

2010

Kilgore Pavement Maintenance, LLC, a Utah limited liability company v. City of West West Jordan : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KILGORE PAVEMENT
MAINTENANCE, LLC, a Utah limited
liability company,

Plaintiff/Appellant,

v.

CITY of WEST JORDAN,

Defendant/Appellee.

Case No. 20100123-CA

**BRIEF OF APPELLANT KILGORE PAVEMENT MAINTENANCE, LLC
APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, JUDGE SANDRA PEULER
CASE NO. 090901586**

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**FILED
UTAH APPELLATE COURTS**

AUG 03 2010

ORAL ARGUMENT REQUESTED

Appellant Kilgore Pavement Maintenance, LLC (“KPM”), by and through its undersigned counsel Strong & Hanni law firm, respectfully requests oral argument. The district court, in dismissing KPM’s first cause of action, erroneously determined that KPM assumed the risk of a commercially impracticability pursuant to its contract with the City of West Jordan (“West Jordan”). Oral argument may assist the Court in its consideration of this issue.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding in the Third District Judicial Court, Salt Lake County, for the State of Utah.

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STATEMENT OF JURISDICTION

In dismissing KPM’s first cause of action, the district court had jurisdiction to hear its claims against West Jordan under Utah Code Ann. § 63G-7-501. Final judgment of dismissal was entered for the West Jordan on January 12, 2010, and KPM timely filed its notice of appeal on February 3, 2010. This Court has jurisdiction to hear KPM’s appeal under Utah Code Ann. §§ 78A-3-102(3) and 78A-3-103(2)(j).

STATEMENT OF THE ISSUES PRESENTED

This is an appeal by KPM from a dismissal under Utah Rule of Civil Procedure 12(b)(6) and final judgment in a civil action alleging commercial impracticability and practical impossibility. In 2008, KPM entered into a contract (the “Contract”) with West Jordan to provide asphalt services, labor and materials for the completion of the 9000 South Road Reconstruction Project—Bangerter Highway to 4000 West (the “Project”). KPM’s bid for the Project was based on the then-current liquid asphalt oil cost of \$350/ton. Within a short period of time and based on unforeseen factors outside of KPM’s control, the price for liquid asphalt oil increased 300% to \$1,005/ton. The district court dismissed KPM’s *Complaint*, and in particular its first cause of action, “Commercial Impracticability/Practical Impossibility,” on the grounds that “pursuant to the contract, [KPM] assumed responsibility for supplying all materials necessary for their performance, and therefore assumed the risk of supply cost increases.” (R. 244.) The

district court further ruled that while it noted the dramatic increase in cost of liquid asphalt oil after the Contract was entered, “a party who assumes the risk of cost increases pursuant to contract terms cannot rely on a claim of impossibility/commercial impracticability.” (R. 244.)

The issues thus presented to this Court are:

1. Did the district court err in determining that KPM assumed the risk of an unforeseen and extraordinary increase in the cost of liquid asphalt oil pursuant to the parties’ contract? Preserved at the Hearing regarding West Jordan’s Motion for Reconsideration. (R. 261.)

2. Did the district court err in dismissing KPM’s first cause of action because of its determination that “a party who assumes the risk of cost increases pursuant to contract terms cannot rely on a claim of impossibility/impracticability”? (R. 244.) This issue was preserved at the Hearing regarding West Jordan’s Motion for Reconsideration. (R. 261.)

DETERMINATIVE RULES

Restatement (Second) of Contracts § 261 (adopted by *Western Prop. v. Southern Utah Aviation, Inc.* 776 P.2d 656 (Utah App. 1989))::

Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Utah Rule of Civil Procedure 12(b)(6):

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

A. Nature of the Case.

KPM's *Complaint* alleges that a dramatic and unforeseen escalation of liquid asphalt oil prices in 2008 after execution of the Contract with West Jordan caused KPM to suffer an unreasonable and excessive cost to complete the Project. (R. 1-3.) The *Complaint* also alleges that this escalation of asphalt oil prices was not addressed in the Contract, rendered performance of the Project impracticable, and that to hold KPM to the contract price would be unjust and cause an extreme, commercially unacceptable and unreasonable expense to KPM far beyond what was contemplated in the Project. (R. 3-4.)

The district court denied and then granted on reconsideration West Jordan's motion to dismiss based on its above-stated conclusion that KPM assumed any and all risks associated with the Project, and therefore could not rely on a commercial impracticability/commercial impossibility claim. (R. 245-247.)

B. Facts.

The following facts are drawn from KPM's *Complaint* and should be accepted as true for purpose of this appeal according to the Standard of Review described below:

On July 1, 2008, KPM submitted a bid to West Jordan to provide asphalt services, labor and materials for the Project. (R. 2.) KPM was awarded the job and entered into

the Contract with West Jordan on July 22, 2008. (R. 2.) The bid for the Project submitted by KPM was calculated based on the then-current liquid asphalt oil cost of \$350/ton. (R. 2.) Within a very short period of time, this cost increased threefold to \$1,005/ton. (R. 2.) This occurred because of an unprecedented and unforeseen escalation in crude oil prices which coincided with a severe shortage of liquid asphalt oil in the summer of 2008. (R. 2-3.)

On August 12, 2008, the Utah Chapter of the Associated General Contractors (the “AGC”) issued a Whitepaper stating that the instability of the crude oil prices and limited supply and shortage of asphalt had dramatically driven up the price of liquid asphalt. (R. 2, 32.) The AGC encouraged state entities to include asphalt price escalation clauses in their hot-mix asphalt contracts and not to compel contractors to predict future costs of liquid asphalt. (R. 3, 32.) The AGC further emphasized that “the current economic climate makes such costs extremely difficult to predict, and injecting such a large measure of uncertainty in the bidding process would introduce gross and potentially costly inefficiencies to procurement of necessary work.” (R. 3, 32.)

The Contract, written and prepared by West Jordan just prior to the AGC Whitepaper, did not contain an asphalt escalation clause. (R. 3.) Further, the risk of the unexpected escalation of asphalt oil prices was not specifically contemplated anywhere in the Contract. (R. 3.) Instead, Section 11.1 of the Contract addresses the potential for changes in the Contract price. Specifically, it states:

c. The value of any Work covered by a Change Order or Work Directive Change or of any claim for an increase or decrease in the Contract Price shall be determined in one of the following ways:

...

3. On the basis of the Cost of the Work . . . plus the Contractor's Fee for overhead and profit.

(R. 51.) Cost of the Work as referenced in above Article 11.1(c)(3) is defined as "the sum of all costs necessarily incurred and paid for by the Contractor for labor, materials, and equipment in the proper performance of the Work, plus the Contractor's fee for overhead and profit." (R. 35.)

Subsequent to executing the Contract and the unexpected increase in cost of liquid asphalt oil, KPM submitted a request to West Jordan's Engineering Department on August 22, 2008, for a price increase of \$91,000.00. (R. 3.) Although the City Manager presented an amendment to the Contract for approval of this price adjustment, the West Jordan City Counsel voted against the proposed amendment and denied KPM's request for price adjustment. (R. 3.)

