CONTRACT IMPOSSIBILITY *FROM THE SPANISH FLU OF 1918 TO THE COVID-19 PANDEMIC*

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ABSTRACT

The COVID-19 pandemic has brought chaos to contractual agreements in many sectors. As the number of contract breaches caused by the pandemic escalates, law firms and experts have turned to the common law doctrine of contract impossibility as a defense for nonperformance. Drawing from the Supreme Courts of North Dakota, Ohio, and Oregon decisions on contract nonperformance caused by government orders that forced all businesses and schools to shut down during the Spanish influenza of 1918, this Article argues that the defense of contract impossibility in the age of COVID-19 will yield unpredictable results and that litigants should be wary of relying upon this strategy. The lesson from the Spanish flu of 1918 dictates that parties should anticipate and allocate risks by providing contingencies directly in contracts.

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INTRODUCTION

C.J. Alden was arrested for operating his movie theatre in violation of quarantine orders promulgated by the local board of health in response to the spread of the virus.[1] The State of Arizona prosecuted Alden for a misdemeanor offense due to his violation of the law that was designed to curb the outbreak.[2] The James A. Benson Shows' traveling circus could not obtain a license from a North Carolina authority to conduct its show, because the local government prohibited gatherings of large groups of people until further notice.[3] The circus incurred daily expenses for performers, equipment, and location rentals during the shutdown.[4] An Arizona school's board of trustees challenged the enforcement of a new order that made it a public nuisance for two or more persons to congregate in banks, schools, churches, businesses, and other places of entertainment.[5] The instances described above all occurred during the Spanish influenza epidemic in 1918, but they eerily resemble what we are currently facing in the age of the COVID-19 pandemic.[6]

1. *See* Alden v. State, 179 P. 646, 646 (Ariz. 1919).

2. *Id.* (". . . a complaint charging appellant with an offense of willfully, maliciously, and unlawfully conducting and carrying on a movie picture show at Globe, in violation of the published rules and regulations of the local board of health, then in force to prevent the spread of Spanish influenza.").

3. *See* Benson v. Walker, 274 F. 622, 622 (4th Cir. 1921).

4. *See id.* at 622.

5. Globe Sch. Dist. v. Bd. of Health, 179 P. 55, 61 (Ariz. 1919) (holding that ". . . the measure adopted by the local board of health, closing the schools of the Globe school district, was, at the time adopted, a valid, enforceable order and regulation for the purpose of reasonably protecting the public health, . . . that during the existence of said disease in epidemic form in said community said regulation was binding upon the educational administrative officers, and continued binding so long as such epidemic continued in such form, and no longer.").

6. *See, e.g.*, *7 people issued $1,000 tickets for violating COVID-19 shelter-in-place order, Santa Cruz police chief says*, ABC NEWS (Apr. 11, 2020), https://abc7news.com/shelter-in-place-violation-will-i-get-ticketed-for-violating-the-shelter-order-santa-cruz-ticket-in-place-california-COVID-19/6095620 [https://perma.cc/JA84-5ZK6];

In the short span of years between 2003 and 2020, the international community witnessed three pandemics—SARS, H1N1, and COVID-19. Unlike the other two pandemics, COVID-19 has tormented the global community and economy on an unparalleled level. From the global supply network to local restaurants, all activities have come to a grinding halt with governments issuing stay-at-home and social distancing orders.[7] In the United States, the grinding halt has brought back the ghosts of the Spanish influenza of 1918 when all economic, social, entertainment, educational, and religious activities were shut down for months under quarantine.[8] A little over one hundred years later, COVID-19 arrived in an unpre-

Police arrest Oakland man for violating shelter-in-place order, SAN FRANCISCO EXAMINER (Apr. 26, 2020, 9:50 P.M.), https://www.sfexaminer.com/news/police-arrest-oakland-man-for-violating-shelter-in-place-order/ [https://perma.cc/E867-WLK4]; *NYPD Arrests 3, Issues 51 Summonses Amid Enhanced Social Distancing Enforcement*, NBC NEW YORK (May 3, 2020 2:06 pm), https://www.nbcnewyork.com/news/local/nypd-arrests-3-issues-51-summonses-amid-enhanced-social-distancing-enforcement/2400113/ [https://perma.cc/5P35-GSAN]; *see Henry v. DeSantis*, 461 F. Supp. 3d 1244 (S.D. Fla. 2020) (the plaintiff – who worked at a bar – was prohibited from returning to her place of employment under the defendant's shutdown order and sought to enforce her civil rights); *see also Cassell v. Snyders*, 458 F. Supp. 3d 981 (N.D. Ill. 2020), *aff'd*, 990 F.3d 539 (7th Cir. 2021) (Pastor Stephen Cassell filed an action challenging the constitutionality of Illinois's stay-at-home order, which allowed liquor stores to stay open as "essential," but shut down churches as "non-essential."); *see also* Complaint at 3, Gondola Adventures v. Newsom, 2:20 cv 3789 (C.D.Ca., Apr. 24, 2020) (action challenging the constitutionality of California's shelter-in-place orders that inflicted massive and widespread economic damages to plaintiffs).

7. TD Bank Financial Group, *COVID-19 Brings the Longest U.S. Expansion to a Grinding Halt in Q1 of 2020*, ACTIONFOREX (Apr. 29, 2020, 13:53 GMT), https://www.actionforex.com/contributors/fundamental-analysis/291148-COVID-19-brings-the-longest-u-s-expansion-to-a-grinding-halt-in-q1-of-2020/ [HTTPS://PERMA.CC/5WCB-4XDZ]; *See also* Sophia Chen, et al., *The Economic Impact of COVID-19 in Europe and the US: Outbreaks and Individual Behaviour Matter a Great Deal, Non-pharmaceutical Interventions Matter Less*, VOX (May 11, 2020), https://voxeu.org/article/economic-impact-COVID-19-europe-and-us [HTTPS://PERMA.CC/PLK2-USSE].

8. Jennifer Jolly-Ryan, *Balancing Interests and Risk of Error: What Quarantine Process is Due After Ebolamania*, 96 NEB. L. REV. 100, 113 (2017) (stating that during the Spanish influenza, "[p]ublic-health departments distributed gauze masks for people to wear in public, forbade stores from holding public sales, and limited funerals to fifteen minutes in length. Some towns required people to sign a certificate verifying they were healthy as a prerequisite to entering a public building. Railroads were instructed to deny transport to passengers who did not present a certificate of health. Some state boards of health placed the entire state under quarantine, closing all places of amusement, churches, schools, and such places of business where crowds could congregate. Public gatherings of any sort were forbidden; children were to remain at home and were not permitted to play on the public streets.").

pared nation. Federal rescue packages totaling trillions of dollars have so far failed to suspend the economic freefall, as most businesses remain closed, some businesses face increased risks of bankruptcy, and unemployment filings escalate.[9] From the early days of the COVID-19 pandemic to the present time, many contracts that once held individuals and businesses together in a myriad of agreements and relationships now cannot be performed.[10]

As expected, contract lawsuits soon followed the pandemic's arrival. By March 9, 2020, seven weeks after the first positive coronavirus case was reported in the United States, the first contract lawsuit related to COVID-19 was filed.[11] By early May 2020,

9. Andy Sullivan, *What's in the $2.3 Ttrillion U.S. Coronavirus Rescue Package*, REUTERS (March 27, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-bill-contents/factbox-whats-in-the-2-2-trillion-u-s-coronavirus-rescue-package-idUSKBN21E328 [https://perma.cc/MYN3-FTM6]; Erica Werner, *House Passes $484 Billion Bill with Money for Small Businesses, Hospitals and Testing to Battle Coronavirus*, WASH. POST (Apr. 23, 2020, 6:13 P.M. EDT) https://www.washingtonpost.com/us-policy/2020/04/23/congress-coronavirus-small-business/ [https://perma.cc/JPM4-SJAE]. ("Congress has now committed almost $3 trillion in emergency spending to battling the economic fallout from the coronavirus . . ."); Leo Hindery, Jr., *Stimulus Packages Aren't Enough to Recover from the COVID-19 Economy*, QUARTZ (Apr. 14, 2020), https://qz.com/1837047/how-to-fix-the-economy-after-coronavirus/ [HTTPS://PERMA.CC/KW96-SMU]; Richard McGahey, *COVID-19 Could Bankrupt Your State*, FORBES (Apr. 6, 2020, 2:06 PM EDT), https://www.forbes.com/sites/richardmcgahey/2020/04/06/COVID-19-could-bankrupt-your-state/#50d4e0cf5489 [https://perma.cc/5EFY-KUXT]; Alana Semuels, *For Millions of People, Relief From the COVID-19 Stimulus Package Remains Out of Reach*, TIME (last updated Apr. 6, 2020, 1:20 PM EDT), https://time.com/5816775/coronavirus-unemployment-stimulus/ [HTTPS://PERMA.CC/EA85-9DZB]; Zach Montague, *A Look at What's in the Stimulus Package Trump Signed*, N.Y. TIMES (last updated Dec. 29, 2020), https://www.nytimes.com/2020/12/28/business/economy/second-stimulus-package.html?action=Click&pgtype=article&state=default&module=STYLN_pharmacy_components&region=BELOW_MAIN_CONTENT&context=styln-stimulus-faq [HTTPS://PERMA.CC/V8N2-ARKH].

10. The law firm Hunton Andrew Kurth compiles all lawsuits (including contract suits) related to COVID-19. *Hunton Andrews Kurth COVID-19 Complaint Tracker Media Coverage*, HUNTON ANDREWS KURTH (Feb. 2, 2020), https://www.huntonak.com/en/news/hunton-andrews-kurth-COVID-19-complaint-tracker-media-coverage.html [https://perma.cc/53CS-MHKH]; *see also COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, https://www.huntonak.com/en/covid-19-tracker.html [https://perma.cc/C9TP-ZNVH].

11. In *Ghazal Mehrani v. Persia House of Michigan*, the plaintiff sought to postpone a concert and requested refunds to ticket holders because the defendants had not taken sufficient precaution to prevent the coronavirus spread. *COVID-19 Complaint Tracker*, COGNICION, (listing case 2020-180173-CZ filed on March 9, 2020, with the Oakland County Circuit Court, Michigan) https://www.cognicion.com/covid/.

more than 200 contract lawsuits had been filed.[12] Many of those cases were contract class actions suits.[13] Illustratively, in *Steven Hills Diary v. Chula Vista Cheese Co.*, the plaintiffs brought a breach of contract action against the defendants for terminating a supply agreement due to the COVID-19 outbreak.[14] In *Palm Springs Mile Associates Ltd v. Taco Bell of America LLC*, the plaintiff sought rent payments from the defendants, whose business closures were forced by COVID-19.[15] In *GV KB Store v. Scottsdale Insurance Co.*, the plaintiffs brought a contract class action against the insurance defendant for failure to pay the plaintiff and the class members for business income losses and other covered expenses incurred because of COVID-19.[16] In *BM Real Estate Services v. Angel Oak Mortgage Solutions*, the plaintiff alleged breach of contract against the defendant for failure to purchase mortgage loans as agreed, even though the defendant repeatedly provided assurances of performance as the COVID-19 pandemic erupted.[17] In *Nicholas Bergeron v. Rochester Institute of Technology*, students filed a contract class action and unjust enrichment claim against the university.[18] The students sought a refund of tuition after the university transitioned all classes to a virtual environment as a result of the COVID-19 pandemic.[19]

Witnessing the rise in contract disputes, law firms sent client alerts and experts voiced their comments in trade publications asserting a defense for contract nonperformance based on the doctrine of impossibility or impracticability.[20] These publications

12. Debra Cassens Weiss, *Nearly 800 COVID-19 lawsuits have been filed, according to law firm's tracker*, ABA J. (May 4, 2020, 4:41 PM CDT), https://www.abajournal.com/news/article/nearly-800-COVID-19-lawsuits-have-been-filed-according-to-law-firms-tracker [https://perma.cc/7UA5-DHEZ]; *see also* HUNTON ANDREWS KURTH, *supra* note 10.

13. *Id.*

14. Compl. at 1, Seven Hills Dairy v. V&V Supremo Foods, Inc., No. 04C01-2004-PL-000047 (Benton Cir. Ct. Apr. 22, 2020).

15. Compl. at 5, Palm Springs Mile Assoc., Ltd., v. Taco Bell of Am., LLCNo. 1:20 cv 21650 (S.D. Fla. May 14, 2020).

16. Compl. at 2, GV KB Store v. Scottsdale Ins. Co., No. 1:20CV21815 (S.D. Fla. Sept. 1, 2020).

17. BM Real Est. Servs., Inc. v. Angel Oak Mortg. Sols. LLC, No. CV 20-3974-KS (C.D. Cal. Sept. 3, 2020).

18. Bergeron v. Rochester Inst. of Tech., No. 20-CV-6283 (CJS), 2020 WL 7486682 (W.D.N.Y. Dec. 18, 2020)

19. *Id.* at 1; *See also* Smith v. Univ. of Pennsylvania, No. CV 20-2086, 2021 WL 1539493 (E.D. Pa. Apr. 20, 2021).

