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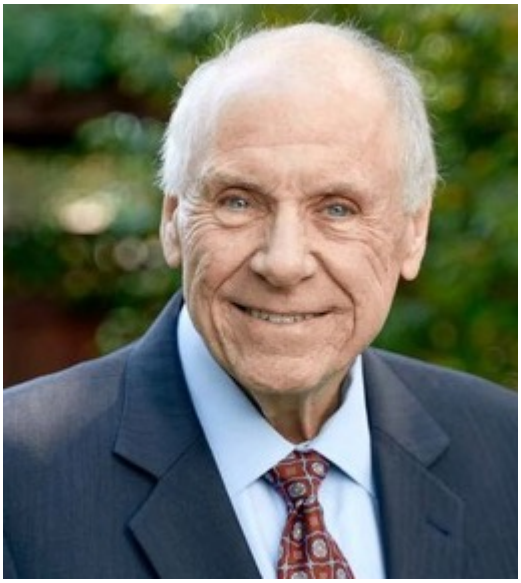
ADR & Conflict Management Strategies

Temporary or Partial Impracticability and Frustration of Purpose and Pandemic Affected Contracts and Leases

By Frank Burke on April 22, 2021



The Restatement 2d of Contracts, adopted in 1981, added concepts of temporary and partial impracticability and also restitution or reliance damages to ameliorate loss. While traditional application of such doctrines would lead to a finding that the contract automatically terminates, other cases state that if the frustration or impracticability is only temporary, then so is the hold on obligations (i.e. paying rent on office space when local ordinance forbids non-essential office use). This will obviously be only temporary.

Thus, the Restatement 2d Contracts Section 269 operates to temporarily suspend a party's obligation to perform during the period of impracticality or frustration, but typically does not discharge the obligation altogether. In other words, when the circumstances giving rise to the impracticality or frustration cease to exist, then the parties will be required to perform.

A condition which temporarily affects a party's performance need not make the performance literally impossible, but the presence of facts that frustrate the purpose of the act are enough to trigger application of Section 269. Section 269 provides that when the facts giving rise to the impracticality or frustration cease to exist, a party will have a reasonable time to resume performance. Under Section 269, a party's duty of performance is discharged when the period of impracticability or frustration ends, and full performance becomes overly burdensome.

In these cases, the parties may take advantage of Restatement Section 272 that suggests the possible use of restitution or reliance damages to cover potential losses.

It is conceivable that commercial and retail lessees might point to Section 269 as support for the position that they are excused altogether from rental obligations during the period when they are unable to access their premises or operate their business due to COVID-19, but when the premises were accessible and partial re-opening was allowed, a proportional reduction in rent might be the correct remedy.

Other commercial lease negotiation tools might include rent abatement with deferred payments; moving from a set base rent to a percentage of monthly sales; increasing tenant improvement allowances to implement social distancing; allowing the tenant to use a portion of its security deposit to help reopen or reconfigure; moving the tenant to a smaller space at less rent or larger space for the same rent; shortening or lengthening the lease; triggering "kick out" clauses which enable mutual cancellation; landlords seeking release of cotenancy or key tenant provisions which allow rent reduction based on lower foot traffic; smaller tenants insisting that they not be required to reopen or pay full rent until key tenants are open or replaced.

Other types of pandemic impacted contracts include construction contracts, real estate development agreements, supply contracts, sales of goods, consulting agreements, and event agreements.

Restatement 2d Contracts 269:

Temporary Impracticability or Frustration

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the

impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Restatement 2d Contracts 270:

Partial Impracticability

Where only part of an obligor's performance is impracticable, his duty to render the remaining part is unaffected if

> (a) it is still practicable for him to render performance that is substantial, taking account of any reasonable substitute performance that he is under a duty to render; or
>
> (b) the obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered.

***Restatement 2d Contracts* 272:**

Relief Including Restitution

> (1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in Sections 240 and 377.
>
> (2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

Case Law

In ***G.W. Andersen Constr. v. Mars Sales*, 210 Cal. Rptr. 409 (Cal. Ct. App. 1985),** a contractor and an owner entered into a building construction contract. After the plans had been drafted, the city in which the building was to be constructed imposed a construction moratorium; but the parties were not aware of the moratorium when they later signed the contract. The court ruled that the construction delay did not discharge the owner's obligation to pay a deposit, as the delay was not substantial. The court also ruled that the fact that the delay created a risk of increased costs because of price changes in the construction industry did not entirely excuse performance, as such a risk was too speculative at that time. The court did hold that the owner was temporarily excused from paying the deposit while the impossibility existed.

In ***Maudlin v. Pac. Decision Scis.*, 40 Cal. Rptr. 3d 724 (Cal. Ct. App. 2006),** the court stated that a company's deficiency in retained earnings only rendered its ability to remit payment under a deferred compensation agreement "temporarily impossible," so that the company's payment obligation would not be discharged but "merely suspended —unless the delayed performance becomes materially more burdensome, or the temporary impossibility becomes permanent." The Court stated that the California law on temporary impossibility mirrors the Restatement 2d Contracts section 269.

