**Impossibility, Impracticability and Frustration**

Welcome to this podcast on Impossibility, Impracticability and Frustration brought to you by CALI. I am Professor Jennifer S. Martin. Ordinarily we expect the parties to perform their contracts under the principle of *pacta sunt servanda*, meaning promises are to be kept. Contract law, though, does provide excuse for non-performance (meaning a party is not in breach) in the event of certain contingencies the nonoccurrence of which are basic assumptions of a contract. This podcast covers the three distinct grounds for excuse provided by contract law: (i) impossibility; (ii) impracticability; and (iii) frustration of purpose. The rationale behind these doctrines is that in each contract there is an implied condition of the contract that extraordinary, unforeseen events will not occur. That is, the nonoccurrence of these events are basic assumptions of the contract. If discharge of performance is granted to a contracting party, either party may have a claim to relief arising as justice requires, including restitution and protection of reliance interests.

Sometimes students have difficulty distinguishing contract defenses, such as mistake, from events that excuse nonperformance. Defenses arise from circumstances present at the time of contracting, whereas an event that creates a grounds for excuse typically occurs after the parties form the contract.

Let’s begin with excuse arising from impossibility of performance.

Sometimes events will occur that change the performance of a contract in such a way as to make performance of the contract impossible by one or both parties. Impossibility of performance can only provide an excuse to discharge the party’s duties under the contract where an unforeseen event makes contractual performance objectively impossible (meaning the thing cannot be done by anyone) and the parties have not allocated the risk of the contingency by their agreement.

In the case of *Taylor v. Caldwell*, Taylor and Caldwell contracted for the rental of the Surrey Gardens Music Hall for concerts promoted by Taylor. Prior to the first rental, a fire destroyed the music hall. The fire was not the fault of either of the parties and the contract did not allocate risk of disasters. The court excused the parties from performing their duties under the contract on the grounds that performance became impossible from the perishing of the music hall without the fault of either of the parties. Basically, without the existence of the music hall, performance was impossible and the parties were excused from their contractual obligations.

Let’s look at several examples involving impossibility.

Example #1. Tom owned a mountainside vacation home. Tom contracted with Jim to deliver for $75 some new chairs that Tom bought for the home. An unusually early snowstorm hit the area the day before Jim was to deliver the chairs, blocking the access road to the home. Jim is unable to deliver the chairs to the home. If Tom seeks to enforce the contract, Jim would claim discharge due to impossibility of performance. Notice that Tom would not be able to assert the defense of impossibility because payment of a fee for the delivery is not impossible. It is Jim’s performance that is impossible. If Tom has already paid Jim the $75 delivery fee, though, he might be able to claim restitution of that amount.

Example #2. Same as Example #1, but presume that Tom hired Jim because Tom needed the chairs delivered (longer pause) and hired Jim after Jim told Tom he had a snowplow on his truck and no snow could stop him. If Jim cannot deliver the chairs now due to the storm, it is likely that Jim cannot claim impossibility because the snowstorm was foreseen by the parties. If a party contracts to do something that turns out to be impossible, the event is not unforeseen and, as such, the risk of that event was probably assumed by that party.

Example #3. The same as Example #1, but presume that Jim could still travel to the house to deliver the chairs, but had to use a different road that required more travel. If the performance is just more burdensome, impossibility would not be available to Jim because performance would not be impossible.

Let’s move on to excuse arising from impracticability.

In some cases, performance is not impossible, but performance might be excused on grounds of impracticability. The elements of impracticability are the same as impossibility, but instead of performance being impossible, it is merely more difficult or burdensome. So, excuse due to impracticability requires: (i) an unforeseen event; (ii) the event is a basic assumption of the contract; and (iii) the event has made the performance impracticable. Again, impracticability is only available where the contract or custom does not allocate risk for the contingency. A simple slight increase in cost of performance is considered allocated by the contract price and not a grounds for excuse as it’s presumed parties take the risk of such small fluctuations.

Example #4. The same as Example #1, but presume that other roads were available for Jim to use in the delivery of the chairs. Jim could not claim excuse due to impossibility because it’s still possible to deliver the chairs. Moreover, if the available alternative road for delivery would increase Jim’s cost to deliver due to the need for more fuel, Jim would not be able to claim impracticability as it’s presumed that he takes the risk of small changes in fuel costs. However, Jim might be able to claim impracticability if, for instance, instead of being a 1 hour job, the alternative road would now make the delivery an 8 hour job and require him to rent a different truck for the delivery.

Example #5. Kim contracted to clean Tom’s mountainside vacation home after a visitor departed. An unusual storm arrived, making it dangerous for Kim to drive to the home for the cleaning. While performance by Kim is not impossible, the risk of injury to Kim is likely sufficient to make her performance impracticable and her duty to clean the mountainside home is discharged and Kim is not liable to Tom for breach of contract.