20. *See* David J. Ball et al., *Contractual Performance in the Age of Coronavirus: Force Majeure, Impossibility and Other Considerations*, NAT. L. REV. (Mar. 18, 2020) (stating "parties could be excused from performance by claiming impossibility or impracticability" and noting "[d]epending on the circumstances, unanticipated govern-

suggest that the defense is readily available and that courts would be receptive to the defense to excuse contract nonperformance due to COVID-19 disruptions.[21] Such assertions, however, lack support in legal precedents, as several state supreme courts did not accept impossibility defenses to contract nonperformance brought on by the impact of the Spanish influenza.[22]

This article contends that the success of the contract impossibility defense will be at best inconsistent in the age of COVID-19, due to the already scarce victories of that parties that have argued it.[23] Parties who wish to argue that their nonperformance should be

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ment decrees arising from the coronavirus outbreak—such as prohibiting public gatherings and border closures—may give rise to a valid impossibility defense") *https://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other* [https://perma.cc/P4HM-QWQD] ; Amy E. Murphy et al., *Evaluating Whether COVID-19 Excuses Nonperformance Based on Impossibility, Frustration of Purpose, or Impracticability*, MILLER JOHNSON PUBL. (Mar. 19, 2020), https://millerjohnson.com/publication/evaluating-whether-covid-19-excuses-nonperformance-based-on-impossibility-frustration-of-purpose-or-impracticability/ [https://perma.cc/G388-VXA7]; David C. Agee & Natalie R. Holden, *How COVID-19 Affects Contractual Obligations: A Summary of Force Majeure and Related Legal Doctrines*, HUSCH BLACKWELL (Mar. 22, 2020), https://www.huschblackwell.com/newsandinsights/how-COVID-19-affects-contractual-obligations.-excuses-non performance-based-on-impossibility-frustration-of-purpose-or-impracticability/ [https://perma.cc/6SHX-GYZ5].

21. Peter A. Biagetti & Clare Prober, *"Fuss" Majeure: Lessons from the Early Outbreak of Covid v. Contract Cases*, NAT. L.J. (Apr. 24, 2020), https://www.natlawreview.com/article/fuss-majeure-lessons-early-outbreak-covid-v-contract-cases [https://perma.cc/U3B4-N6FE] ("[A]s America enters its second month of social distancing and travel restrictions, COVID-19-related lawsuits have begun to spread, with parties variously portraying the pandemic to suit their respective positions, dissecting the often clumsy prose of Force Majeure clauses or, absent such provisions, dusting off common-law doctrines of impossibility, impracticability, and frustration of purpose to excuse contractual performance."); Daniel Moak & Karl Johnson, *Failure to Pay: Does COVID-19 Excuse a Party's Contractual Obligations?*, TAFT NEWS & EVENTS (Mar. 24, 2020), https://www.taftlaw.com/news-events/law-bulletins/failure-to-pay-does-covid-19-excuse-a-party-s-contractual-obligations [https://perma.cc/QYW7-GZSF] ("Even if a contract does not include a force majeure clause, a party may argue that the common law doctrine of impossibility excuses nonpayment due to some previously unknown and unforeseeable change in circumstance that renders performance impossible. Under the doctrine of impossibility, merely making performance more difficult or more expensive generally will not excuse the promisor from its obligations. But, regardless of whether impossibility is a winning argument, it could in many cases buy a contracting party more time while the issue is litigated.").

22. *See, e.g.*, Sandry v. Brooklyn Sch. Dist. No. 78, 182 N.W. 689, 691 (N.D. 1921); Montgomery v. Bd. of Educ., 131 N.E. 497 (Ohio 1921); Crane v. Sch. Dist. No. 14, 188 P. 712 (Or. 1920).

23. Although the Supreme Court recognized the doctrine of impossibility defense in *The Tornado*, 108 U.S. 342 (1883), courts do not automatically embrace

excused due to the COVID-19 pandemic will face an extremely difficult task. This article draws support from decisions rendered by the Supreme Courts of Ohio, Oregon, and North Dakota concerning similar breaches of contract and nonperformance caused by government shutdown orders during the 1918 Spanish influenza. As legal precedents continue to guide the development of the law, a look at decisions related to the contract impossibility defense penned by the courts during the Spanish influenza is both instructive and pertinent. These precedents are illuminating and remain useful resources in contract disputes concerning COVID-19 today.

The article will proceed as follows.

Part I provides a background on the Spanish influenza and its devastating impact on daily life as the contagion ravaged the nation from fall 1918 to spring 1919. The shutdown caused contracts to go unperformed and led to numerous breach of contract disputes. Similarly, this Part focuses on the background of the COVID-19 pandemic, tracing the contagion's origin and discussing federal and state governments' stay-at-home and social distancing orders.

As law firms and experts have identified impossibility as a potential defense to contract nonperformance caused by COVID-19, Part II examines the history of the doctrine of impossibility. Wars, plagues, and natural disasters have occurred throughout the history of civilization. It is therefore understandable that impossibility of performing contractual obligations has ancient roots as a defense in Roman law and Canon law, in addition to enjoying a rich set of English cases. The history of the doctrine illuminates the high bar required for establishing whether the defense is viable.

English contract law has greatly influenced U.S. contract law. Some state courts traced the doctrine of impossibility to English cases to support recognizing the doctrine as a defense to performance in contract law. As U.S. contract law evolved, notably, the California Supreme Court modernized the doctrine to reflect a more practical approach in 1916 before the arrival of the Spanish flu in 1918. The devastating influenza led to a series of contract nonperformance cases decided by the Supreme Courts of North Dakota, Ohio, and Oregon on similar facts, wherein the school boards refused to pay for contracted services in accordance with the contracts, relying on government shutdown orders as an excuse. Part

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the defense. *See infra* Sections III and IV. Likewise, the modern approach to the doctrine advocated in the Restatement (Second) of Contracts is not uniformed embraced by all jurisdictions. *See infra* Section IV.

III discusses each decision, including the nuances and the Courts' rejections of the impossibility defense.

Based on these precedents, Part IV refutes suggestions claiming that the impossibility defense is readily viable. This Part provides five major reasons why the defense is *impossible* to use successfully.

The Article concludes that the impossibility defense to contract nonperformance in the age of COVID-19 is likely to yield unpredictable results under different state laws. As legal precedents and our past experiences continue to guide legal development, we should expect courts to observe general contract principles. Courts preserve what the parties to contracts already agreed to by declining to redraft or add new terms to a contract. The lesson of both contract law and contract drafting continues to hold true in any pandemic: parties to contracts should anticipate and allocate risks by including contingencies in their agreements. Reliance on the common law doctrine of impossibility is a risky strategy.

I.
THE SPANISH INFLUENZA OF 1918, THE COVID-19 PANDEMIC, AND CONTRACT CONCERNS

Viral outbreaks have previously affected the United States. More than one century ago, the Spanish influenza of 1918 ravaged the nation and suspended daily life and commerce for many months. COVID-19 is inflicting similar magnitudes of harm. Both contagions challenged contractual parties' ability to perform due to government-imposed shutdowns designed to flatten the curve of infection and deaths. Parties to contracts turned to the courts for redress of their disputes.

A. Background on the Spanish Influenza and Contract Disputes

In ten months, the Spanish flu killed 675,000 Americans. The virus was first identified in American soldiers who returned home from Europe after they fought in World War I.[24] The epidemic tormented the nation in three waves, the first of which began in the spring of 1918, the second in fall of 1918, and the last in the spring of 1919. The raging epidemic brought the nation to a grinding halt.

24. *1918 Pandemic (H1N1 Virus)*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html [HTTPS://PERMA.CC/6MVZ-922N].

During the epidemic, schools closed across the country for three months. Churches and houses of worship shut their doors.[25] Movie theatres, pool halls, skating rinks, shooting galleries, and all places of entertainment and amusement sat empty in compliance with board of health orders claiming these places contributed to the spread of the epidemic.

Laws prohibited gathering, declaring it unlawful for two or more persons to congregate.[26] In Arizona, for example, it was a misdemeanor for an individual to violate the lockdown law.[27] The State of Arizona arrested and prosecuted the owner of a movie theatre for operating the theatre in defiance of the lockdown.[28] Local police arrested people in Idaho for violating quarantine regulations.[29]

As everything came to a standstill, legal issues percolated. Business owners that were incurring daily expenses challenged local authorities for preventing them from carrying on their businesses in violation of their constitutional rights.[30] Some business owners risked arrest and prosecution in their desperate attempts to operate their establishments.[31]

With respect to contracts, issues related to breach, nonperformance, and suspension due to the epidemic emerged. Many of the contract disputes – as seen in the reported cases – centered on

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25. *See* Globe Sch. Dist. v. Bd. of Health, 179 P. 55, 56 (Ariz. 1919).

26. Arizona's relevant statutory law provided: "2. That it shall be unlawful for two or more persons to congregate in the United States post office, any bank, store, meat market, or other business house, shooting gallery, pool hall, theater, motion picture show, skating rink, lodge, church, school, social gathering, card party, or other place of amusement or entertainment in the city of Globe or vicinity. . . 11. That it shall be unlawful to open up, conduct or hold any sessions of or services in any lodge, school building, church or like place in the city of Globe or vicinity." *Id.*

27. *See* Alden v. State, 179 P. 646, 646 (Ariz. 1919).

28. *Id.* ("[T]he appellant was subject to prosecution and therefore arrest, if, as a fact, he willfully and knowingly violated said health rules by opening his said moving picture show and place of entertainment at that particular period of time").

29. Archbold v. Huntington, 201 P. 1041 (Idaho 1921).

30. *See* Benson v. Walker, 274 F. 622 (4th Cir. 1921) (traveling circus owner who incurred daily expenses of $1,200 to pay for performers, equipment and local rentals, brought an action to challenge the Board of Health); *see also Globe School*, 179 P. at 58 ("The specific inquiry is whether the city board of health has the power to order the public schools within the jurisdiction of such board to close and remain closed until the further order of the board because of the existence of Spanish influenza, a dangerous contagious or infectious disease raging in epidemic form within such jurisdiction.").

31. *See* Alden, 179 P. at 646.

interpretation of insurance coverage policies.[32] These insurance contract disputes were brought by the beneficiaries against insurance companies. Another contract dispute involved a manufacturer who, due to the quarantine, failed to deliver drums of glycerin for soap making.[33] Unpaid employees filed employment-related contract lawsuits on the basis that employers breached by nonpayment after their businesses were forced to close.[34] These types of contract disputes during the Spanish flu epidemic foreshadowed similar contract disputes in the age of the COVID-19 pandemic.[35]

B. COVID-19 Pandemic and Contract Problems

The arrival of the COVID-19 pandemic to U.S. shores has upended daily life and commerce. Federal, state, and local governments have responded to the pandemic by imposing stay-at-home orders. All normal activities and the entire economy have come to a painful, grinding halt. Parties to contracts have stopped performing their obligations. Lawsuits relating to contracts began as of March 2, 2020 and continue to escalate today.[36]

i. COVID-19 Pandemic Background

In early November 2019, the intelligence community reported that a novel virus was rapidly spreading in Wuhan, China.[37] The

32. Ill. Bankers' Life Ass'n v. Jackson, 211 P. 508 (Okla. 1922); Mattox v. New England Mut. Life Ins. Co., 103 S.E. 180 (Ga. Ct. App. 1920).

33. *See* Citrus Soap Co. v. Peet Bros. Mfg. Co., 194 P. 715 (Cal. Dist. Ct. App. 1920) (involving breach of contract based on failure to delivery drums of glycerin caused by the Spanish flu and quarantine law).

34. Sandry v. Brooklyn Sch. Dist. No. 78., 182 N.W. 689, 689 (N.D. 1921).

35. Washington Life Ins. Co. v. Am. Collapsible Box Co., 117 S.E. 785 (N.C. 1923) (holding that an insured's representations in his application that he had never contracted Spanish influenza, which tends to weaken the patient's resisting powers to tuberculosis, was material to the risk and hence a ground for setting aside the policy); Denton v. Kansas City Life Ins. Co., 231 S.W. 436 (Tex. Civ. App. 1921).

