unjust enrichment claim)
 - Restatement (Third) of Restitution and Unjust Enrichment §§ 38-39
- Parties to contract have duty to mitigate damages
 - *Coos Lumber Co. v. Builders Supply Corp.*, 104 N.H. 404, 407 (1963)
 - Restatement (Second) of Contracts § 350

Relevant Cases from Other Jurisdictions

- September 11 Attacks:
 - *OWBR LLC v. Clear Channel Comms., Inc.*, 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003) (applying impracticability doctrine following September 11)
 - *Bush v. Protravel Int'l, Inc.* 192 Misc. 2d 743, 750 (N.Y. Civ. Ct. 2002) (excusing performance due to impracticability)
- Avian Flu:
 - *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 360 F. Supp. 3d 817, 842 (S.D. Ind. 2018) (rejecting impracticability and frustration defenses)
 - *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308, at *4 (N.D. Iowa Sept. 7, 2017) (analyzing commercial frustration defense following avian flu)