Let’s move onto frustration of purpose. Frustration of purpose can only provide an excuse to discharge the party’s duties under the contract where the contract or circumstances did not indicate otherwise and where two elements are present: (i) the party’s principal purpose in making the contract is frustrated without his fault by an event occurring after the contract was made; and (ii) nonoccurrence was a basic assumption on which the contract was made. Notice that a party whose obligation is just to pay money rarely can claim frustration of purpose.

The well-known case of *Krell v. Henry* is an example of a case of frustration of purpose. In this case, Henry and Krell made a contract for the rental of Krell’s flat so that Henry could watch the coronation of King Edward VII. Although the agreement did not mention that the purpose of the rental was to view the coronation or provide for any contingency in the event of its postponement, both parties understood the purpose of the rental. After Edward developed appendicitis, the coronation was postponed and Henry did not want to rent the flat. Krell brought a suit for breach and Henry requested return of his deposit. The court concluded that there was an implied condition from the circumstances of the case where both parties knew the reason for the lease and without the coronation there was no purpose to the contract. As such, Henry was discharged from his duties under the contract due to frustration, even though performance by him was not impossible.

Let’s look at some examples of frustration of purpose.

Example #6. Martin contracted with Helen to rent Helen’s townhome in Washington DC at a rental price of $600 per night for three nights for the presidential inauguration events. The contract did not specify what was to occur if the events were canceled, but both parties knew that Martin was traveling from Florida specifically for the events and was paying twice the ordinary rental fee. Due to security concerns, all inauguration events were canceled and all public events and exhibits were closed. If Helen seeks to enforce the contract, Martin would likely claim frustration of purpose arising from the cancellation of the inauguration events, a basic assumption of the contract. Notice that Martin can still travel to Washington DC, but her reason for doing so has been frustrated.

Example #7. Same as Example #6, except that only the Women’s March in Washington DC was canceled. Now if Helen asked to enforce the contract, Helen will likely prevail. In this case, there would be a question about whether the principal purpose of the Washington DC rental is frustrated if only one particular event was canceled among several occurring in Washington DC. Moreover, whether the nonoccurrence was a basic assumption might also be questioned where both parties shared an understanding that Martin was traveling for the inauguration events, but no further understanding existed. Again, Martin can still travel to Washington DC, but the parties did not have an understanding regarding the Women’s March.

Example #8. Kenny and Janice have been dating two years and Kenny decides to propose. Kenny contracted with Lover’s Plane to have the plane drag a banner across the sky that would read “Janice, will you marry me?” on Saturday at 3 PM over a nearby beach for the price of $1000, with a $300 deposit. Kenny, excited about making the proposal, asks Janice to marry him on Wednesday. Here, the plane can still drag the banner across the sky on Saturday, but Kenny’s reason for having it displayed has been frustrated, he has already asked Janice to marry him on Wednesday. However, Kenny would not have an excuse for frustration of purpose since the frustration arose from his own actions of asking Janice early. Basically, he cannot claim frustration of purpose unless the event was without his fault.

Before we conclude, remember that these excuses are only available where there is no allocation of the risk of the event either by contract or custom. For instance, a party might contract to perform a task with knowledge that it is extremely difficult or burdensome or might even be impossible. In such cases, the party has assumed the risk of any later inability to perform. Moreover, recourse to excuse doctrine might not be needed if a contract contains contractual outs in the event of stated circumstances, such as a *force majeure* clause stating that the parties shall not be obligated to perform in the event of stated events, such as storms, floods, lightning, earthquakes, fire, strikes and the like.

Let’s look at two examples.

Example #9. Fuelco contracted with Gasco to deliver gasoline to an area that suffered extreme storm damage, demanding a higher price to perform the service. In the event that the task was more difficult than anticipated due to the nature of the storm damage, and perhaps more costly, Fuelco would not be able to claim excuse as it contracted to do the very thing that turned out to be difficult.

Example #10. Same as Example #9, except that Fuelco’s contract specifically provides that delivery can be delayed in the event that the roads needed for delivery have suffered more damage than anticipated. Here, Fuelco would not need to claim excuse as the contract expressly provides for resolution of the difficulty created by the event.

At this point, you should be able to identify the three types of doctrines that apply to excuse performance under a contract due to unforeseen events: (i) impossibility; (ii) impracticability; and (iii) frustration of purpose. You should also be able to determine which type of excuse are raised by a fact pattern and apply the relevant test to conclude whether excuse might be available to a party. You should also be able to explain when a party might not be able to claim excuse due to allocation of the risk of the event by contract or custom.

I hope you’ve enjoyed this podcast on Impossibility, Impracticability and Frustration.

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