36. HUNTON ANDREWS KURTH, *supra* note 10.

37. *See, e.g.*, Josh Margolin & James Gordon Meek, *Intelligence Report Warned of Coronavirus Crisis as Early as November: Sources*, ABC NEWS (Apr. 8, 2020, 9:55 PM), https://abcnews.go.com/Politics/intelligence-report-warned-coronavirus-crisis-early-november-sources/story?id=70031273 [https://perma.cc/6TMK-YDEK]; Zachary Cohen et al., *US Intelligence Agencies Started Tracking Coronavirus Outbreak in China as Early as November,* CNN (Apr. 9, 2020), https://www.cnn.com/2020/04/08/politics/intel-agencies-covid-november/index.html [https://perma.cc/G95X-DZ6Z]; Justine Coleman, *US Intelligence Warned in November that Coronavirus Spreading in China Could be 'cataclysmic event': Report*, HILL, (Apr. 8, 2020, 8:12 AM), https://thehill.com/policy/national-security/intelligence/491712-us-intelligence-warned-in-november-that-virus-spreading [https://perma.cc/9P9G-36V8].

popular media started to pay attention to the contagion in January 2020.[38] A month later, in February, the World Health Organization ("WHO") named the novel virus "COVID-19."[39] Soon, China quarantined the entire city of Wuhan and Hubei province as dying people with acute respiratory problems gasped for air at home and in hospitals.[40] Global travel and commerce brought travelers in contact with each other, hastening the spread of the contagion.[41] Unlike other known viruses, the COVID-19 virus can unleash its

38. *See generally* Sui-Lee Wee, *Japan and Thailand Confirm New Cases of Chinese Coronavirus*, N.Y. TIMES (Jan. 15, 2020), https://www.nytimes.com/2020/01/15/world/asia/coronavirus-japan-china.html [https://perma.cc/NZ55-R5C5]; *First U.S. Case of Coronavirus Confirmed in Washington State*, NPR (Jan. 22, 2020, 5:06 AM), https://www.npr.org/2020/01/22/798392221/1st-u-s-case-of-coronavirus-confirmed-in-washington-state [https://perma.cc/ULG3-GPVT]; Ken Alltucker & Lindsay Schnell, *A Suburban Seattle Man Remains the Only Known US Resident with the Mysterious New Coronavirus,* USA TODAY (Jan. 22, 2020, 8:56 AM), https://www.usatoday.com/story/news/health/2020/01/22/washington-officials-track-infected-mans-travels-counter-new-virus/4547358002/ [https://perma.cc/CW3N-ATAN]; *Stop the Wuhan Virus*, NATURE (Jan. 21, 2020), https://www.nature.com/articles/d41586-020-00153-x [https://perma.cc/XF8J-2MJQ]; Helen Regan et al., *January 29 Coronavirus News*, CNN (updated Jan. 29, 2020, 11:44 PM), https://www.cnn.com/asia/live-news/coronavirus-outbreak-01-29-20-intl-hnk/index.html [https://perma.cc/UED4-W67J].

39. *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It.* WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it [https://perma.cc/KUN8-XY3H].

40. *See China Coronavirus: Lockdown Measures Rise Across Hubei Province*, BBC NEWS (Jan. 23, 2020), https://www.bbc.com/news/world-asia-china-51217455 [https://perma.cc/Y8KY-ZENC]; *see also, Coronavirus in Wuhan: 'We'd Rather Die at Home Than Go to Quarantine,'* BBC NEWS (Feb. 5, 2020), https://www.bbc.com/news/world-asia-china-51379088 [https://perma.cc/EPX2-MT45]; *see generally,* Yawen Chen & Tony Munroe, *Dying a Desperate Death: A Wuhan Family's Coronavirus Ordeal,* REUTERS (Feb. 14, 2020), https://www.reuters.com/article/us-china-health-family/dying-a-desperate-death-a-wuhan-familys-coronavirus-ordeal-id USKBN2080NY [https://perma.cc/4CKZ-RFSR].

41. *See* Madeline Holcombe, *70 of 92 Coronavirus Cases in Massachusetts Linked to Biogen Employees after Biotech Firm's Boston Meeting,* CNN (Mar. 11, 2020), https://cnn.com/2020/03/11/health/coronavirus-massachusetts-state-of-emergency/index.html (reporting on Biogen's international executive meeting in Boston and the subsequent transmission of the coronavirus from the infected employees) [https://perma.cc/C5C6-SX8S]; *see also,* Farah Stockman & Kim Barker, *How a Premier U.S. Drug Company Became a Virus 'Super Spreader,'* NEW YORK TIMES (Apr. 12, 2020), https://www.nytimes.com/2020/04/12/us/coronavirus-biogen-boston-superspreader.html [https://perma.cc/XXW7-F3PE]; *see generally,* Niharika Mandhana et al., *How One Singapore Sales Conference Spread Coronavirus Around the World,* WALL ST. J. (Feb. 12, 2020, 10:32 AM), .https://www.wsj.com/articles/how-one-singapore-sales-conference-spread-coronavirus-around-the-world-11582299129 [https://perma.cc/Z4A4-AW5P] (explaining how one meeting attended by 109

infection silently as asymptomatic people unknowingly spread the virus.[42] The contagion stealthily and swiftly moved beyond China's borders to other nations in Asia, Europe, the Americas, and the rest of the world. The WHO declared COVID-19 a pandemic on March 11, 2020 as the virus infected people in 114 countries.[43]

The first reported COVID-19 case in the United States occurred on January 15, 2020,[44] and three weeks later on February 6, 2020, the nation unknowingly witnessed the first death from the dangerous virus.[45] Consequently, through a short period of time, asymptomatic and symptomatic individuals rapidly spread the virus through respiratory droplets by breathing, speaking, sneezing or coughing, causing uncontrollable community transmission

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people "sent virus hunters scurrying to a French Alpine ski town, a British pub and locations in Malaysia and South Korea").

42. *See* Pien Huang, *What We Know About the Silent Spreaders of COVID-19*, NPR (Apr. 13, 2020, 4:43 PM), https://www.npr.org/sections/goatsandsoda/2020/04/13/831883560/can-a-coronavirus-patient-who-isnt-showing-symptoms-infect-others [https://perma.cc/986F-E8ES]; *see, e.g.*, WORLD HEALTH ORG., Coronavirus Disease 2019 (COVID-19) Situation Report–73, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-COVID-19.pdf [HTTPS://PERMA.CC/D2EU-9YAS] (last updated Apr. 2, 2020, 10:00 AM); s*ee also* Angela N. Baldwin & Sony Salzman, *What We Know and Don't About Asymptomatic Transmission and Coronavirus*, ABC (Apr. 1, 2020), https://abcnews.go.com/Health/asymptomatic-transmission-coronavirus/story?id=69901758 [https://perma.cc/5GLR-SK27] (stating "[t]here is a significant number of people who transmit that are asymptomatic."); *see generally* Aylin Woodward, *'Between 25% and 50%' of People Who Get the Coronavirus May Show No Symptoms, Fauci Says. Here's the Latest Research on Asymptomatic Carriers*. BUS. INSIDER (Apr. 14, 2020, 2:29 PM), https://businessinsider.com/coronavirus-carriers-transmit-without-symptoms-what-to-know-2020-4, [https://perma.cc/3ZJM-R3WR].

43. *See* WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19—11-march-2020, [https://perma.cc/R77B-WMY9] (stating that as of March 11, 2020, COVID-19 had infected more than 118,000 people in 114 countries and caused 4,291 deaths).

44. *See First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CDC PRESS RELEASE (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html [https://perma.cc/ZU85-RSQC].

45. *See* Dennis Romero, *1st U.S. Coronavirus Death Was Weeks Earlier Than Initially Believed*, NBC NEWS (Apr. 22, 2020, 7:18 AM), https://nbcnews.com/news/us-news/first-u-s-coronavirus-death-happened-weeks-earlier-originally-believed-n1189286 [*https://perma.cc/C8MK-8L62*] (reporting that two previously unreported cases from February in California appear to be the nation's first confirmed deaths from COVID-19); s*ee also,* Jason Hanna et al., *2 Californians Died of Coronavirus Weeks Before Previously Known 1st US Death*, CNN (Apr. 22, 2020, 4:26 PM), https://www.cnn.com/2020/04/22/us/california-deaths-earliest-in-us/index.html [https://perma.cc/4G4G-B5E].

throughout the United States.[46] On January 31, 2020, the U.S. Health and Human Services Secretary declared the COVID-19 outbreak a public health emergency for the United States.[47]

On March 19, 2020, California became the first state to issue an indefinite stay-at-home order.[48] Businesses and organizations providing critical infrastructure for the state qualified as exempt, including health care and public health, public safety, food and agriculture, and media. Other states soon followed with executive orders requiring individuals to stay at home and socially distance.[49] The entire nation helplessly watched the number of infected cases climb and the death tolls rise. Even businesses in the exempt categories operated in fear, as reports about COVID-19 infections or deaths among workers escalated.[50] Those impacted included workers from meat packing plants, the Boeing assembly plant,[51] Amazon fulfillment centers,[52] nursing homes, and hospitals.[53]

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46. *See* Siobhán O'Grady et al., *Coronavirus Confirmed in All 50 states and D.C., After West Virginia Reports First Case; U.S. Death Toll Passes 100*, WASH. POST (Mar. 18, 2020, 12:01 AM) https://www.washingtonpost.com/world/2020/03/17/coronavirus-latest-news/ [https://perma.cc/CDS2-XEVK].

47. The public health emergency declaration was retroactive to January 27, 2020. *See* Press Release, U.S. Dep't of Health & Human Servs., Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020), https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html [https://perma.cc/WLB8-VUML].

48. *See* Ca. Exec. Order N-33-20 (Mar. 4, 2020), https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf [https://perma.cc/23M3-6UPU].

49. *See* Ind. Exec. Order No. 20-08 (March 24, 2020) (imposing stay at home and social distancing requirements), https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf, [https://perma.cc/K978-UPVV].

50. *See* J. Edward Moreno, *Coronavirus Outbreaks Triggers Call for More Protections for Meat Plant Workers*, THE HILL (Apr. 25, 2020, 2:04 PM), https://thehill.com/homenews/news/494658-coronavirus-outbreaks-triggers-call-for-more-protections-for-meat-plant-workers [https://perma.cc/4B4G-7R4S]; *see also* Miriam Jordan & Caitlin Dickerson, *Poultry Worker's Death Highlights Spread of Coronavirus in Meat Plants*, N.Y. TIMES (Apr. 9, 2020, updated Jan. 28, 2021), [https://perma.cc/86NK-FZ2Q].

51. *See* Dominic Gates, *Boeing Indefinitely Extends Factories' Coronavirus Shutdown; Here's What That Means for 30,000 Workers*, SEATTLE TIMES (last updated Apr. 11, 2020, 10:46 AM), https://www.seattletimes.com/business/boeing-aerospace/boeing-indefinitely-extends-production-shutdown-at-washington-state-plants-due-to-coronavirus/ [https://perma.cc/RY9K-5VGE]; *see also* David Schaper, *Boeing to Reopen Some Production Plants With New Worker Safety Protocols*, NPR (Apr. 17, 2020, 1:44 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/17/837065262/boeing-to-reopen-some-production-plants-with-new-worker-safety-protocols [https://perma.cc/QH2F-6PUM].

52. *See* Blake Montgomery, *More Amazon Warehouse Workers Test Positive for Coronavirus*, DAILY BEAST (Mar. 25, 2020, 8:32 PM), https://www.thedaily

One of the devastating economic effects caused by the contagion was skyrocketing unemployment filings each week, topping the Great Recession of 2008's statistics and rivaling those of the Great Depression.[54] The federal government passed several rescue packages to slow down the economic bleeding.[55] Unfortunately, the public health crisis and the measures of stay-at-home executive orders hauled the nation's economy into a sudden freefall.[56] Social

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beast.com/more-amazon-warehouse-workers-test-positive-for-coronavirus [https://perma.cc/QF4K-LMR3]; *see also* Amanda Woods, *First Amazon Warehouse Worker Dies of Coronavirus*, NY POST (Apr. 15, 2020, 11:13 AM), https://nypost.com/2020/04/15/first-amazon-warehouse-worker-dies-of-coronavirus/ [https://perma.cc/4AEG-GUMF]; *Factbox: Coronavirus Cases Reported at 19 of Amazon's U.S. Warehouses*, REUTERS (Mar. 31, 2020, 12:19 AM), https://www.reuters.com/article/us-health-coronavirus-amazon-com-warehou/factbox-coronavirus-cases-reported-at-19-of-amazons-us-warehouses-idUSKBN21I0FA.https://nypost.com/2020/04/15/first-amazon-warehouse-worker-dies-of-coronavirus/ [https://perma.cc/2BXV-LB9U].

53. *See* Paige Winfield Cunningham, *The Health 202: Thousands of Medical Workers Are Getting Sick From Coronavirus*, WASH. POST (Apr. 16, 2020, 7 :59 AM), https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2020/04/16/the-health-202-coronavirus-is-sickening-thousands-of-medical-workers/5e972f6988e0fa101a763966/ [https://perma.cc/LVL4-PCHT]; *see also* Gaby Galvin, *The Great Unknown: How Many Health Care Workers Have Coronavirus?*, US NEWS (Apr. 3, 2020), https://www.usnews.com/news/national-news/articles/2020-04-03/how-many-health-care-workers-have-coronavirus *[https://perma.cc/3VBZ-HYVD]*; *see generally* Jessie Hellmann, *CDC: More Than 9,000 Health Workers Have Tested Positive for Coronavirus*, THE HILL (Apr. 14, 2020, 2:41 PM), https://thehill.com/policy/healthcare/492750-cdc-more-than-9000-health-workers-have-tested-positive-for-coronavirus [https://perma.cc/H4WL-9Z6K].