C. Proceedings in the District Court.

On January 30, 2009, KPM filed an action against West Jordan in the Third Judicial District Court, in and for Salt Lake County, State of Utah, alleging commercial impracticability, unjust enrichment, breach of contract, and breach of the implied covenant of good faith and fair dealing. (R. 1.) The *Complaint* alleges that the rapid and unexpected increase in liquid asphalt oil after execution of the Contract rendered KPM's completion of the Project at the contract price impracticable, or alternatively, West Jordan breached its obligations to KPM by refusing to grant a change order and reimburse KPM the increased cost of materials. (R. 1-8.)

West Jordan moved to dismiss the *Complaint* under Utah Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (R. 82-84.) West Jordan argued that all of KPM's claims should be dismissed because (1) West Jordan did not breach the Contract with KPM because it completed its final payment in accordance with the Contract terms; (2) it did not breach the covenant of good faith and fair dealing by refusing to authorize a Change Order for the increased cost; (3) West Jordan was not unjustly enriched because each party received what it bargained for; and (4) KPM assumed the risk of increased cost in the Contract, completed the Project, and thus there was no claim for commercial impracticability/practical impossibility. (R. 164-184.) Accordingly, West Jordan argued, KPM was not entitled to \$91,000.00 for increased costs. (R. 164-184.)

On June 30, 2009, the Honorable Judge Sandra Peuler heard oral arguments on West Jordan's *Motion to Dismiss*. (R. 194.) The district court subsequently dismissed all claims except KPM's first cause of action, "Commercial Impracticability/Practical Impossibility." (R. 194.) West Jordan then moved the district court to reconsider its ruling allowing KPM to proceed on its surviving first cause of action. (R. 204-206.) Acting on West Jordan's *Motion to Reconsider*, the district court dismissed KPM's commercial impracticability claim on January 12, 2010. (R. 245-247.) KPM appealed the ruling to this Court on February 3, 2010. (R. 248-253.)

SUMMARY OF ARGUMENT

KPM did not contract to assume any and all risks associated with its completion of the Project and, therefore, the unforeseen 300% increase in cost of liquid asphalt oil experienced after execution of the Contract allows KPM to make a claim against West Jordan for commercial impracticability. Although a party may “agree to perform in spite of impracticability,” in the absence of express language, the potential foreseeability of a particular event does not necessarily imply the assumption of this “greater obligation.” *See Restatement (Second) of Contracts* § 261 (1981), cmt. c. West Jordan has argued, and the district court has apparently concurred, that KPM contractually assumed *all* risks associated with the cost of materials, including those risks that would normally excuse KPM’s performance under the doctrine of impracticability. (R. 207-218.) In other words, the district court has decided that because KPM agreed to furnish materials at its expense, it can never assert a claim for commercial impracticability, regardless of any unforeseen increase in cost, no matter how abrupt, and no matter how extraordinary or excessive. (R. 242.)

The district court erred in dismissing KPM’s commercial impracticability claim for two reasons. First, the Contract does not explicitly the assign risk of any and all cost increases to KPM. The “four corners” of the Contract do not contain an absolute ceiling on the “Contract Price” or “Cost of Work” to West Jordan, nor does the Contract include any other written provision which conclusively evinces the parties’ intent to allocate the risk of impracticability solely to KPM. (R. 28-30; 34-73.) Based on common law principles of contractual interpretation, before the district court dismissed KPM’s claim,

it should have considered facts relating to the relative increase in cost to KPM and the attending circumstances of the parties (for example, the bargaining power of the City and the inability of KPM to negotiate an asphalt price escalation clause¹) and determined whether the impracticability was actually foreseen and exclusively assumed by KPM. *See Western Prop. v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 659 n. 5 (Utah App. 1989) (noting that the “critical fact” is “whether the parties *actually did* foresee [the event] and provide accordingly in their contract” (emphasis in original text)); *Raytheon Co. v. Sec. of the Army*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (“Whether performance of a particular contract would be commercially senseless is a question of fact.”).

Second, the district court incorrectly interpreted the Contract’s terms to foreclose KPM’s claim of an increase in the contract price for impracticability. Contrary to West Jordan’s arguments and the district court’s determination, the Contract contemplates the potential for change in the contract price, including in this case, an increase for commercial impracticability. In addition to “Work covered by [a City-approved] Change Order,” Section 11.1(c) of the Contract provides a specific formula for determining “[t]he value of . . . any claim for an increase or decrease in the Contract Price” that would include KPM’s claim. (R. 51) (emphasis added) (determining the “Cost of Work” pursuant to sections 11.2 and 11.4). The rule of impracticability and this provision in the

¹ *See Restatement (Second) of Contracts* § 261, cmt. c (stating that “[c]ircumstances relevant in deciding whether a party has assumed a greater obligation include his ability to have inserted a provision in the contract expressly shifting the risk of impracticability to the other party”). As argued before the district court, the Contract prepared and mandated by West Jordan did not allow KPM to propose or even suggest an asphalt price escalation clause to mitigate the risk of impracticability. (R. 227.)

Contract provide a necessary mechanism for adjusting the contract price to compensate KPM for the extraordinary and unforeseen change of circumstances it experienced only a few short weeks after the Contract was executed.

Based on the facts as alleged in KPM's *Complaint*, and which must be accepted by this Court as true (*infra*), the subsequent 300% price escalation of liquid asphalt oil (the raw material required to perform the Contract) was materially excessive, abrupt, and unforeseen, thereby causing KPM to suffer an unreasonable and excessive cost increase, rendering KPM's performance on the Project impracticable and warranting its claim for relief. (R. 3.)

STANDARD OF REVIEW

A. Utah Rule of Civil Procedure 12(b)(6)

The grant of a motion to dismiss is reviewed de novo. *Miller v. State*, 226 P.3d 743, 746 (Utah App. 2010). A motion to dismiss under Rule 12(b)(6) is appropriate only if it appears the plaintiffs would not be entitled to relief under the facts alleged or under any state of facts the plaintiffs could prove to support the plaintiffs' claims. *Mackey v. Cannon*, 996 P.2d 1081, 1084 (Utah App. 2000); *Wells v. WalkerBank & Trust Co., Inc.*, 590 P.2d 1261, 1263 (Utah 1979). When reviewing whether a district court has properly granted a motion to dismiss under Utah R. Civ. P. 12(b)(6), the appellate court accepts the factual allegations in KPM's *Complaint* as true and considers them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff. *Canyon Meadows Home Owners Assn. v. Wasatch County*, 40 P.3d 1148, 1151 (Utah App. 2001).

B. Contract Interpretation

A contract's interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent. *Hoggan v. Hoggan*, 169 P.3d 750, 751-52 (Utah 2007) (quoting *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1986)). So long as a court confines its analysis to the language of the contract and does not resort to extrinsic evidence of the parties' intent, interpretation of the contract is an issue of law and no deference is ceded to the district court's conclusion, which is reviewed for correctness. *Id.*; *Canyon Meadows*, 40 P.3d 1151-51.

C. Commercial Impracticability

Whether a contract is impracticable is a question of law reviewed de novo. *Central Kan. Credit Union v. Mutual Guar. Corp.*, 102 F.3d 1097, 1102 (10th Cir. 1996). "The district court's determination that a plaintiff's complaint 'fail[s] to state a claim upon which relief can be granted,' leading the court to grant the defendant's motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure, is a legal conclusion that [is] reviewed for correctness." *Summit Water Distrib. Co. v. Summit County*, 123 P.3d 437, 441 (Utah 2005). The district court's decision is afforded no deference. *Williams v. Bench*, 193 P.3d 640, 645 (Utah App. 2008).