In ***Lohman v. Ephraim*, No. B207755, 2010 WL 6901 (Cal. Ct. App. Dec. 30, 2009)(unpublished)**, the court rejected a defendant's argument that a real estate purchase agreement was unenforceable because holdover tenants frustrated the delivery of the property, making performance impossible. The court stated that the holdover tenancy—a temporary condition—did not fully excuse performance: "When the obstacle to performance is only temporary, the duty to perform is not discharged but merely suspended until cessation of the impracticability. Temporary impracticability discharges the duty to perform only where performance after cessation of the impracticability would be materially more burdensome than had there been no impracticability . . .(Rest. 2d Contracts 269.)"

In ***4900 Patrick Henry Drive Assocs. v. Keith Roofing.*, No. H032721, 2009 WL 1508515 (Cal. Ct. App. May 29, 2009)(unpublished)**, a contractor was hired to repair and replace a roof, discovered rotting beams, and suspended its work while another contractor was hired to repair the rotting beams. A rainstorm lead to water damage to the interior. The owner sued the roof contractor, alleging that it did not properly cover openings in the roof. The court ruled in favor of the contractor, finding that its performance was suspended because of the repair of the rotting beams. Citing Section 269, the Court ruled that the discovery of the rotting beams "made it temporarily impossible" for the contractor to finish its roofing work and, therefore the contractor could not be held liable for breach of contract on the water damage.

In ***Bush v. ProTravel Int'l, Inc.*, 746 N.Y.S.2d 790 (N.Y. Civ. Ct. 2002**), the court, relying on Section 269, ruled that the plaintiff's need to timely cancel a travel reservation was temporarily suspended because "New York City was in the state of virtual lockdown" following the 9/11 terrorist attacks. The court ruled that "where a supervening act creates a temporary impossibility, particularly of brief duration, the impossibility may be viewed as merely excusing performance until it subsequently becomes possible to perform rather than excusing performance altogether."

***Schaefer Lincoln Mercury v. Jump*, No. 0005-05-86, 1987 WL 642758 (Del. Ct. C.P. June 8, 1987) (unpublished)** In *Schaefer*, a lessee was required to make monthly lease payments on a vehicle. Nine months into the four-year lease, the vehicle was irreparably damaged, without fault by the lessee, and was unusable for the three months while it was in the repair shop. The lessor tried to provide a substitute vehicle, but the lessee rejected it and tried to terminate the lease due to impossibility of performance by the lessor. The court cited Section 269, ruling that the lessee could not terminate the lease because the period of frustration was only temporary. However, the court ruled that the lessee was excused "from making rental payments during the period of time that the purpose of the contract was frustrated" and that the obligation to do so "revives once performance subsequently becomes possible."

In ***Commonwealth Edison v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850 (N.D. Ill. 1990**), the parties entered into a contract reprocessing and delivering spent fuel created by Commonwealth Edison. The re-processer had to secure an operating license for this activity. Soon after the contract as signed, there was an indefinite moratorium on spent-fuel reprocessing which was lifted years later. By that time the re- processing industry was commercially unviable and essentially nonexistent. Pursuant Section 269, the court found that the re-processor was discharged from its contractual obligations, as performance had become "materially more burdensome."

In ***Glen Hollow P'Ship v. Wal-Mart Stores*, 139 F.3d 901 (7th Cir. 1998)**, Wal-Mart entered into a construction contract for the contractor to build a shopping center to be leased by Wal-Mart. A lawsuit was filed against the city's commercial zoning of the property. Six months after the end of that lawsuit, construction had not yet started and Wal- Mart terminated the lease. The contractor sued Wal-Mart for breach of contract and won in the trial court. On appeal, the Seventh Circuit applied Section 269 because of the temporary impossibility in construction due to the rezoning dispute. It ruled that "[o]nce the governmental regulations no longer delayed performance, [contractor] would have a reasonable extension of time to perform." But the court ruled that the contractor's delay in starting construction for more than six months after the end of the rezoning litigation was not caused by the rezoning dispute, but by the contractor's own inability to finance the project.

***See also Culp v. Tri-City Tractor, Inc.*, 736 P.2d 1348 (Idaho Ct. App. 1987)** ("Temporary impossibility [under Section 269] merely suspends the duty of performance until the impossibility ceases.").

See ***Nash v. Bd. of Educ., Union Free Sch. Dist. No. 13*, 345 N.E.2d 575 (N.Y. 1976)** (a required notice was meaningless during the temporary period of impracticality, so defendant was excused from giving notice, but was then "obliged to give notice at the earliest possible opportunity" once the circumstance giving rise to the impracticality had ended).

Conclusion

The pandemic has led to many contract and commercial lease court cases, and the doctrines of temporary or partial impracticability and frustration of purpose may provide pathways to settlement in those disputes.

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