54. *See* Lucia Mutikani, *Millions of Americans Join Unemployment Line As Coronavirus Savages Economy*, REUTERS (Apr. 23, 2020, 12:08 AM), https://www.reuters.com/article/us-usa-economy/millions-of-americans-join-unemployment-line-as-coronavirus-savages-economy-idUSKCN2250CS [https://perma.cc/3SQ5-Q9HY] (reporting that "[a] stunning 26.5 million Americans have sought unemployment benefits since mid-March 2020").

55. Jim Tankersley & Emily Cochrane, *Congress Shovels Trillions at Virus, With No Endgame in Sight,* N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/04/24/business/congress-coronavirus-stimulus-bill.html[https://perma.cc/VBV4-MAPP]; Erica Werner et al., *Trump and Congress spar over next coronavirus economic package as CBO paints grim picture of what's to come*, WASH. POST (Apr. 24, 2020, 7:34 PM), https://www.washingtonpost.com/us-policy/2020/04/24/trump-cbo-congress-coronavirus/ [https://perma.cc/F29Z-LLWV] (reporting that the emergency aid packages of nearly $3 trillion "approved in two months as policymakers scramble to arrest the virus's medical and economic impact").

56. Kelsey Snell, *Lessons From Congress' Last Experience Helping Rescue An Economy In Free Fall*, NPR (Apr. 16, 2020), https://www.wnyc.org/story/lessons-from-congress-last-experience-helping-rescue-an-economy-in-free-fall/ [HTTPS://PERMA.CC/8C6U-EUA3]; Adam Tooze, *The Normal Economy Is Never Coming Back*, FOREIGN POLICY (Apr. 29, 2020, 8:36 AM), https://foreignpolicy.com/2020/04/09/unemployment-coronavirus-pandemic-normal-economy-is-never-coming-back/

distancing and virtual screens substituting for face-to-face contact abruptly forced individuals and businesses to communicate, transact, and conduct commerce in such a manner that created an unprecedented cloud of anxiety over the nation.[57]

ii. COVID-19 Contracts Fallout

The dangerous contagion and the stay-at-home orders have ushered contracts—the fundamental agreements connecting and facilitating relationships between and among individuals and businesses locally, nationally, and globally—into uncertainty. In the two months after the outbreak began, more than 200 contracts related cases were filed in courts across the nation.[58] Many of these cases

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[HTTPS://PERMA.CC/C5EC-7H43] ("[The]latest U.S. data proves the world is in its steepest freefall ever—and the old economic and political playbooks don't apply").

57. To cope with social distancing, people have moved to Zoom and other platforms for virtual meetings, conferences, and classes. Dain Evans, *How Zoom became so popular during social distancing*, CNBC (Apr. 4, 2020, 9:01 AM), https://www.cnbc.com/2020/04/03/how-zoom-rose-to-the-top-during-the-coronavirus-pandemic.html [HTTPS://PERMA.CC/7VUU-Q2MW] (reporting that as "millions of people being forced to stay home to help stop the spread of COVID-19, many have found creative ways to virtually stay social through happy hours, trivia nights and birthday parties. And Zoom, one of the dozens of video conferencing services, has risen to the top, thanks to intense separation measures and a profound resonance within this new social distancing culture."); Tucker Higgins, *Coronavirus pandemic could inflict emotional trauma and PTSD on an unprecedented scale, scientists warn*, CNBC (Mar. 27, 2020, 7:27 PM), https://www.cnbc.com/2020/03/27/coronavirus-pandemic-could-inflict-long-lasting-emotional-trauma-ptsd.html [HTTPS://PERMA.CC/PR5K-2BYB] ("Researchers are warning that the coronavirus pandemic could inflict long-lasting emotional trauma on an unprecedented global scale. They say it could leave millions wrestling with debilitating psychological disorders while dashing hopes for a swift economic recovery . . . It has left millions without jobs, sent billions into isolation and forced nearly everyone on earth to grapple with the feeling that they or those they love are suddenly physically vulnerable. The nature of the disease means that there can be no certainty about when the worst will pass. "); Kim Lyons, *Cuomo issues order allowing New Yorkers to obtain marriage licenses over Zoom*, THE VERGE (Apr. 18, 2020, 4:31 PM), https://www.theverge.com/2020/4/18/21226544/cuomo-new-yorkers-marriage-licenses-zoom-coronavirus [*https://perma.cc/L4QU-GHNL*].

58. HUNTON ANDREW KURTH, *supra* note 10. For example, in *Holloway v. Planet Fitness Franchising LLC*, the plaintiff sought refunds of gym membership after the fitness facilities closed due to coronavirus. Complaint at 2, No. 1:20-cv-01868 (N.D. Ga. Apr. 30, 2020). In *Unify Events LLC, v. Mascoli Ent.*, the plaintiff asserted that the defendant breached the contract by refusing to refund the plaintiff a speaker fee after COVID-19 forced a shutdown order that canceled defendant's conference. *See* https://www.cognicion.com/covid/ (detailing case A-20-814466-C filed on May 1, 2020 with the Clark County District Court in Nevada). In *Christina Ferrante v. Ratner Companies*, plaintiff hair dressers brought a breach of contract against the defendant for failure of payment of wages accrued during a pay period

were contract class actions.[59] Predictions deem that this litigation will take years to resolve.

In the global supply chains, parties cannot perform their agreements when borders are shut, quarantines are imposed, and workers become ill or are required to self-isolate.[60] Reports of global supply chain shutdowns range from copper mines in Peru, Apple component makers in Italy, Germany, Malaysia and South Korea, GM plants in Detroit, and truck bottlenecks at the German borders.[61]

In other sectors, contract nonperformance also emerged during COVID-19. For example, South By Southwest or SXSW, the famed tech and culture festival that infuses $350 million into Austin each year was canceled on March 6, 2020 in response to COVID-19.[62] Holders of platinum badges at $1,600 per person sued SXSW LLC for ticket refunds after the 2020 festival was canceled.[63] They alleged that SXSW breached its contracts with ticketholders and unjustly enriched itself by refusing to refund the money paid for a

shortened by COVID-19. *See* Compl. at 4, CASE20007011 (Fla. Cir. Ct. Apr. 24, 2020). Similarly, in *Kim v. Sentinel Insurance Co.*, the plaintiff filed a contract class action seeking coverage for business loss because the plaintiff could not provide dental services due to COVID-19. Compl. at 2-5, No. 2:20-cv-00657 (W.D. Wash. Apr. 30, 2020).

59. *Id.* HUNTON ANDREW KURTH, *supra* note 10.

60. For example, China, the world's manufacturer and supplier, faces many contract nonperformance issues. On April 20, 2020, China's Supreme People's Court published its "Guiding Opinion on Several Issues Concerning Proper Trial of Civil Cases Involving COVID-19 Pandemic" to assist lower courts in addressing contract disputes related to COVID-19. *See* Timothy W. Blakely et al., *China's Supreme People's Court Issues Long-awaited Guidance on COVID-19 Related Civil Disputes*, MORRISON FOERSTER (Apr. 22, 2020), https://www.mofo.com/resources/insights/200422-china-supreme-court-guidance-COVID-19-civil-disputes.html [https://perma.cc/8867-QLR7].

61. Shawn Donnan et al., *A COVID-19 Supply Chain Shock Born In China Is Going Global*, BLOOMBERG (Mar. 20, 2020, 6:00 AM), https://www.bloomberg.com/news/articles/2020-03-20/a-COVID-19-supply-chain-shock-born-in-china-is-going-global [https://perma.cc/59JS-E8G2] (reporting that the global chain shutdowns inside and outside China will have larger impact than the last financial crisis the world suffered).

62. Avery Hartmans & Rob Price, *South by Southwest Festival is the Latest Public Event Canceled Amid Coronavirus Outbreak*, INC. (Mar. 9, 2020), https://www.inc.com/business-insider/sxsw-canceled-south-by-southwest-coronavirus-announcement.html [https://perma.cc/TM7R-L4NX].

63. Bromley v. SXSW, LLC, No. 1:20-cv-00439 (W.D. Tex. Apr. 24, 2020); KVUE Staff, *South by Southwest sued over no-refund policy after 2020 festival canceled*, KVUE (Apr. 25, 2020) [hereinafter *South by Southwest*] https://www.kvue.com/article/entertainment/events/sxsw/sxsw-2020-no-refund-lawsuit/269-477a69dc-c728-4873-b970-53ea9defe496 [HTTPS://PERMA.CC/X98D-VE7X].

festival that never occurred.[64] Likewise, Coachella, the NCAA Tournament, Rock'n Roll Hall of Fame Inductions, and The Masters, among others, canceled events that triggered contract disputes.[65]

Educational institutions emptied their students from classrooms and dormitories, and all abruptly moved to virtual classrooms. Students turned to contract law for redress. For instance, students brought breach of contract suits against Columbia University, Pace University and Long Island University, as well as all private institutions in the New York metropolitan area, seeking refund of tuition and fees paid to have in-person, on-campus classes and activities.[66] Universities in the California State and UC systems faced a similar breach of contract suit brought on behalf of 700,000 students.[67]

Airline passengers, cruise ship passengers, and theme park fans frustrated by cancellations and mistreatments brought actions against the respective businesses.[68] In particular, cruise ship passen-

64. *South by Southwest*, *supra* note 63.

65. Matthew V. Wilson & Henry M. Perlowski, *Your Event is Cancelled Because of COVID-19: Breach of Contract or Excused Performance?*, ARNALL GOLDEN GREGORY LLP (Mar. 17, 2020), https://www.agg.com/news-insights/publications/your-event-is-cancelled-because-of-COVID-19-breach-of-contract-or-excused-performance/ [HTTPS://PERMA.CC/7447-TQVC]; *see also* Complaint at 1-2, Tzak v. Live National Entertainment, 1:20 cv 2482 (N.D. Il Apr. 23, 2020) (contract class against defendants for indefinite postponing of ticketed events) https://www.classaction.org/media/tezak-v-live-nation-entertainment-inc-et-al.pdf [HTTPS://PERMA.CC/Z4CG-8LKS].

66. Annie Grayer, *Students in New York file class-action lawsuits against 3 universities, claiming that schools have failed to adequately refund fees*, CNN (Apr. 25, 2020, 5:57 PM), https://www.cnn.com/2020/04/25/us/student-class-action-lawsuits-coronavirus/index.html [HTTPS://PERMA.CC/X69L-88EZ]; *see also* Diaz v. Univ. of S. Cal., No. CV204066DMGPVCX, 2020 WL 5044419, at *1 (C.D. Cal. July 17, 2020).

67. Associated Press, *Lawsuit: California Universities Owe Virus-Related Refunds*, U.S. NEWS (Apr. 27, 2020), https://www.usnews.com/news/best-states/california/articles/2020-04-27/lawsuit-california-universities-owe-virus-related-refunds [https://perma.cc/3RQD-SCPA] ("The California State University and the University of California systems [are being] sued . . . by students demanding refunds of some campus fees since the virus pandemic has shut schools and forced learning online."); *DiCello Levitt: California University Systems Sued on Behalf of More Than 700,000 Students for Refusing to Refund Fees in Wake of Coronavirus Pandemic*, BUS. WIRE (Apr. 28, 2020, 10 :34 AM), https://www.businesswire.com/news/home/20200428005646/en/DiCello-Levitt-California-University-Systems-Sued-Behalf [https://perma.cc/N7YS-3N84].

68. For instance, a Six Flags Magic Mountain fan "object[ed] to the park collecting monthly payments for his membership pass while the park is closed due to the pandemic." Hugo Martín, *A coronavirus side effect: lots of lawsuits*, L.A. TIMES (Apr. 21 2020, 3:45 PM), https://www.latimes.com/business/story/2020-04-21/

gers whose contracts with cruise companies contained limited liability provisions sought damages in the millions against the companies for misconduct that caused increased COVID-19 transmission and harm to passengers.[69]

Many employees in different sectors found themselves suddenly out of work.[70] Unemployment benefits could hardly assist many ready and able workers to make ends meet. Employees without work sued their employers for breach of contract.[71] Other employment contract concerns arose when new recruits faced

coronavirus-lawsuits-target-theme-parks-airlines-cruise-ships-others [https://perma.cc/36FT-XMRX]; *see also* Complaint, Dusko v. Delta Air Lines, Inc., 1:20 cv 1725, 2020 WL 1969159 (N.D. Ga. Apr. 22, 2020) (contract class action against the defendant airlines for refunds); *see also* Ward v. Am. Airlines, Inc., No. 4:20-CV-00371-O, 2020 WL 8415080 (N.D. Tex. Nov. 2, 2020).

69. Lucas Manfredi, *Coronavirus lawsuits pile up for cruise lines*, FOX BUS. (Apr. 19, 2020), https://www.foxbusiness.com/lifestyle/coronavirus-cruise-line-lawsuits [https://perma.cc/U9XY-QTLE]; Hannah Sampson, *Costa Cruises Slapped with Proposed Class-Action Suit over Handling of Coronavirus Aboard Luminosa Ship*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/travel/2020/04/07/costa-cruises-slapped-with-proposed-class-action-suit-over-handling-coronavirus-aboard-luminosa-ship/ [https://perma.cc/MM5M-3NAA] (indicating that the limitation on the contract to bring an action against the cruise company is one year).