ARGUMENT

I. The District Court Erred in Dismissing KPM's *Complaint* under Rule 12(b)(6)

Utah adopts the common law rule of impracticability that a contractual obligation "is deemed discharged if an unforeseen event occurs after formation of the contract and

without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable.” *Western Prop.*, 776 P.2d at 658 (citing *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 861 (Utah 1978) and *Restatement (Second) of Contracts* § 261). Although this rule is usually phrased in terms of impossibility of performance, it can also apply in circumstances beyond absolute impossibility. *Restatement (Second) of Contracts* § 261, cmt. d. For example, “an unforeseen shutdown of major sources of supply, or the like,” which “causes a marked increase in cost” may render contractual performance impracticable. *Id.* The rule is based, in part, on a principle of “basic equity” (*Western Prop.*, 776 P.2d at 658) such that unforeseen increased costs “beyond the normal range,” even in a fixed-price contract, can invoke application. *Id.*²

Also, courts have recognized that the rule of impracticability may apply in broader circumstances beyond excusing performance. *See Corbin on Contracts* § 74.15 (2009) (“Like the common law in general, the impossibility doctrine is sufficiently flexible and adaptive to achieve just results dependent on the factual circumstances presented to the court.”); *see also, generally, Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 68 (Utah 1982) (stating that a liberal application of the doctrine of impossibility has been applied by the courts in recent years). In government contracting for example, a commercially impracticable contract can entitle a contractor to an equitable adjustment in price to

² Specifically, comment d to the Restatement provides: “A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, *unless well beyond the normal range*, does not amount to impracticability since it is the sort of risk that a fixed-price contract is intended to cover.” (Emphasis added).

compensate for the constructive change imposed by an unforeseen event. *Raytheon*, 305 F.3d 1354, 1367 (Fed. Cir. 2002).³ Some states provide for equitable adjustments in public contracts even without reference to a specific clause in the given contract. *See M.J. Paquet, Inc. v. N.J. Dept. of Transp.*, 794 A.2d 141, 149-50 (N.J. 2002). Although it appears that Utah has yet to address this issue directly.

As discussed below, the district court erred in dismissing KPM's claim because KPM did not assume the risk of any and all price increases and the Contract allows for a price adjustment based on KPM's impracticability claim.

A. The District Court Erred in Determining that KPM Assumed the Risk of a Commercial Impracticability.

The district court determined that KPM expressly assumed the risk of impracticability under the Contract; namely, the extraordinary and unforeseen increase in cost of liquid asphalt oil that KPM realized shortly thereafter. (R. 242-244.) To find one side has assumed the risk of impracticability, the court must determine whether that risk was explicitly contracted for by the parties. *See Corbin on Contracts* § 74.15 (2009). Importantly, the principal factor for a determination of impracticability is actual foreseeability. *Western Prop.*, 776 P.2d at 659 n. 5. Because the rule is also based on the principle of assent, "the critical fact is not whether the event *could* have been foreseen, but rather, whether the parties *actually did* foresee it and provide accordingly in their

³ Although this case does not find the doctrine of impracticability applicable, it recognizes that "[i]n government contracting, impracticability has also been treated as a type of constructive change to the contract; because a commercially impracticable contract imposes substantial unforeseen costs on the contractor, the contract is entitled to an equitable adjustment."

contract.” *Id.* (emphasis in original). Most contracts (including the one at issue) do not explicitly allocate the burden of a specific risk and, more often, a court must examine the entire contract and other circumstances affecting the agreement to make such a determination. *Corbin on Contracts* § 74.15.

In this case, the district court determined that commercial impracticability, caused by the dramatic increase in the cost of liquid asphalt oil, was—notwithstanding the allegations in KPM’s *Complaint*—foreseen by the parties and exclusively assumed by KPM. (R. 242-244.) However, no terms of the Contract expressly allocate this risk to KPM. Only section 11.1(a) of the Contract speaks of the parties’ “Contract Price,” which does not mandate an absolute ceiling, but contemplates claims for an “increase or decrease” under Section 11.1(c). The various responsibilities of KPM argued by West Jordan for its “Work” on the Project under sections 6.2(d) and 9.9(c) of the Contract relate to indemnification of the City (§ 6.11), KPM’s means and methods of construction (§ 9(c)-(d)), warranty (§ 13.1), and the like. Significantly, the “Work” of KPM referenced in these sections is distinguished from the “Cost of Work” defined in Article I and invoked in Section 11.2. As such, under the terms of the Contract and as alleged in the *Complaint*, KPM did not foresee and did not contract for the risk of an impracticable increase in material supplies.

In deciding West Jordan’s Rule 12(b)(6) motion to dismiss, the district court should have considered fact questions regarding impracticability and the actual foreseeability of the same KPM’s favor and not ruled that an assumption of risk of normal unextraordinary cost increases necessarily forecloses *any* claim of impracticability. (R.

245-247.)⁴ Absent a specific provision within the Contract evincing the parties' intent that the risk of a commercial impracticability would be solely borne by KPM, KPM's claim does not fail and should not have been dismissed. The district court erroneously concluded that KPM assumed the risk of impracticability without considering the intent of the parties in contracting (or not) for an unforeseen increase in the price of materials, well beyond the normal range of contract expectation. *See Restatement (Second) of Contracts* § 261, cmt. c and d.

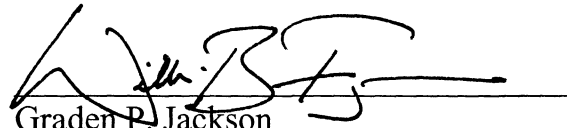
B. The District Court Further Erred in Determining that KPM Could Not Rely on a Claim of Impracticability Pursuant to the Terms of the Contract to Increase the Contract Price.

The district also erred in accepting West Jordan's argument that the Contract's terms foreclose KPM's request for an increase in price. Examining the terms of the Contract, it is clear that it does not provide an absolute ceiling on the contract price, and in fact, addresses a procedure for change to the contract price. (R. 51.) Section 11.1(a) states that "[t]he Contract Price constitutes the total compensation (subject to City-authorized adjustments [under section 11.1(b)])" payable to KPM and that "[a]ll duties, responsibilities, and obligations assigned to or undertaken by [KPM] shall be at its expense without change in the Contract Price." (R. 51.) However, the Contract also provides a formula for adjustment of the Contract Price outside of City-approved change orders. (R. 51) (stating that "[t]he value of any Work covered by a Change Order or

⁴ The district court's determination in this regard is as follows: "While it is true that the cost of asphalt oil increased dramatically after the contract was entered into, a party who assumes the risk of cost increases pursuant to contract terms *cannot* rely on a claim of impossibility/commercial impracticability." (R. 242) (emphasis added).

Dated this 3rd day of August, 2010.

STRONG & HANNI

A handwritten signature in black ink, appearing to read "Graden P. Jackson", written over a horizontal line.

Graden P. Jackson

William B. Ingram

Attorneys for Plaintiff/Appellant

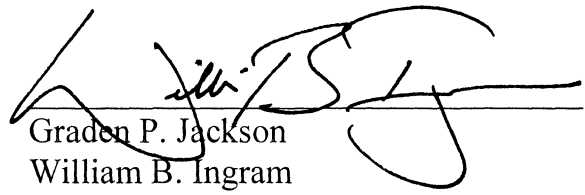
Work Directive Change or of any claim for an increase or decrease in the Contract Price shall be determined in one of the following ways” (emphasis added)). Of course, if only West Jordan-authorized adjustments could increase the Contract Price, there would be no need for the additional language of section 11.1(c) for any other “claim.” See *Jones v. ERA Brokers Consol.*, 6 P.3d 1129, 1131 (Utah 2000) (stating that contract provisions should be interpreted by a court “in relation to all of the others, with a view toward giving effect to all and ignoring none”). The Contract does not impose an absolute ceiling on the Contract Price but contemplates changes, both for City-authorized adjustments and other claims, including KPM’s claim for commercial impracticability. *Contract* at § 11.1(c). As such, under the rule of commercial impracticability and the language of the Contract itself, KPM has a claim to increase the contract price pursuant to its first cause of action.

CONCLUSION

For the foregoing reasons, KPM respectfully requests the Court reverse the district court’s dismissal and reinstate KPM’s first cause of action. Because the parties did not expressly allocate the risk of a commercial impracticability in the Contract, there are substantial questions that should have precluded the district court’s order, specifically relating to KPM’s assumption of the risk and the Contract’s provision for price adjustment based on KPM’s claim. Furthermore, the decision of the district court to dismiss despite the pleadings and the non-explicit terms of the Contract is erroneous.

Dated this 3rd day of August, 2010.

STRONG & HANNI



Graden P. Jackson
William B. Ingram
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2010, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was served by the method indicated below, to the following:

Jeffrey Robinson
David M. Bernstein
8000 South Redwood Road
West Jordan, UT 84088

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

E. Jay Sheen
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ADDENDUM

Restatement (Second) of Contracts, § 261

§ 261 Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope: Even though a party, in assuming a duty, has not qualified the language of his undertaking, a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event (see Introductory Note to this Chapter). This Section states the general principle under which a party's duty may be so discharged. The following three sections deal with the three categories of cases where this general principle has traditionally been applied: supervening death or incapacity of a person necessary for performance (§ 262), supervening destruction of a specific thing necessary for performance (§ 263), and supervening prohibition or prevention by law (§ 264). But, like Uniform Commercial Code § 2-615(a), this Section states a principle broadly applicable to all types of impracticability and it "deliberately refrains from any effort at an exhaustive expression of contingencies" (Comment 2 to Uniform Commercial Code § 2-615). The principle, like others in this Chapter, yields to a contrary agreement by which a party may assume a greater as well as a lesser obligation. By such an agreement, for example, a party may undertake to achieve a result irrespective of supervening events that may render its achievement impossible, and if he does so his non-performance is a breach even if it is caused by such an event. See Comment *c*. The rule stated in this Section applies only to discharge a duty to render a performance and does not affect a claim for breach that has already arisen. The effect of events subsequent to a breach on the amount of damages recoverable is governed by the rules on remedies stated in Chapter 16. See Comment *e* to § 347. Their effect on a claim for breach by anticipatory repudiation is governed by the rules on discharge stated in Chapter 12. Cases of existing, as opposed to supervening, impracticability are governed by § 266 rather than this Section.

b. Basic assumption. In order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a "basic assumption" on which both parties made the contract (see Introductory Note to this Chapter). This is the criterion used by Uniform Commercial Code § 2-615(a). Its application is simple enough in the cases of the death of a person or destruction of a specific thing necessary for

performance. The continued existence of the person or thing (the non-occurrence of the death or destruction) is ordinarily a basic assumption on which the contract was made, so that death or destruction effects a discharge. Its application is also simple enough in the cases of market shifts or the financial inability of one of the parties. The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section. In borderline cases this criterion is sufficiently flexible to take account of factors that bear on a just allocation of risk. The fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption. See Comment *c* to this Section and Comment *a* to § 265.

Illustrations:

1. On June 1, A agrees to sell and B to buy goods to be delivered in October at a designated port. The port is subsequently closed by quarantine regulations during the entire month of October, no commercially reasonable substitute performance is available (see Uniform Commercial Code § 2-614(1)), and A fails to deliver the goods. A's duty to deliver the goods is discharged, and A is not liable to B for breach of contract.
 2. A contracts to produce a movie for B. As B knows, A's only source of funds is a \$ 100,000 deposit in C bank. C bank fails, and A does not produce the movie. A's duty to produce the movie is not discharged, and A is liable to B for breach of contract.
 3. A and B make a contract under which B is to work for A for two years at a salary of \$ 50,000 a year. At the end of one year, A discontinues his business because governmental regulations have made it unprofitable and fires B. A's duty to employ B is not discharged, and A is liable to B for breach of contract.
 4. A contracts to sell and B to buy a specific machine owned by A to be delivered on July 30. On July 29, as a result of a creditor's suit against A, a receiver is appointed and takes charge of all of A's assets, and A does not deliver the goods on July 30. A's duty to deliver the goods is not discharged, and A is liable to B for breach of contract.
- c. Contrary indication.* A party may, by appropriate language, agree to perform in spite of impracticability that would otherwise justify his non-performance under the rule stated in this Section. He can then be held liable for damages although he cannot perform. Even absent an express agreement, a court may decide, after considering all the circumstances, that a party impliedly assumed such a greater obligation. In this respect the rule stated in this Section parallels that of Uniform Commercial Code § 2-615, which applies "Except so far as a seller may have assumed a greater obligation" Circumstances relevant in deciding whether a party has assumed a greater obligation include his ability to have inserted a provision in the contract expressly shifting the risk of impracticability to the

other party. This will depend on the extent to which the agreement was standardized (cf. § 211), the degree to which the other party supplied the terms (cf. § 206), and, in the case of a particular trade or other group, the frequency with which language so allocating the risk is used in that trade or group (cf. § 219). The fact that a supplier has not taken advantage of his opportunity expressly to shift the risk of a shortage in his supply by means of contract language may be regarded as more significant where he is middleman, with a variety of sources of supply and an opportunity to spread the risk among many customers on many transactions by slight adjustment of his prices, than where he is a producer with a limited source of supply, few outlets, and no comparable opportunity. A commercial practice under which a party might be expected to insure or otherwise secure himself against a risk also militates against shifting it to the other party. If the supervening event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have provided against its occurrence. However, if it was reasonably foreseeable, or even foreseen, the opposite conclusion does not necessarily follow. Factors such as the practical difficulty of reaching agreement on the myriad of conceivable terms of a complex agreement may excuse a failure to deal with improbable contingencies. See Comment *b* to this Section and Comment *a* to § 265.