70. *See, e.g.*, Lauren Hepler & Matt Drange, *Tech Braces for Layoffs at Startups, but the Biggest Firms Keep Hiring*, PROTOCOL (Mar. 20, 2020), https://www.protocol.com/coronavirus-tech-startups-layoffs-cuts [https://perma.cc/3DDW-THQZ] ("A Boston startup laid off nearly one-third of its employees this week. Insiders and economists say others will follow."); Kenneth Rapoza, *Coronavirus Impact: U.S. Tech Companies Fear Job Cuts, Income Loss*, FORBES (Mar. 13, 2020, 1:55 PM), https://www.forbes.com/sites/kenrapoza/2020/03/13/coronavirus-impact-us-tech-companies-fear-job-cuts-income-loss/#a57924c5d660 [https://perma.cc/WF9Y-ZG95]; Zack Whittaker, *Staff Angered as Charter Prohibits Working from Home Despite Spread of Coronavirus*, TECHCRUNCH (Mar. 16, 2020, 7:14 PM), https://techcrunch.com/2020/03/16/charter-coronavirus-work-home/ [https://perma.cc/J2EZ-A272] (reporting some tech workers who raised safety concerns were forced to resign).

71. *See, e.g.*, Becky Peterson et al., *Cruise Lines Told Ship Workers to Carry on as Normal as the Coronavirus Spread. Now, Many Crew Members Are Infected or Unemployed*, BUS. INSIDER (Apr. 7, 2020, 1:33 PM), https://www.businessinsider.com/cruise-line-crew-workers-lose-salaries-benefits-over-coronavirus-2020-4 [https://perma.cc/QC36-WR9Q] (noting that "[c]ruise-ship employees typically work on contracts that last anywhere from two to 11 months"); Frances Robles, *'Nobody Cares About the Little People': Cruise Crews File Covid-19 Suit*, N.Y. TIMES (Apr 14, 2020), https://www.nytimes.com/2020/04/14/us/coronavirus-cruise-ship-crew-lawsuit.html [https://perma.cc/M3QX-CSV8]. The complaint filed by crewmembers raises an issue related to contract and arbitration.

rescinded offers because employers needed to reduce the workforce to cope with decreased demand.[72]

Insured businesses sought coverage for losses and damages caused by COVID-19 interruption.[73] Insurance companies have displayed caution in their payouts.[74] The issue of whether such losses are covered by insurance policies will be subject to litigation on contract interpretation.[75] Universities, facing unprecedented losses, joined forces and filed a class action lawsuit against their shared insurers.[76]

The nursing home industry continues to face an existential crisis. As the death toll climbs in nursing homes across the country, many nursing home entities face lawsuits for breach of contract, in addition to negligence and wrongful death.[77] The industry is ac-

72. *See, e.g.*, Casey Sullivan, *Some Top Law Firms Are Canceling Summer Associate Programs While Others Cut Them in Half — Here's Everything We Know So Far*, BUS. INSIDER (Apr. 16, 2020, 5:59 PM), https://www.businessinsider.com/3-top-law-firms-delay-start-date-of-summer-associate-program-2020-4 [https://perma.cc/9DDU-WATK]; *Know Your Rights: Coronavirus (COVID-19) and the Workplace*, OUTTEN & GOLDEN (last updated Jan. 6, 2021), https://www.outtengolden.com/know-your-rights-coronavirus-COVID-19-and-workplace [https://perma.cc/37MY-D6D4] (considering the question: "Can an employer withdraw an offer letter or employment agreement because of changed circumstances, like Covid-19?").

73. *See, e.g.*, Andrew G. Simpson, *P/C Insurers Put a Price Tag on Uncovered Coronavirus Business Interruption Losses*, INS. J. (Mar. 30, 2020), https://www.insurancejournal.com/news/national/2020/03/30/562738.htm [https://perma.cc/JE7Y-52G2].

74. Numerous insured businesses and individuals have initiated lawsuits against insurance companies for refusal to cover business losses caused by COVID-19. *See* Cosmetic Laser, Inc. v. Twin City Fire Ins. Co., No. 3:20-cv-00638 (D. Conn. filed May 8, 2020); Derrick Scott Williams PLLC v. Cincinnati Ins. Co., No. 1:20-cv-02806 (N.D. Ill. filed May 8, 2020); Graileys Inc. v. Hartford Fire Ins. Co., No. 3:20-cv-01181 (N.D. Tex. filed May 8, 2020).

75. *See, e.g.*, *Would Insurance Policies Cover Losses Related to Coronavirus?*, WILLIS TOWERS WATSON (Feb. 20, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/02/would-insurance-policies-cover-losses-related-to-coronavirus [https://perma.cc/ZWW7-DCWR] ("Losses related to coronavirus could be covered under different insurance, but circumstances and policy language are paramount.").

76. *See* Lyle Adriano, *Hitting the Books: Two MO Universities File Class Action Against Insurer over Pandemic Losses*, INS. BUS. AM. (July 27, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/hitting-the-books-two-mo-universities-file-class-action-against-insurer-over-pandemic-losses-228899.aspx [https://perma.cc/8UMV-VW66].

77. *See* Bethany Blankley, *Families Sue Abbott, Nursing Homes Over Coronavirus Restrictions Causing Isolation of Elderly Residents*, THE CENTER SQUARE (Sept. 15, 2020), https://www.thecentersquare.com/texas/families-sue-abbott-nursing-homes-over-coronavirus-restrictions-causing-isolation-of-elderly-residents/article_c850edae-f770-11ea-ae21-27259b7df4fb.html [https://perma.cc/FW6B-

tively lobbying state governments for immunity from lawsuits for owners of the nation's 15,600 facilities.[78]

Overall, COVID-19 has not only tormented public health, it has also punctured through agreements that connect individuals and businesses. Whether nonperformance should be excused has become the question at the heart of many contract breach disputes.

II.
A BRIEF HISTORY OF THE IMPOSSIBILITY DOCTRINE

Contract impossibility caused by intervening events is a familiar doctrine in contract law. The defense of impossibility possesses an illustrious history rooted in both Roman and Canon laws. In U.S. legal development, the impossibility doctrine received a modern focus on commercial impracticability in 1916,[79] two years before the

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VMBL]; Tara Sklar & Nicholas Paul Terry, *States Are Making It Harder to Sue Nursing Homes over COVID-19: Why Immunity from Lawsuits Is a Problem*, THE CONVERSATION (June 9, 2020, 8:19 AM), https://theconversation.com/states-are-making-it-harder-to-sue-nursing-homes-over-covid-19-why-immunity-from-lawsuits-is-a-problem-139820 [https://perma.cc/8A78-BT5G] (reporting that nursing homes would attempt to prevent residents or their families from filing a lawsuit in courts because the contracts with nursing homes contain arbitration clauses); A. Bradley Bodamer et al., *COVID-19 Client Primer: Senior Living Facilities*, JD SUPRA (May 11, 2020), https://www.jdsupra.com/legalnews/COVID-19-client-primer-senior-living-45436/ [https://perma.cc/8WJ4-8FBN] ("Traditional class actions against senior living facilities often allege failures to satisfy applicable state and federal regulatory requirements, breach of contract, and violation of residents' rights and state consumer fraud statutes."); Tim Reid, *Seattle-Area Nursing Home Hit with Wrongful Death Lawsuit over Coronavirus Death*, REUTERS (Apr. 10, 2020, 9:07 PM), https://www.reuters.com/article/us-health-coronavirus-lawsuit/seattle-area-nursing-home-hit-with-wrongful-death-lawsuit-over-coronavirus-death-idUSKCN21T00Q [https://perma.cc/HJF3-8XQF]; Priscilla DeGregory, *Man Sues Brooklyn Nursing Home for Failing to Protect Dead Father from COVID*, N.Y. POST (May 26, 2020, 5:18 PM), https://nypost.com/2020/05/26/man-sues-brooklyn-nursing-home-where-father-died-from-coronavirus/ [https://perma.cc/9WPZ-AWAX]; *COVID-19 and Personal Injury Tort Liability: Preliminary Considerations for Businesses*, GIBSON DUNN (May 4, 2020), https://www.gibsondunn.com/COVID-19-and-personal-injury-tort-liability-preliminary-considerations-for-businesses/ [https://perma.cc/Z82L-KV8Z].

78. Laura Strickler & Adiel Kaplan, *Nursing Home Industry Pushes for Immunity from Lawsuits During Coronavirus Emergency*, NBC NEWS (Apr. 27, 2020, 10:17 AM), https://www.nbcnews.com/health/health-care/nursing-home-industry-pushes-immunity-lawsuits-during-coronavirus-emergency-n1192001 [https://perma.cc/78N3-G75R].

79. *See* Mineral Park Land Co. v. Howard, 156 P. 458 (Cal. 1916) (accepting impracticability as within the meaning of the impossibility defense); *see also* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966) (quoting *Mineral Park Land*) ("A thing is impossible in legal contemplation when it is not

Spanish influenza swept through the United States, forcing courts to confront contract nonperformance due to government lockdowns.

A. The Impossibility Doctrine

The contract doctrine of impossibility enjoys its ancient roots in Roman law which famously states "impossibilium nulla obligatio est"[80] or "there is no obligation to the impossible."[81] A party is excused from contract performance when performance is impossible at the time the contract is made, as in the nonexistence of goods in a sale transaction.[82] This is referred to as initial impossibility. The phrase "Et si consensum fuerit in corpus, id tamen in rerum natura ante venditionem esse desierit, nulla emptio est" means "Even if there is agreement on the physical identity of the thing, the purchase is void if it ceases to exist before the sale."[83] If performance is possible at the time of contract creation but later becomes impossible after contract creation – e.g., the goods perish before the delivery date – the party is excused.[84] This is referred to as subsequent impossibility.

Scholars from different traditions and countries attempted to understand and explain the Roman law on the doctrine of impossibility for several centuries.[85] The standard of judging impossibility to excuse contract performance was objective or absolute, not subjective or personal.[86] Therefore, a party could not escape liability if performance was "merely beyond *his* power."[87] Performance had to be beyond "anyone's power".[88] Also, if the party's performance became impossible after the contract was made, the party could not

practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.").

80. Dig. 50.17.185 (Celsus, Digest 8).

81. James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 AM. J. COMP. L. 513, 514 (2004) (tracing the origins of the impossibility doctrine).

82. *Id.*; *see also* Dig. 18.1.15.pr. (Paulus, Ad Sab. 5); Dig. 18.1.57.1 (Paulus, Ad Plaut. 5).

83. PETER BIRKS, THE ROMAN LAW OF OBLIGATIONS 72 (Eric Descheemaeker ed., Oxford Univ. Press 2014) (1982).

84. *See* Gordley, *supra* note 81, at 514; *see also* REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 92 n.2 (1992).

85. See ZIMMERMAN, *supra* note 8484, at 92 n.2 (tracing and discussing what Canon lawyers, scholars and jurists in France, Germany and England from medieval time to the 20th century have explained about the Roman text on impossibility doctrine).

86. Gordley, *supra* note 81, at 514.

87. *Id.* (emphasis added).

88. *Id.*

avoid liability "merely because he was not at fault in the ordinary sense of the word."[89]

As to the common law tradition, the English courts prior to the 19th Century did "sometimes" accept impossibility as an excuse for contract nonperformance.[90] Examples can be found in which English courts excused performance due to illegality, death, act of God, and plague.[91]

In *Abbot of Westminster v. Clerke*, the Abbot brought an action against the executors of Leman Clerke for a "plea to debt on bond for the performance of covenants, and demurrer."[92] Initially, the Abbot and Clerke entered into an agreement for a term of forty years for the lease of a rectory.[93] The agreement contained several provisions, including Clerke's promise to pay for rent, repairs, and indemnification as stipulated. Further, the agreement provided that "it should not be lawful" for Clerke to sell "his term to any person without" first obtaining permission from the Abbot.[94] Clerke occupied the rectory and paid his rent accordingly.[95] Later, Clerke assigned his rights under the agreement to Payne.[96] Upon the assignment, Payne paid the rent and performed all the covenants.

The Abbot demurred in law.[97] The assignment between Clerke and Payne became illegal because a statute was passed in the "21st year of the present king" against "spiritual persons occupying farms."[98] Because the statute only allowed assignments "to a layman," and Payne was "a spiritual person," the grant was void.[99] Accordingly, there was "no question but that all the covenants are dispensed with and discharged, for the covenants can continue no longer than the term has being; for purpose that within the term the lessee surrender to the lessor."[100] In other words, Payne's performance was excused as the assignment agreement between

89. *Id.*

90. Professor Gordley asserts that English courts "sometimes excused a party who could not perform." Gordley, *supra* note 81, at 521. He notes that scholar Samuel Williston, however, "represented" that "impossibility was no excuse" in *Paradine v. Jane*, and that not until *Taylor v. Caldwell* in 1863 did the doctrine of impossibility first become a defense in contract nonperformance. *Id.*

91. *Id.*

92. Abbot of Westminster v. Clerke (1536) 73 Eng. Rep. 59, 59 (K.B.).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Abbot of Westminster*, 73 Eng. Rep. at 60.