Illustration:

5. A, who has had many years of experience in the field of salvage, contracts to raise and float B's boat, which has run aground. The contract, prepared by A, contains no clause limiting A's duty in the case of unfavorable weather, unforeseen circumstances, or otherwise. The boat then slips into deep water and fills with mud, making it impracticable for A to raise it. If the court concludes, on the basis of such circumstances as A's experience and the absence of any limitation in the contract that A prepared, that A assumed an absolute duty, it will decide that A's duty to raise and float the boat is not discharged and that A is liable to B for breach of contract.

d. Impracticability. Events that come within the rule stated in this Section are generally due either to "acts of God" or to acts of third parties. If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter and the situation will be governed by the rules stated in Chapter 10, without regard to this Section. See Illustrations 4-7 to § 237. If the event is due to the fault of the obligor himself, this Section does not apply. As used here "fault" may include not only "willful" wrongs, but such other types of conduct as that amounting to breach of contract or to negligence. See Comment 1 to Uniform Commercial Code § 2-613. Although the rule stated in this Section is sometimes phrased in terms of "impossibility," it has long been recognized that it may operate to discharge a party's duty even though the event has not made performance absolutely impossible. This Section, therefore, uses "impracticable," the term employed by Uniform Commercial Code § 2-615(a), to describe the required extent of the impediment to performance. Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one

of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section. Performance may also be impracticable because it will involve a risk of injury to person or to property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance. However, "impracticability" means more than "impracticality." A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover. Furthermore, a party is expected to use reasonable efforts to surmount obstacles to performance (see § 205), and a performance is impracticable only if it is so in spite of such efforts.

Illustrations:

6. A contracts to repair B's grain elevator. While A is engaged in making repairs, a fire destroys the elevator without A's fault, and A does not finish the repairs. A's duty to repair the elevator is discharged, and A is not liable to B for breach of contract. See Illustration 3 to § 263.

7. A contracts with B to carry B's goods on his ship to a designated foreign port. A civil war then unexpectedly breaks out in that country and the rebels announce that they will try to sink all vessels bound for that port. A refuses to perform. Although A did not contract to sail on the vessel, the risk of injury to others is sufficient to make A's performance impracticable. A's duty to carry the goods to the designated port is discharged, and A is not liable to B for breach of contract. Compare Illustration 5 to § 262.

8. The facts being otherwise as stated in Illustration 7, the rebels announce merely that they will confiscate all vessels found in the designated port. The goods can be bought and sold on markets throughout the world. A refuses to perform. Although there is no risk of injury to persons, the court may conclude that the risk of injury to property is disproportionate to the ends to be attained. A's duty to carry the goods to the designated port is then discharged, and A is not liable to B for breach of contract. If, however, B is a health organization and the goods are scarce medical supplies vital to the health of the population of the designated port, the court may conclude that the risk is not disproportionate to the ends to be attained and may reach a contrary decision.

9. Several months after the nationalization of the Suez Canal, during the international crisis resulting from its seizure, A contracts to carry a cargo of B's wheat on A's ship from Galveston, Texas to Bandar Shapur, Iran for a flat rate. The contract does not specify the route, but the voyage would normally be through the Straits of Gibraltar and

the Suez Canal, a distance of 10,000 miles. A month later, and several days after the ship has left Galveston, the Suez Canal is closed by an outbreak of hostilities, so that the only route to Bandar Shapur is the longer 13,000 mile voyage around the Cape of Good Hope. A refuses to complete the voyage unless B pays additional compensation. A's duty to carry B's cargo is not discharged, and A is liable to B for breach of contract.

10. The facts being otherwise as in Illustration 9, the Suez Canal is closed while A's ship is in the Canal, preventing the completion of the voyage. A's duty to carry B's cargo is discharged, and A is not liable to B for breach of contract.

11. A contracts to construct and lease to B a gasoline service station. A valid zoning ordinance is subsequently enacted forbidding the construction of such a station but permitting variances in appropriate cases. A, in breach of his duty of good faith and fair dealing (§ 205), makes no effort to obtain a variance, although variances have been granted in similar cases, and fails to construct the station. A's performance has not been made impracticable. A's duty to construct is not discharged, and A is liable to B for breach of contract.

e. "Subjective" and "objective" impracticability. It is sometimes said that the rule stated in this Section applies only when the performance itself is made impracticable, without regard to the particular party who is to perform. The difference has been described as that between "the thing cannot be done" and "I cannot do it," and the former has been characterized as "objective" and the latter as "subjective." This Section recognizes that if the performance remains practicable and it is merely beyond the party's capacity to render it, he is ordinarily not discharged, but it does not use the terms "objective" and "subjective" to express this. Instead, the rationale is that a party generally assumes the risk of his own inability to perform his duty. Even if a party contracts to render a performance that depends on some act by a third party, he is not ordinarily discharged because of a failure by that party because this is also a risk that is commonly understood to be on the obligor. See Comment *c*. But see Comment *a* to § 262.

Illustrations:

12. A, a milkman, and B, a dairy farmer, make a contract under which B is to sell and A to buy all of A's requirements of milk, but not less than 200 quarts a day, for one year. B may deliver milk from any source but expects to deliver milk from his own herd. B's herd is destroyed because of hoof and mouth disease and he fails to deliver any milk. B's duty to deliver milk is not discharged, and B is liable to A for breach of contract. See Illustration 1 to § 263; compare Illustration 7 to § 263.

13. A contracts to sell and B to buy on credit 1,500,000 gallons of molasses "of the usual run from the C sugar refinery." C delivers molasses to others but fails to deliver any to A, and A fails to deliver any to B. A's duty to deliver molasses is not discharged, and A is

liable to B for breach of contract. If A has a contract with C, C may be liable to A for breach of contract.

14. A, a general contractor, is bidding on a construction contract with B which gives B the right to disapprove the choice of subcontractors. A makes a contract with C, a subcontractor, under which, if B awards A the contract, A will obtain B's approval of C and C will do the excavation for A. A is awarded the contract by B, but B disapproves A's choice of C, and A has the excavation work done by another subcontractor. A's duty to have C do the excavation is not discharged, and A is liable to C for breach of contract.

f. Alternative performances. A contract may permit a party to choose to perform in one of several different ways, any of which will discharge his duty. Where the duty is to render such an alternative performance, the fact that one or more of the alternatives has become impracticable will not discharge the party's duty to perform if at least one of them remains practicable. The form of the promise is not controlling, however, and not every promise that is expressed in alternative form gives rise to a duty to render an alternative performance. For example, a surety's undertaking that either the principal will perform or the surety will compensate the creditor does not ordinarily impose such a duty. See Restatement of Security § 117. Nor does a promise either to render a performance or pay liquidated damages impose such a duty. Furthermore, a duty that is originally one to render alternative performances ceases to be such a duty if all but one means of performance have been foreclosed, as by the lapse of time or the occurrence of a condition including election by the obligor, or on the grounds of public policy (Chapter 8) or unconscionability (§ 208).

Illustrations:

15. On June 1, A contracts to sell and B to buy whichever of three specified machines A chooses to deliver on October 1. Two of the machines are destroyed by fire on July 1, and A fails to deliver the third on October 1. A's duty to deliver a machine is not discharged, and A is liable to B for breach of contract. If all three machines had been destroyed, A's duty to deliver a machine would have been discharged, and A would not have been liable to B for breach of contract. See Uniform Commercial Code § 2-613.

16. A contracts to repair B's building. The contract contains a valid provision requiring A to pay liquidated damages if he fails to make any of the repairs. S is surety for A's performance. Before A is able to begin, B's building is destroyed by fire. Neither A's nor S's duty is one to render an alternative performance. A's duty to repair the building is discharged, and A is not liable to B for liquidated damages or otherwise for breach of contract. S's duty as surety for A is also discharged, and S is not liable to B for breach of contract.