97. *Id.*

98. *Id.* at 61.

99. *Id.* at 62.

100. *Id.* at 63.

Clerke and Payne happened to be illegal.[101] Similarly, some current day businesses are struggling because temporary COVID-19 restrictions make it illegal to perform certain contracts.[102]

Another old English case that excused contract performance is *Hyde v. Dean of Windsor*, decided in 1597.[103] The court there recognized that when a covenant was to be performed by a particular person, but that person died, it could not be performed. Likewise, in 1624, the court in *Williams v. Hide* considered the impossibility excuse where performance became impossible by an act of God. In that case, the plaintiff declared in consideration that he lent to the defendant's wife a horse to be returned upon request. She promised to return the horse, but the horse died before the request was made. The court excused contract performance since "where the agreement is possible when made, but afterwards becomes impossible by the act of God, the party is forever discharged."[104]

English common law also dealt with nonperformance due to plague. In *Lawrence v. Twentiman*, decided in 1668, the court held

101. *Id.* Peculiarly, some scholars seem to incorrectly identify the facts and ruling in the case. *See* Mark B. Baker, *"A Hard Rain's A-Gonna Fall" - Terrorism and Excused Contractual Performance in a Post September 11th World*, 17 TRANSNAT'L L. 1, 15 (2004) ("In *Abbot of Westminster v. Clerke*, the Court of King's Bench ruled that if a seller is to deliver wheat on a given day in another country, and prior to the date of delivery such performance is made statutorily illegal, the seller is excused from his contractual obligation.") *(footnote omitted)*; Philip L. Bruner, *Impossibility of Performance in the Law of Government Contracts*, 9 U.S. A.F. JAG L. REV. 6, 7 n.10 (1967) ("*Abbot of Westminster v. Clerke*, 73 Eng. Rep. 59 (K.B. 1536), in which the promisor was excused from delivering grain to France when prior to the date of delivery it became prohibited by law."); John H. McCreery, *Continuity of Contracts and the Euro*, 12 N.Y. INT'L L. REV. 55, 67 n.63 (1999) ("This comes from an earlier King's Bench case involving two parties contracting for the sale of wheat. The agreement was in place and then the delivery was made illegal by statute. The court relieved the seller of liability and the illegality exception was thereafter recognized. *See* Abbot of Westminster v. Clerke, 1 Dy. 26b, 28b, 73 Eng. Rep. 59, 63 (K.B. 1536)."); Aaron Wright, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183, 2189 n.43 (2005) ("*See* Abbot of Westminster v. Clerke, 73 Eng. Rep. 59 (K.B. 1536) (holding that a promise to sell a building was excused, because unknown to either party, the building had burned down prior to the execution of the sales agreement.")).

102. *See* Jack Pembroke-Birss et al., *Options for businesses when temporary COVID-19 restrictions make it illegal to perform a contract*, NORTON ROSE FULBRIGHT (Apr. 2020), https://www.nortonrosefulbright.com/en/knowledge/publications/24ee0083/options-for-businesses-when-temporary-covid-19-restrictions-make-it-illegal-to-perform-a-contract [https://perma.cc/8WGG-6DKN].

103. Hyde v. Dean of Windsor (1597) 78 Eng. Rep. 798 (K.B.).

104. *Id.*; *see also* Williams v. Lloyd (1629) 82 Eng. Rep. 95 (K.B.) (holding that the bailee was discharged from duty to return a horse after the animal had passed).

that "as a rule of law, that the presence of the plague in a house is a good excuse for the non-performance of a covenant to repair by a particular day but is liable if he does not perform the covenant within a reasonable time after the plague has disappeared."[105] It seems that the Court permitted the plague to excuse, suspend, and later resume contract performance once the plague vanished.

A notable case in which the Court famously did not accept the impossibility excuse is *Paradine v. Jane*, decided in 1647.[106] In that case, the plaintiff leased property to the defendant, but the defendant failed to pay rent for three years. The defendant asserted that the German Prince Rupert and his hostile army of men forcefully expelled the defendant and occupied the property.[107] The defendant therefore could not cultivate the land for profits.[108] The defendant sought to excuse his obligation to pay rent. The Court stated that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good. . . notwithstanding the interruption by enemies."[109] The defendant could not escape his obligation to pay unless he included provisions otherwise in the contract.[110] By entering the contract, the defendant enjoyed the profits as well as "the hazard of casual losses."[111]

The above cases illustrate that depending on the facts of the case, early English courts accepted or rejected the impossibility defense. Absolute performance seemed to be the rule, and even under the categories of exceptions (illegality, death, act of God, and plague), courts did not liberally excuse nonperformance. Unlike in Roman law, the English courts in these cases did not distinguish between initial and subsequent impossibility with fault. Judicial acceptance of impossibility as an excuse at common law was a recognition of changed circumstances that render the promisor unable to perform the contract. This English approach to the doctrine of impossibility as an excuse to contract performance, however, originates in Canon law's doctrine of changed circumstances.

105. H. Rolle, Abridgment 450, Cond. (G), p. 10 (London 1668); *see also* SEAN WILKEN & KARIM GHALY, THE LAW OF WAIVER, VARIATION AND ESTOPPEL 29 (2d ed. 2012) (discussing Lawrence v. Twentiman [1611] 1. Rolle Abr. 450, and stating that the court ruled that the obligation to build the house was suspended whilst the plague affected the area).

106. Paradine v. Jane (1647) 82 Eng. Rep. 897 (K.B.).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 897.

B. The Doctrine of Changed Circumstances

A doctrine that runs parallel to the doctrine of impossibility (or that may be thought of as falling under the umbrella of impossibility) is the doctrine of changed circumstances. Under this doctrine, a party may be excused when, due to changed circumstances or intervening events after contract formation, parties encounter difficulties with performing. 'Changed circumstances' may encompass a wide variety of scenarios and is not limited to use in certain categories like death, illegality, and plague. Therefore, it is more flexible than the common law doctrine of impossibility.[112] Modern courts take this approach, and may consider hardship, high costs due to market price changes, and route changes due to war to be changes beyond anticipation and control.[113] The doctrine of changed circumstances addresses these types of contract performance problems. The doctrine originated in Canon law, not Roman law.[114]

Under Canon law, although breaking a promise is morally wrong, a party can legitimately break a promise when circumstances have sufficiently changed.[115] St. Augustine, according to Gratian's Decretum, stated that "one need not keep a promise to return a sword to a person who has become insane."[116] Decretum included that the condition for a promise was whether "matters remain in the same state."[117] The medieval Italian jurist Baldus de Ubaldis later read this condition concerning promises into the civil law as *clausula rebus sic habentibus*, or "frustration or failure of basis," as it is known in common law.[118]

The great Thomas Aquinas, in the 13th century, relied on a theory of equity to argue that a promise is a kind of law, and the law is not binding in circumstances under which the promisor did not intend to be bound.[119] In the 16th and 17th centuries, Thomas Aquinas' view continued – the promisor is not bound if the changed circumstance constitutes the "unique reason" or "unique

112. *See Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) ("The doctrine of impossibility of performance has gradually been freed from the earlier fictional and unrealistic strictures . . . .").

113. *See Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916); *Transatlantic Fin. Corp.*, 363 F.2d at 316.

114. Gordley, *supra* note 81, at 525–26.

115. *Id.*

116. MARTIN HOGG, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES 80 (2011). Hogg notes that both Cicero and Plato had used similar examples. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 40.

cause" for performance of the promise or the "presumption of facts" for the condition.[120]

As mentioned above, the English court decisions that accepted impossibility as an excuse to contract performance had origins in Canon law's doctrine of changed circumstances. One of the leading English cases in contract law embracing the doctrine of changed circumstances is *Taylor v. Caldwell* of 1863, in which Judge Blackburn released the owner of a music hall from a contractual obligation after the hall was destroyed by fire.[121] Judge Blackburn recognized that performance of the contract was impossible as the hall ceased to exist, preventing the party from fulfilling its obligation.[122] Today, *Taylor v. Caldwell* is often erroneously celebrated as the case that established the doctrine of impossibility as an excuse for contract nonperformance in common law, but English courts previously accepted impossibility excuses in the 1500s.[123]

However, in practice, contract performance is rarely excused based on supervening events that render the performance impossible.[124] While recognizing the existence of the doctrine, courts usually rule against the party asserting the defense. The rarity of accepting the changed circumstances or supervening events excuse for contract nonperformance is interestingly consistent with the Roman law's objective standard for judging impossibility. It seems that *both* Roman law and Canon law influenced American courts' approach to the impossibility defense; the constrained application of

120. *Id.*

121. Taylor v. Caldwell (1863) 122 Eng. Rep. 309 (KB); Gordley, *supra* note 81, at 521 (noting that other scholars assert that Judge Blackburn's decision came from civil law).

122. While Blackburn based the impossibility excuse on civil law, scholars have criticized Blackburn for conflating the doctrine of impossibility with the implied condition in *Taylor v. Caldwell*. Gordley, *supra* note 81, at 521–523; *see also* William Warwick Buckland, *Casus and Frustration in Roman and Common Law*, 46 HARV. L. REV. 1281, 1287–89 (1933). In the United States, scholars and courts later rejected the implied condition rationale for accepting impossibility of performance. *See* Opera Co. of Bos., Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1097-1102 (4th Cir. 1987).

123. *Taylor v Caldwell*, WIKIPEDIA, https://en.wikipedia.org/wiki/Taylor_v_Caldwell (last visited June 12, 2020) [https://perma.cc/G827-W8A5]; Joshua M. Cartee & William M. Mattes, *Origins of the Force Majeure Clause and Impossibility of Contractual Performance Defens*e, NAT. L. REV. (March 19, 2020), https://www.natlawreview.com/article/origins-force-majeure-clause-and-impossibility-contractual-performance-defense [https://perma.cc/4MWS-HCB5].

124. *See, e.g.*, *Opera Co. of Bos., Inc.*, 817 F.2d at 1098-99 (explaining the rejection of the implied condition by Corbin and Williston, and the Virginia Supreme Court).

the doctrine of changed circumstances reaffirms the sanctity of the contract that the parties freely entered.[125]

Fifty years after *Taylor v. Caldwell*, the California Supreme Court issued a seminal decision in *Mineral Park Land Co. v. Howard*.[126] The Court devised relief in a contract where performance is not impossible, but is more physically difficult or substantially higher in cost than what the parties had planned.[127] In other words, the California Supreme Court focused not on impossibility to perform, but on commercial impracticability of carrying out the contractual obligation.[128] Under commercial impracticability, courts dictate that three requirements must be present in evaluating whether the plea of impossibility is viable.[129] First, something unexpected must have occurred.[130] Second, the parties to the contract neither anticipated nor allocated the risk of the contingency, either by agreement or custom.[131] Finally, the occurrence of the contingency rendered the contract performance commercially impracticable.[132]

Two years after the pragmatic approach to the doctrine of impossibility by the California Supreme Court in *Mineral Park Land v. Howard*, the Spanish flu swept through the United States and the

125. The rationale for constrained application of the impossibility excuse was expressed by the U.S. Supreme Court in *Dermott v. Jones*, 69 U.S. 1, 8 (1864): "The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated." *See also* Jennifer Camero, *Mission Impracticable: The Impossibility of Commercial Impracticability*, 13 U. N.H. L. REV. 1, 1 (2015).

126. *Mineral Park Land Co. v. Howard*, 156 P. 458 (Cal. 1916).

127. *See id.* at 460 (excusing performance where the defendant had agreed to remove the gravel from the plaintiff's land but encountered substantially higher cost than anticipated due to the later discovered fact that the gravel was under water).

128. *See also Opera Co. of Bos., Inc.*, 817 F.2d at 1099-1100 (tracing and discussing the evolution of the impossibility of performance doctrine under the Restatement (Second) of Contracts); John Delikanakis & Gil Kahn, *Force Majeure Clauses and the Impossible and the Impractical*, SNELL & WILMER (Apr. 7, 2020), https://www.swlaw.com/publications/legal-alerts/2739 [https://perma.cc/M5EC-GERV].

129. See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315–16 (D.C. Cir. 1966).

130. *Id.*

131. *Id.*

132. *Id.*

rest of the world, grinding everything to a standstill in 1918. As the country was locked down, parties to contracts began to raise impossibility as a defense to nonperformance.

III.
IMPOSSIBILITY IN THE AGE OF THE SPANISH FLU

A rare opportunity to understand the operation of the doctrine of impossibility in the age of the Spanish flu is present in three opinions decided by the Supreme Courts of North Dakota, Ohio, and Oregon. The cases involve similar facts. All three were contract disputes in which bus drivers sought payments from their respective school employers for the period of time that schools were forced to close to prevent the spread of the Spanish flu. Each state Supreme Court addressed the defense of impossibility and resolved the breach of contract claims differently. As seen below, the courts ignored the pragmatic approach of commercial impracticability espoused by *Mineral Park Land v. Howard*.