Utah Rule of Civil Procedure 12

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and

disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the

plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

PART VII DISCHARGE AND IMPOSSIBILITY
TOPIC B IMPOSSIBILITY
CHAPTER 74 IMPOSSIBILITY OF PERFORMANCE-- PERSONAL INABILITY

74.15 When a Promisor Assumes the Risk of Impossibility of Performance--General Framework for Analysis

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Courts and commentators often expressly engage in risk analysis when analyzing impossibility cases. The duty will not be discharged if the party seeking discharge assumed the risk that the disabling event might occur. This focuses the inquiry of the reviewing court but begs the question: What is meant by "assumption of risk" in this context? On what basis should a court say that one party, rather than the other, assumed the risk of changed circumstances? Generally speaking, risk assumption may be understood in several ways: by voluntary assent to accept the risk in the contract itself; by tacit assent, e.g., by failing to protect against a known risk in the contract; by implication, e.g., when custom in the trade or profession allocates it to one party or the other; or by a rule of law based upon principles of equity, fairness, and other societal norms. Often, when a court says that a contractor "assumed the risk," we cannot tell whether the court means that the contractor expressed such an intention or impliedly accepted it, or that the court has decided on other grounds that the promisor ought to carry the risk and bear the loss. In other words, a statement that one party "assumed the risk" means only that the court refused to discharge the duty. Without more, it does not explain why the duty was not discharged.

Risk analysis in the impossibility doctrine "ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance."¹ Courts are hesitant to relieve contracting parties from their obligations, since contracts by their very nature are made to lock in rights and protect against unknown circumstances the future may bring. In deciding who should bear the risk of post-contract events disrupting expectations, courts attempt to balance the sometimes competing policies of certainty in contractual relations and shared attitudes about fairness, equity, and proportionality. Like the common law in general, the impossibility doctrine is sufficiently flexible and adaptive to achieve just results dependent on the factual circumstances presented to the court.

Cases holding that a promisor assumed the risk of certain types of impossibility, and that the promisor must pay damages in case of nonperformance, can sometimes be explained by process of reasonable contract interpretation. The promisor expressly or impliedly assumed the risk by having knowledge of the risk and either accepting it explicitly or failing to protect against it in the agreement.² If A sells land to B and the latter promises that no building other than a house will be erected on the premises, is there a breach if a railroad company takes the land by eminent domain and builds a station there? Contract interpretation may show that B's undertaking was no more than a promise that B would not personally build or assent to the building of anything but a house, and that B would do all within B's power to prevent any different type of construction. On this interpretation, B has not breached the promise; and any loss must be borne by A.³ On the other hand if we interpret B's obligations to mean that B promised to indemnify A against a loss resulting from any building, regardless of its cause and even if it was unstoppable, B will be compelled to do so.⁴

Seldom will reported cases involve contracts where the risk was explicitly allocated to a party. More often, the allocation can be found by looking at the entire contract and other circumstances affecting the agreement. In *Gordon v. Indusco Management Corp.*,⁵ Indusco purchased a franchise under a contract making time of the franchise outlets. Gordon contracted to erect a building in ninety days but did-

not perform as promised, claiming impossibility because it could not obtain building permits under the zoning category of the property. The agreement did not assign the obligation to obtain permits to either party, and was silent on the effect of permit denial or delay. The court nevertheless held that there was no excuse because Gordon knew of the zoning issue and permit requirements at the time of contracting, or would at least be charged with such knowledge given his position in the industry, had represented to Indusco that there would be no problem obtaining permits, and had induced Indusco to enter a lease for the site without providing for any such contingencies in the agreement.⁶ Gordon therefore was deemed to have assumed the risk of this type of delay.

Sometimes the primary purpose of one of the parties in creating the contractual relationship is to eliminate a particular risk of injury by obtaining a promise from another party to prevent that injury. If an irrigation company promises to supply water for irrigation or other use in an arid region, it may be held to anticipate natural shortages, even unusually severe ones, and to find the necessary water at the time and place where it exists.⁷ Even if the contract is silent on risk allocation, the promisor may fairly be said to have assumed the risk of its own inability to do what others might have done--ensure that adequate water supplies are available to those who are paying for it. The contract can be viewed as a risk management agreement, not unlike an insurance contract, whereby the land owner agrees to pay a premium in exchange for someone else taking the risk of severe water shortages.

In other cases the same result may be reached even though the court is convinced that it never entered the minds of the parties that there was a risk of impossibility. The court's action may be governed by the custom of the relevant community in such cases. Do promisors generally indemnify promisees in such circumstances, or do promisees usually bear their own disappointment? There may have been reliance on the promise, a loss occurred, or an expected gain prevented. Someone must bear the loss, and the court may deem it more just, in light of accepted community standards, to make the promisor carry the risk and suffer the consequences. In such an instance occurs when market conditions change or the financial circumstances of one of the parties changes for the worse, rendering performance impossible. As stated in comment b to Restatement (Second) of Contracts § 261, "the continuation of existing market conditions and of the financial situation of the parties are ordinarily not such [basic] assumptions, so that mere market shifts or financial inability do not usually effect discharge" Following this comment, illustration 2 gives the example of a contracting party who is unable to perform because his funds are on deposit in a bank that fails. According to the Restatement, the party assumes such a risk and is not discharged.

If the contract does not allocate the risk, and if the relevant customs are variable and uncertain, then the cases become more difficult to decide and the court may find guidance in precedent. From an economic perspective, consistency of decision may reduce uncertainty and litigation, and enable well-informed contractors to adjust their affairs in accordance with the risks to be carried. It may make little difference to the community at large which party bears the risk, but it is important that the contracting parties know in advance which one will likely bear it, so they can order their affairs differently if they wish to deviate from the norm. At the very least, adherence to precedent can allow disputing parties to predict the outcome of contemplated litigation when changed circumstances lead to nonperformance.

General rules have developed in this area. Courts usually hold, for example, that a contracting party must carry the risk when subsequent events cause a decline in the value of the land or goods for which the party was paid.⁸ If events have prevented the realization and enjoyment of expected values from a promised performance, or increased those values, those losses or gains generally fall where they may. In some cases, however, it has been held that a contractor does not carry the risk of catastrophic collapse of value. It may be found that the contractor did not assume the risk and that the circumstances are so extraordinary that fair-minded people would conclude that the contractor should not be compelled to carry it.⁹

The Uniform Commercial Code makes no significant change in the general approach to risk analysis.¹⁰ Section 2-511 states, in part, as follows:

Except so far as a seller may have assumed a greater obligation ... (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has become impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made

first clause refers to an assumption of the risk by the seller's taking on a greater obligation in the agreement than the law would otherwise imply. The parties may allocate risks in the agreement. A different element is introduced by the phrase "by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made," which relates to the assumption of certain risks but not others after the contract is made.¹¹ In essence, the introductory language relates to an assumption of risk by the terms of the agreement or by implication based on the circumstances under which the agreement was made. The second provision relates to the allocation of the risk imposed by law in light of subsequently occurring events.¹² As one court put it: "The latter part of the test seems a somewhat complicated way of stating Professor Corbin's question of how much risk the promisor assumed."¹³ The Restatement (Second) takes a similar approach, except it makes explicit what the UCC leaves implicit: a promisor may not benefit from the doctrine of impossibility if the promisor is guilty of contributory fault.¹⁴ The subject of contributory fault is addressed in the next section of this treatise.