A. Fractured North Dakota Supreme Court's Decision on Impossibility

In April 1921, the Supreme Court of North Dakota addressed a contract interrupted by the Spanish flu of 1918.[133] The plaintiff, William Sandry, was a school bus driver who signed a contract with the defendant Brooklyn School District to transport students and teachers during the school year of 1918-1919. According to the contract, the District would pay Sandry $65 per month for his bus driving services for nine months, commencing on September 23, 1918. The contract did not contain any provision relating to relieving the parties from performance by reasons beyond their control.[134]

Two weeks into the school year, in early October, the District closed the schools on the account of the Spanish flu sweeping across the country. The District made its decision based on an order promulgated by the county board of health, which directed the school board to close all schools and places of amusement.[135] The order also stated:

> "This is not only a board of health measure, but it is the substance of a telegram received by the State Board of Health

133. Sandry v. Brooklyn Sch. Dist. No. 78, 182 N.W. 689, 691 (N.D. 1921).

134. *Id.* at 690 (stating that the contract provides ". . . [t]hat the school board may at any time cancel this contract in case of the nonperformance of this agreement by the driver, or in case of the discontinuance of school"). The District did not cancel the contract with Sandry. *Id.* at 691.

135. *Id.* at 691 (Robinson, J., concurring).

> from the Surgeon General at Washington. It is therefore a war measure."

The flu was infectious and fatal.[136] The District paid Sandry for the two weeks of service and stopped payments for the subsequent 13 weeks while the schools remained closed. The District resumed payments to Sandry when the schools reopened in January 1919.

Sandry brought an action for breach of contract, alleging that he was at all times ready to perform his services under the contract, but the District breached by failing to provide compensation as stated under the contract. Sandry argued that his contract should be treated similarly to the teachers' contracts, as the teachers in the District did not perform during the school closures, but nevertheless received compensation.[137] The jury found in favor of Sandry and the District appealed.

In a divided 3-2 decision, the Supreme Court of North Dakota penned a total of four opinions. The majority opinion first squarely rejected Sandry's argument that the bus driver should be treated similarly to teachers for compensation during school closures caused by the influenza outbreak.[138] The majority believed that the "true intention of the parties" could not be that Sandry should be paid for the thirteen weeks of "holding in readiness" because it required "so little inconvenience" on the driver's part to remain ready to perform.[139]

The majority instead applied the "ordinary rule applicable to personal service contracts," that they are subject to an "implied condition" of ability to perform on one side and of ability to receive performance on the other.[140] Although the majority did not apply the doctrine of impossibility, it acknowledged the doctrine and identified examples of when it might be invoked: "sickness or death of either party or the inability of one party to give or receive performance, occasioned by the prevalence of an epidemic."[141] Ultimately, the majority concluded that Sandry was not allowed to recover the stipulated compensation for the thirteen weeks of school closure because Sandry's two weeks of performance before the school closure failed to constitute substantial performance of

136. *Id.*

137. *Id.* at 690 (stating that under the relevant statute governing teachers' contracts, the epidemic was not grounds for discontinuing teachers' compensation if the teachers remained ready to perform).

138. Sandry v. Brooklyn Sch. Dist. No. 78, 182 N.W. 689, 690 (N.D. 1921).

139. *Id.* at 691.

140. *Id.*

141. *Id.*

the nine-month contract.[142] Unlike the majority, which did not focus much on the influenza epidemic in its reasoning, Justice Robinson penned a concurring opinion and took judicial notice of the infectious and fatal disease that alarmed the nation and forced the closing of the school.[143] The influenza "was an act of God," but Sandry and other bus drivers "had due notice" of the school closing.[144] Consequently, Justice Robinson believed, "there was no occasion for any watchful waiting" as claimed by Sandry.[145] Because Sandry did not perform any service during the thirteen weeks of mandatory school closure and the District was "not responsible for the epidemic or the closing of the school," the District "had no power to contract for the payment at the time when the school was closed."[146] The concurring opinion emphasized that "[n]o man is responsible for that which no man can control."[147] Therefore, the trial court's jury instruction was erroneous; the District was rightful in closing the school "by compulsion and by act of God."[148] The District was not liable to Sandry for his "idleness" during school closure.[149]

Two justices – Bronson and Grace – issued dissenting opinions. Justice Bronson first noted that the majority opinion treated the contract as continuous for the entire nine months and, therefore, that Sandry's two weeks of service before school closure failed to qualify as substantial performance.[150] Contrary to the majority opinion, Justice Bronson emphasized that there was no breach of the contract by Sandry either "presumed or proved" at trial.[151] Moreover, Sandry was ready to perform but was preventing from doing so by the District's action of closing the schools.[152] The jury found that the District's school closure constituted breach of the contract.[153] Consistent with the law, Sandry suffered from defendant's breach and should recover "the detriment proximately caused through the breach of a contract."[154]

142. *Id.*
143. *Id.* at 691 (Robinson, J., concurring).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 692.
148. Sandry v. Brooklyn Sch. Dist. No. 78, 182 N.W. 689, 691-92 (N.D. 1921).
149. *Id.* at 692 (Robinson, J., concurring).
150. *Id.* at 692 (Bronson, J., dissenting).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

Justice Grace, authoring the other dissenting opinion, focused on the definite nature of the contract between Sandry and the District, as the agreement was for a predetermined period of time with specified compensation, rights, and duties.[155] The jury reviewed and relied on the evidence at trial and found for Sandry as the party who substantially performed the contract.[156] Justice Grace disagreed with the majority's construction of the contract and argued that the ruling would render similar contracts in the future "of little force or effect."[157]

In summary, the divided North Dakota Supreme Court exhibited discomfort with the impossibility doctrine and the supervening event of the Spanish flu as an excuse for the District's refusal to pay the bus driver. The majority barely mentioned the epidemic as an excuse but focused solely on the driver's failure to substantially perform as a bar to recovery of payment for the driver.

B. The Ohio Supreme Court, Rejection of Impossibility, and Lack of Contingencies in Contractual Terms

The Supreme Court of Ohio decided a similar case during the same period of time, *Montgomery v. Board of Education of Liberty TP., Union County*, in which it rejected the impossibility defense.[158] Notably, the Supreme Court of Ohio's decision was unanimous;[159] there were no separate concurring opinions.[160]

In this case, plaintiff Homer Montgomery was a bus driver for the Board of Education of Liberty township.[161] Pursuant to the contract entered by the parties, Montgomery agreed to transport students in the school district during the school term of about 8 months at a rate of $3 per day, payable monthly.[162] The contract contained no provision relating to relieving the parties from their obligations by reason of any conditions which might thereafter arise.[163] During the contractual period, the Board closed the schools until further notice due to the influenza at the order of the local board of health.[164]

155. Sandry v. Brooklyn Sch. Dist. No. 78, 182 N.W. 689, 692 (N.D. 1921) (Grace, J., dissenting).
156. *Id.*
157. *Id.*
158. 131 N.E. 497, 498 (Ohio 1921).
159. *Id.* at 498.
160. *Id.*
161. *Id.* at 497.
162. *Id.*
163. *Id.*
164. *Montgomery*, 131 N.E. at 497.

Montgomery was ready and able to perform the contract during the period that the schools were closed, but he did not receive payments for this time. He brought a breach of contract action against the Board. The trial court rendered a judgment in his favor, but the Court of Appeals reversed on the ground that the performance of the contract during the influenza period was made impossible by order of the health authorities.[165] The case then proceeded to the Supreme Court of Ohio.[166]

The Ohio Supreme Court held that Montgomery was entitled to compensation per the contract. First, the Court opined that Montgomery, a bus driver for the public school, should be treated similarly to the teachers and saw no reason to treat the bus drivers differently.[167]

Second, abiding by the contract, Montgomery was ready to perform during the entire contractual period and could not mitigate the damages.[168] Specifically, he could not make any other arrangements which would "interfere with his constant readiness to resume the active discharge of the duties imposed."[169] In fact, as the Ohio Supreme Court noted, Montgomery fully engaged himself in transporting the students once school resumed.[170]

In the end, the Court concluded that because the contract did not include any contingency, the law "will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract."[171] The court reversed the judgment rendered by the Court of Appeals.

In reaching its decision, the Court did not engage in any analysis relating to the doctrine of impossibility as raised on appeal by the board. In other words, only the four corners of the contract controlled. As the contract was silent on the occurrence of an act of God, an epidemic, or an act by the other party that would render

165. *Id.* at 497 (Synopsis).

166. *Id.*

167. *Id.* at 498.

168. *Id.* at 498 ("During all such period, therefore, upon each school day, his time and service and the service of his team, which he must necessarily provide and constantly maintain, continued subject to the order of the board of education; and his employment, in so far at least as it prevented his engagement in other occupation or undertaking inconsistent with his duties under his contract, was continuous throughout all of the period in question.").

169. *Id.*

170. *Montgomery*, 131 N.E. at 498.

171. *Id.*

performance impossible, the Supreme Court of Ohio was unwilling to import the missing term into the contract.

In summary, the Ohio Court's unanimous decision is different from the North Dakota Court's decision with respect to the impossibility defense. While the North Dakota Supreme Court found for the defendant on grounds of substantial performance, the Ohio Supreme Court found for the plaintiff because, on its view, the terms of the contract govern when the contract fails to include a contingency.

C. The Oregon Supreme Court, Act of Law and Impossibility

The Oregon Supreme Court also addressed the impossibility defense in a breach of contract case brought by a school bus driver against a school district[172] in *Crane v. School District. No. 14 of Tillamook County*[173] The bus driver signed a contract with the school to transport pupils during the school year. However, on October 1, 1918, the Surgeon General of the United States issued a public health order to state health officers of all states to investigate closing schools.[174] Nothing in the order required schools to be closed.[175] Nevertheless, the Oregon state health officer by "order of the Surgeon General of the United States" issued and directed the county health officers to close all schools in the state.[176]

Crane drove the bus from September 16 until October 14 when the school was closed. The school paid Crane for the weeks that he transported the students. During the school closure, Crane was ready, able, and willing to furnish the transportation per the contract.[177] The school refused to pay Crane for the four months of school closure from October 14, 1918 to February 10, 1919. In a non-jury trial, the lower court ruled in favor of Crane.[178]

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172. Crane, 188 P. at 715 (1920)

173. *Id.* at 713.

174. *Id.* at 713-14.

175. *Id.*

176. *Id.* at 714. "The letter signed by Robert E.L. Holt, acting state health officer to the local health officers states as follows: "'Portland, October 8, 1918. "'Dr. R. T. Boals, County Health Officer, Tillamook, Oregon. Dear Doctor: By order of the Surgeon General of the United States Public Health Service, you are directed in case of the appearance of an outbreak of influenza in your community to discontinue all public meetings and close all schools and places of public amusement. Report immediately any cases occurring.'"

177. *Crane v. Sch. Dist. No. 14 of Tillamook Cty.*, 95 Or. 644, 188 P. 712, 713 (1920)

178. *Id.* at 714.

The District asserted the defense of impossibility. It argued that the contract was entered into by the parties with the understanding that the school year would continue in the usual and ordinary course and that it "would not be suspended or interrupted by extraordinary casualty, operation of law, or orders or directions from authorities of the state or federal government, or other causes, over which neither party was responsible."[179] Specifically, the District argued that it was excused from performing the contract because the "performance [was] rendered impossible by an act of law" as ordered by the local health officers in response to the Surgeon General's order.[180]

The Oregon Supreme Court first rejected the argument that the school was closed by operation of law because the Surgeon General's order did not explicitly direct schools to close.[181] In addition, the Court stated that the Oregon board of health possessed no authority to close schools; the board's duty was "to make and enforce quarantine regulations" which "does not embrace or carry with it the authority to close public schools."[182] Consequently, the closure of the schools was not an act of law and would not suspend the contract between Crane and the District.[183]

Next, the Oregon Supreme Court focused on the terms of the contract. The contract was expressly confined to the transportation of students to and from school.[184] The contract did "not contain any provisos or exceptions, and no order was made by any one which would in any manner prohibit the carrying out of its terms."[185] That meant the District was bound by the contract's terms to perform its obligation to pay Crane.[186]

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179. *Id.* at 713.

180. *Id.* at 715. (according to the defendant "[w]here from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse performance. One of the conditions implied in a contract is that the promisor shall not be compelled to perform if performance is rendered impossible by an act of law")

181. *Id.* at 715 ("[T]here is nothing in the order of the Surgeon General of October 8, 1918, authorizing or directing that all public meetings should be discontinued, or that schools or places of public entertainment should be closed. Nothing is said about closing schools. There is no reference to them whatever.").

182. *Crane v. Sch. Dist. No. 14 of Tillamook Cty.*, 95 Or. 644, 188 P. 712, 715 (1920).

183. *Id.* at 716.