The most frequently cited inquiry in deciding these cases is the foreseeability of the event that caused the difficulty.¹⁵ If the court concludes that the problem was or should have been anticipated by the party seeking discharge, the impossibility argument inevitably fails; if the event was wholly unforeseeable, the argument has much better chance of succeeding.¹⁶ In *Dills v. Town of Enfield*,¹⁷ for example, the duty of a developer under a purchase option agreement for the sale of land was not discharged by supervening impracticability on the ground that the developer was unable to obtain mortgage financing. The court found that the failure to obtain financing was a possibility that the developer foresaw, or should have anticipated, at the time the contract was formed.¹⁸

The foreseeability of an event is not conclusive, however. Several authorities argue against placing heavy reliance on foreseeability as a means of allocating post-contract risks.¹⁹ An explanatory comment to the Restatement (Second) states that foreseeability is only one of the factors to be considered in determining whether the defense of impossibility is available.²⁰ It also provides that the failure to deal with an improbable or insignificant contingency, even though foreseen, should not be deemed to amount to an assumption of the risk.²¹ One court reasoned that the promisor should be allowed to explain why there was no clause in the contract covering the contingency, e.g., the other party might have been the dominant party and the promisor was forced to sign a standard form contract.²² Under these circumstances, discharge could be granted even though the risk was foreseeable and the agreement failed to address the issue.

The more liberal view has been espoused by a few courts and some commentators.²³ They contend that foreseeability is of no importance when the parties did not intend that the risk of the occurrence should be assumed by the promisor. For example, in *West Los Angeles Institute for Cancer Research v. Mayer*,²⁴ the defendant contracted to sell certain real property to the plaintiff, a tax-exempt charity, and to lease it back. The parties assumed that substantial tax benefits would accrue to defendant through this arrangement. It was clear that the plaintiff knew that the defendant would not have entered into the transaction but for the prospective tax advantages. The IRS subsequently issued a revenue ruling disallowing the type of tax advantages that the parties expected. The defendant refused to perform and claimed the defense of frustration. The plaintiff argued that defendant could not use the defense because it was foreseeable that the IRS might disapprove the tax benefits. Notwithstanding the foreseeability, the court held that the defense was available because the parties intended that neither party should assume this risk.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) > Sales (Article 2) > Breach, Repudiation & Excuse > Excuse From Performance
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Contracts Law > Performance > Impossibility of Performance > Impracticability

FOOTNOTES:

¹Footnote 1. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) .

²Footnote 2.

denying discharge to landlord who agreed to specific escalator clause in lease, court stated that it "must examine the agreement of the parties and the circumstances surrounding their negotiations in order to determine if they contemplated that the commercial risk involved would be borne by the party claiming discharge ...").

Ariz. -- Thoracic Cardiovascular Associates, Ltd. v. St. Paul Fire and Marine Ins. Co., 181 Ariz. 449, 891 P.2d 916 (1995) ("impossibility does not excuse nonperformance where promisor has indicated an intent to assume the risk; no relief where insured elected to purchase "claims made" policy instead of "occurrence" policy).

Del. -- S.A. Judah v. Delaware Trust Co., 378 A.2d 624 (Del. 1977) (agreement between corporation and purchasers of debentures placed risk of currency devaluation on debenture holders).

Idaho -- City of Boise v. Bench Sewer District, 773 P.2d 642 (Idaho 1989) (impossibility claim denied, and contract containing mechanism for accommodating increased costs enforced according to its terms; "[t]he law generally enforces such choices because, even though a particular agreement may prove to be improvident, contracts as a whole benefit society by contributing to the rational ordering of human affairs").

Mo. -- Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575 (Mo. App. 2000) (ultimate question is whether the nature of the contract and the surrounding circumstances show that the risk of the subsequent events was assumed by the promisor; if a party desires to be excused from performance, it is that party's duty to provide for it in the contract).

Footnote 3. See Baily v. De Crispigny, [1869] L.R. 4 Q.B. 180 (holding that B is not required to indemnify A). If this is the interpretation of the contract, it would seem that the taking by eminent domain has deprived A of a property interest, in the nature of an easement, for which A should be given compensation, just as B is given compensation for the taking of B's larger interest in the land taken. The question in the condemnation proceeding should not be who is the owner, but who are the owners and what are the values of their respective ownership interests. In Johnstone v. Detroit, Grand Haven & Milwaukee Ry. Co., 245 Mich. 65, 222 W. 325 (1928) , it was held that on a taking by eminent domain, the holder of an easement based upon a restrictive covenant for its benefit has a right to compensation. Cf. Doan v. Cleveland Short Line Ry. Co., 92 Ohio St. 461, 112 N.E. 505 (1916) (interest not compensated).

Kan. -- Gammon v. Blaisdell, 45 Kan. 221, 25 P. 580 (1891) .

N.Y. -- Reife v. Osmer, 252 N.Y. 320, 169 N.E. 399, 67 A.L.R. 1101 (1929) .

Of course, the opposite might be true and the purchaser suffers a loss due to subsequent government action beyond the parties' control. In Summers v. Midland Co., 167 Minn. 453, 209 N.W. 323, 46 A.L.R. 816 (1926) , where the purchaser had paid the price and taken possession, the municipality condemned the district so as to limit it to residences only. The purchaser's purpose in buying had been to erect and operate a gas station on the lot. The court held that the purchaser had no right to the restitution of the price. He was regarded as an absolute owner in possession who should bear the ordinary risks of a property owner. See also Hillington v. Stonefield Estates Co. v. Stonefield Estates, [1952] 1 All E.R. 853 (Ch.D.).

Footnote 4. In Walton Harvey v. Walker & Homfrays, [1931] 1 Ch. 145, 274 , 144 L.T.R. 331, the lessees of a hotel contracted to permit the plaintiffs to maintain an advertising sign for 12 years, knowing at the time the hotel was within the terms of an act of Parliament that empowered the Manchester Corporation to use the property for its uses. Later, the hotel was taken for such uses and the plaintiffs were forced to remove the sign. The lessees were held liable in damages for breach, since the seizure under the statute was an event which might have been anticipated and guarded against in the contract."

Footnote 5. 164 Conn. 262, 320 A.2d 811 817 (1972)

otnote 6.

Md. -- Fred W. Frank Bail Bondsman, Inc. v. Maryland, 99 Md. App. 227, 636 A.2d 484 (1994) (bail bondsman's inability to secure extradition of defendants from Haiti because United States has no diplomatic relations with Haiti was a risk allocated to bondsman under bail bond contract); Levine v. Rendler, 272 Md. 1, 320 A.2d 258 (1974) (subdivision developer not relieved from liability following change in county road specifications, since developer could have foreseen change).

Mont. -- 360 Ranch Corp. v. R & D Holding, 278 Mont. 487, 926 P.2d 260 (1996) (impossibility defense raised questions of fact when vendor could not obtain necessary subdivision approval).

ootnote 7.

Iowa -- Wernli v. Collins, 87 Iowa 548, 54 N.W. 365 (1893) (where defendant promised to dig a well and produce water for a herd of cattle).

Kan. -- Sunflower Elec. Cooperative, Inc. v. Tomlinson Oil Co., 7 Kan. App. 2d 131, 638 P.2d 963 (1981) (seller not relieved of liability for breach of agreement for sale of natural gas, where inadequate supplies were foreseeable and circumstances indicate that seller assumed the risk of low reserves).

Tex. -- Northern Irrigation Co. v. Watkins, 183 S.W. 431 (Tex. Civ. App. 1916) ; Northern Irr. Co. v. Dodd, 162 S.W. 946 (Tex. Civ. App. 1914) . But the risk may be expressly not assumed, by putting in a clause as to drought and causes beyond control. Souther v. San Diego Flume Co., 121 F. 347 (9th Cir. 1903) .

Footnote 8. Comment b to Restatement (Second) of Contracts § 261 states: "The continuation of existing market conditions and the financial situation of the parties are ordinarily on such assumptions, so that mere market shifts or financial inability do not usually effect discharge" Comment d provides: "A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials or costs of construction, unless well beyond the normal range, does not amount to impracticability since this is the sort of risk that a fixed price contract is intended to cover."

Footnote 9.

U.S. -- Gulf Oil Co. v. FPC, 563 F.2d 588, 599-600 (3d Cir. 1977) (depends on whether "the cost of performance has in fact become so excessive and unreasonable that failure to excuse performance would result in grave injustice").

Footnote 10. See Lee Russ, Annotation, *Impracticability of Performance of Sales Contract Under UCC § 2-615*, 55 A.L.R.5th 1 (1998) . See also the discussion of UCC § 2-615 at § 74.8.

Footnote 11. United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966) .

Footnote 12. See Posner, *Economic Analysis of Law* 102-06 (4th ed. 1992). For a critique of Posner's analysis see Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 Ind. L.J. 44 (1995); Trimarchi, *Commercial Impracticability in Contract Law: An Economic Analysis*, 11 Int'l Rev. of L. & Econ. 63 (1991); Wagner, *In Defense of the Impossibility Defense*, 27 Loy. U. Chi. L.J. 55 (1995). A different perspective is provided by Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. Pa. L. Rev. 1029 (1992).

Footnote 13. *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966) .

✚Footnote 14. Restatement (Second) of Contracts § 261.

✚Footnote 15. The issue of foreseeability is viewed in some cases as one of law for the court to decide, in others as a question of fact for the jury. See *Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 861 F.2d 650 (11th Cir. 1988) (question of fact); *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363 (1974) (question of fact); *Berline v. Waldschmidt*, 159 Kan. 585, 156 P.2d 865 (1945) (question of law); *Mitchell v. Ceazan Tires, Ltd.*, 25 Cal. 2d 45, 153 P.2d 53 (1944) (question of law); *Oosten v. Hay Haulers, Dary Employees & Helpers Union*, 45 Cal. 2d 784, 291 P.2d 17 (1955) , cert. denied, 351 U.S. 937, 76 S. Ct. 833, 100 L. Ed. 1464 (1956) (question of fact).

✚Footnote 16.

Alaska -- *U.S. Smelting, Refining and Mining Co. v. Wigger*, 684 P.2d 850 (Alaska 1984) (commercial frustration in performance of mining lease was no defense if event was foreseeable).

Cal. -- *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal. 2d 666, 451 P.2d 721 (Cal. 1969) (question whether risk was foreseeable is distinct from question whether it was contemplated by the parties, and it is possible for parties to contemplate and make express provision for a risk that would not otherwise be foreseeable; conversely, some risks are so wholly foreseeable that they are deemed contemplated by the parties).

Ill. -- *Mouhelis v. Thomas*, 95 Ill. App. 3d 181, 419 N.E.2d 956 (1981) (parties anticipated possibility of mortgage financing problems); *M.A. Felman Co. v. WJOL, Inc.*, 104 Ill. App. 2d 66, 243 N.E.2d 33 (Ill. App. 1968) (when a party contracts to do a thing without qualification, performance is *not* excused even if unforeseen event makes performance impossible).

Ind. -- *Strodtman v. Integrity Builders*, 668 N.E.2d 279 (Ind. App. 1996) (no discharge when developer conveyed adjoining land to third party, thereby making it impossible to complete landscaping along property border).

Kan. -- *White Lakes Shopping Center, Inc. v. Jefferson Standard Life Ins. Co.*, 208 Kan. 121, 490 P.2d 609 (1971) (no discharge if contingencies might have been foreseen and provided against in the loan agreement).

Mont. -- *Smith v. Zepp*, 173 Mont. 358, 567 P.2d 923 (1977) (absence of gold in mining property was foreseeable risk and therefore did not discharge purchasers from obligation of producing 300 yards of material daily from the mine).

Ohio -- *Paul v. First Nat'l Bank*, 369 N.E.2d 488 (Ohio C.P. 1976) (no discharge because executor could have foreseen the probability that decedent's children would remove articles from real estate prior to sale to purchaser).

Utah -- *Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656 (Utah App. 1989) (city's refusal to approve building permit was unforeseeable and discharged sub-lessee from obligation to construct building).

Wash. -- *Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc.*, 112 Wash. 2d 694, 773 P.2d 70 (1989) (en banc) (foreseeability only one part of general inquiry into whether the contingency was a basic assumption on which contract was made).

Wyo. -- *Mortenson v. Scheer*, 957 P.2d 1302 (Wyo. 1998) (impossibility did not discharge landowner who failed to obtain requisite government permit because landowners were expected to provide for all foreseeable contingencies; they therefore assumed the risk that permit would not issue); *Gibson v. J.T. Allen Agency*, 407 P.2d 708 (Wyo. 1965) (impossibility will not discharge condition when promisor himself is the cause of the supervening event).

Footnote 17. 210 Conn. 705, 557 A.2d 517 (1989) . See also *Hess v. Dumouchel Paper Co.*, 154 Conn. 343, A.2d 797, 801 (1966) .

Footnote 18.

U.S. -- *Skelly Oil Co. v. Federal Power Comm'n*, 532 F.2d 177, 180 (10th Cir. 1976) ; *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196, 1211 (2d Cir. 1975) .

Footnote 19. See *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal. 2d 666, 75 Cal. Rptr. 889, 451 P.2d (1969) ; *Wills v. Shockley*, 52 Del. 295, 157 A.2d 252 (1960) ; *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363 (1974) ; Restatement (First) of Contracts § 457. Official Comment 8 to UCC § 2-615 provides, in part:

Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances.

Footnote 20. Restatement (Second) of Contracts § 261 cmt. b.

Footnote 21. See Restatement (Second) of Contracts § 261 cmts. b & c.

Footnote 22. *L.N. Jackson & Co. v. Royal Norwegian Gov't*, 177 F.2d 694 (2d Cir. 1949) .

Footnote 23. *West Los Angeles Inst. v. Mayer*, 366 F.2d 220 (9th Cir. 1966) ; *Edward Maurer Co. v. Tubeless Co.*, 285 Fed. 713 (6th Cir. 1922) ; *Glenn R. Sewell Sheet Metal v. Loverde*, 70 Cal. 2d 666, 75 Cal. Rptr. 896 n.13, 451 P.2d 721 (1969) ; Smit, *Frustration of Contract. A Comparative Attempt at Consolidation*, Colum. L. Rev. 287 (1958). See also Aubrey, *Frustration Reconsidered*, 12 Int'l & Comp. L.Q. (1963).

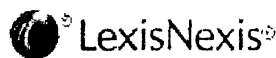
Footnote 24. 366 F.2d 220 (9th Cir. 1966) .

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