184. *Id.*

185. *Id.*

186. *Id.*

As to the defense of impossibility, the Court rejected it outright in the following statement:

> . . . when a party voluntarily undertakes to do a thing without qualification, per formance [sic] is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing he agreed to do, is well settled.

The Court adhered to the general rule of contract construction that

"[w]here no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement. . .the promisor remains responsible for damages, notwithstanding the supervening impossibility or hardship."[187] The Court affirmed the judgment of damages in the amount of $380 in favor of Crane.

In summary, the Oregon Court's decision is close in reasoning to the Ohio Court's decision in its rejection of the impossibility doctrine. Both courts refused to intervene and held that the terms of the contract alone governed the parties' obligations. Moreover, the Oregon Court declined to accept an excuse based on "act of law" in this context.

IV.
INVOKING THE IMPOSSIBILITY DOCTRINE IN THE COVID-19 PANDEMIC

Numerous law firms' websites, news alerts, and articles highlight impossibility as a defense for contract nonperformance in the age of the COVID-19 pandemic.[188] These publications often men-

187. *Id.*

188. *See generally* Michael J. Dunne et al., *COVID-19 and Contracts: Potential Impacts of the Pandemic on Private Agreements?*, Day Pitney Advisory (Mar. 23, 2020), https://www.daypitney.com/insights/publications/2020/03/23-covid19-and-contracts-potential-impacts [https://perma.cc/ZY9X-RD22]; Adam Hakki et al., *Analysis of Non-Performance of Contractual Obligations in Light of the COVID-19 Pandemic*, Shearman & Sterling (Apr. 20, 2020), https://www.shearman.com/perspectives/2020/04/analysis-of-non-performance-of-contractual-obligations-in-light-of-the–COVID-19-pandemic [https://perma.cc/D6YU-99T3] ("[A] party might seek to excuse nonperformance of its contractual obligations pursuant to the related common-law doctrines of impossibility, impracticability of performance, or frustration of purpose."); Kyle W. Robisch, *Contracts, Compliance, and Coronavirus – Defenses to Nonperformance in the Age of Coronavirus*, Bradley (Apr. 13, 2020), https://www.bradley.com/insights/publications/2020/04/contracts-compliance-and-coronavirus-defenses-to-nonperformance-in-the-age-of-coronavirus [https://perma.cc/8YWA-CSLF].

tion the doctrine along with citations to a couple of cases, suggesting that the defense is readily available and that courts are willing to extend the defense to nonperformance caused by the contagion and governments' stay-at-home orders.[189] Contrary to these assertions, as legal precedent demonstrates, the success of the impossibility defense in the age of COVID-19 is highly uncertain for the following reasons.

First, courts are generally very reluctant to apply the impossibility defense doctrine to excuse contract nonperformance.[190] They preserve the sanctity of the contract by holding the parties to their obligations pursuant to the contract terms.[191] As seen in the cases described in the previous section, the Oregon and Ohio Supreme

189. Jarrett M. Behar, *Contract Law: The COVID-19 Shutdown and the Impossibility of Performance Defense*, CERTILMAN BALIN LLP (last visited June 15, 2020), https://certilmanbalin.com/contract-law-the-COVID-19-shutdown-and-the-impossibility-of-performance-defense/ [https://perma.cc/BX95-CWTP] (discussing contract nonperformance cases prior to COVID-19); Christina Laun Fugate et al., *Coronavirus (COVID-19): Excusing Contract Performance*, ICE MILLER LLP (March 20, 2020), https://www.icemiller.com/ice-on-fire-insights/publications/coronavirus-(COVID-19)-excusing-contract-performa/ [https://perma.cc/H7BQ-TNGL] ("[R]ecent COVID-19 federal, state and local government containment restrictions bring into play other contract law doctrines such as impracticability, impossibility and frustration of purpose. Each of which can serve to excuse contract performance."); Cathy T. Moses et al., *California Contractual Enforceability Issues Arising in the Wake of COVID-19: Force Majeure, Frustration, and Impossibility*, COX, CASTLE & NICHOLSON LLP (last visited June 15, 2020), https://www.coxcastle.com/news-and-publications/2020/california-contractual-enforceability-issues-arising-in-the-wake-of-COVID-19-force-majeure-frustration-and-impossibility [*https://perma.cc/X58R-Z2K6]* ("The doctrine applies where performance is subsequently prevented or prohibited by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States. In order to be an excuse for nonperformance of a contract, the impossibility of performance must attach to the nature of the thing to be done and not to the inability of the obligor to do it.").

190. *See, e.g.*, Ala. Football, Inc. v. Greenwood, 452 F. Supp. 1191, 1196 (W.D. Pa. 1978) (finding no court in Alabama has extended the "impossibility of performance in a situation similar to the instant case."); Gulf Oil Corp. v. Southland Royalty Co., 478 S.W.2d 583, 590 (Tex. App. 1972) (quoting EARL A. BROWN, ET AL., THE LAW OF OIL AND GAS LEASES, ch. 13, § 13.05 (2d ed. 2021)) ("The courts appear reluctant to overturn what they have called 'a well established rule' that impossibility of performance will not excuse a party from complying with the obligations of a contract, especially where the performance becomes impossible after the contract is executed.").

191. Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) ("While such defenses [of impossibility] have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.").

Courts rejected the impossibility defense in school bus driver actions where the school districts refused to uphold their end of the agreements while school remained closed.[192] The schools declined to pay the bus drivers based on local government orders to close schools.[193] The Oregon and Ohio Supreme Courts adhered to the general rule that parties to a contract are obligated to perform according to the contract terms.[194] The intervening events of infectious contagion and government orders failed to persuade the courts to deviate from general contract rules.[195]

Second, in considering the defense of impossibility, courts prefer that parties anticipate and include contingency provisions in the contract.[196] If the contract terms do not include contingency provisions, courts typically decline to incorporate additional terms. Courts do not wish to redraft contracts for the parties. For instance, the bus driver contracts during the Spanish 1918 influenza did not contain terms relating to school closures by operation of law or acts of God.[197] Both the Ohio and Oregon Supreme Courts restricted the interpretation of the contract to what was within the four corners of the contract.[198] As the nonperforming parties, the school boards in the bus driver suits had to pay the drivers the agreed upon monthly sums for the time the schools were forced to close.[199]

Third, a successful impossibility defense seems to require literal *impossibility*, not mere impracticability due to hardship or increased costs. The modern approach adopted by the California Supreme Court in *Mineral Park Land v. Howard* advocates for a definition of impossibility that means the performance is impracticable due to either physical difficulty or substantially higher cost compared to the original cost anticipated by the parties.[200] Seemingly

192. Montgomery v. Bd. of Educ., 131 N.E. 497 (Ohio 1921); *Crane v. School Dist.*, 188 P. 712 (Or. 1920).

193. *Montgomery*, 131 N.E. at 497; *Crane*, 188 P. at 713.

194. *Montgomery*, 131 N.E. at 497–98; *Crane*, 188 P. at 716.

195. *Montgomery*, 131 N.E. at 498; *Crane*, 188 P. 712 at 715.

196. *Crane* 188 P. at 715.

197. *Montgomery*, 131 N.E. at 497; *Crane*,188 P. at 713.

198. *Montgomery*, 131 N.E. at 498; *Crane,* 188 P. at 715.

199. *Montgomery*, 131 N.E. at 497 (ruling for the bus driver); *Crane*, 188 P. at 716 (ruling for the bus driver).

200. *See* Nicholas R. Weiskopf, *Frustration of Contractual Purpose—Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 270 n.126 (1996) (noting that leading Contracts scholars like Williston and Corbin had long acknowledged that "the traditional reluctance of American courts to excuse a performance made significantly more expensive than anticipated by supervening circumstance"); JAMES BROOK, SALES AND LEASES: EXAMPLES & EXPLANATIONS 451 (7th ed. 2015) ("In point of fact the courts have been very reluctant to give any credence to the impossibility defense

consistent with *Mineral Park Land*, the Ohio and Oregon Supreme Court decisions declined to excuse the school boards. The excuse for nonperformance advanced by the school boards was neither the increased degree of physical difficulty nor substantially higher cost.[201] The bus drivers did not demand higher payments; they requested the sums specified in the agreements.[202] The schools did not assert that they were unable to pay.[203] Impossibility vis-à-vis impracticability due to difficulty or cost therefore was not at issue.[204] Impossibility must be present but was not.[205] Yet, what does impossibility really mean? The Ohio and Oregon Supreme Courts avoided this type of question by focusing instead on the general contract principle of holding parties to their obligations per contract terms.[206] Likewise, the North Dakota Supreme Court's majority opinion in *Sandry v. Brooklyn School Dist. No. 78 of Williams County* brushed aside any discussion of impossibility. Instead, the *Sandry* majority excused the board's payment nonperformance by ruling against the driver for failure to substantially perform because of the weeks of school closures due to the Spanish flu.[207]

Finally, contract law varies from state to state. Aptly illustrating the differences are the decisions rendered by each of the highest courts of North Dakota, Ohio and Oregon on similar facts, claims, and excuses during the Spanish flu in 1918.[208] Although the contract law of all three states recognized the doctrine of impossibility, the highest court of each of the three states articulated different rationales, focused on different issues, and presented different nuances in reaching their decisions.[209] The Oregon Supreme Court questioned the "operation of law" as the intervening event causing school closures.[210] The Ohio Supreme Court was concerned that to accept the impossibility defense would be to impose additional

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under § 2-615 where the fundamental problem is just that a seller's own costs have gone up or because completion of the contract could only be done at a loss to the seller.").

201. *Montgomery*, 131 N.E. at 497 (the school board relied on the school shutdown pursuant to a local health officer's order); *Crane*, 188 P. at 715 (the school board advanced the excuse of nonperformance due to act of law).

202. *Montgomery*, 131 N.E. at 497; *Crane*, 188 P. at 714.

203. *Montgomery*, 131 N.E. at 497; *Crane ,* 188 P. at 714.

204. *Montgomery*, 131 N.E. at 497, 498; *Crane,* 188 P. at 714.

205. *Montgomery*, 131 N.E. at 497, 498; *Crane,* 188 P. at 714.

206. *Montgomery*, 131 N.E. at 497–98; *Crane*,188 P. at 715.

207. 182 N.W. 689, 691 (N.D. 1921).

208. *Id.* at 691; *Montgomery*, 131 N.E. at 497; *Crane*, 188 P. at 712.

209. See III(A)-(C), *supra*.

210. *Crane,* 188 P. at 715.

terms unintended by the parties to the contract.[211] The North Dakota Supreme Court did not credit the excuses for nonperformance asserted by the school board and found different reasons for ruling in favor of the school board.[212]

Based on the above precedents, a party that advances impossibility as a defense for contract nonperformance in the age of the COVID-19 pandemic will encounter an uphill challenge. If the terms of the contract do not contain contingency provisions related to a contagion or government orders, courts may not wish to read additional terms to the contract.[213] Also, if true hardship and substantially higher costs are lacking, the nonperforming party will find that the defense of impossibility is quite difficult to invoke successfully.[214] Moreover, some jurisdictions are stringent in their approach to the impossibility defense.[215] For instance, New York courts require that the party asserting the impossibility doctrine must prove that: (1) the event or "destruction of the subject matter of the contract or the means of performance" makes performance objectively impossible; (2) the event was unforeseeable; and (3) the parties did not assume the risk of the occurrence in the contract.[216]

211. *Montgomery*, 131 N.E. at 498.

212. *Sandry*, 182 N.W. at 691.

213. *See generally Montgomery*, 131 N.E. at 497; *Crane,* 188 P. at 715.

214. *See Montgomery*, 131 N.E. at 497; *Crane,* 188 P. at 716.

215. The modern approach to the doctrine of impossibility is epitomized in the California Supreme Court's decision in *Mineral Park Land v. Howard* and the Restatement (Second) of Contracts. *See Opera Co. of Bos., Inc.*, 817 F.2d at 1097–1102 (discussing the evolution of the impossibility of performance doctrine from *Taylor v. Caldwell* to present day); Restatement (Second) of Contracts § 263, § 265 (Am. L. Inst. 1981).

216. Kel Kim Corp.v. Cent. Mkts., Inc., 519 N.E.2d 295 (N.Y. 1987). *See also* Bank of Am. Nat'l Trust & Sav. Ass'n v. Envases Venezolanos, S.A., 740 F. Supp. 260, 267 (S.D.N.Y. 1990) (finding that "the risk which causes the alleged impossibility of performance is foreseen, accounted for, and allocated in the contract, failure to perform cannot be excused."); *In re* Dayton Seaside Assocs. #2, L.P., 257 B.R. 123, 139 (Bankr. S.D.N.Y. 2000) (finding that the city's refusal to grant the tax abatement did not constitute contract impracticability as the problems associated with the rent control program were known and foreseeable, and the debtor therefore assumed the risks); Kolodin v. Valenti, 979 N.Y.S.2d 587, 589 (N.Y. App. Div. 2014) (extending the impossibility doctrine because the situation was unforeseeable and caused the contract performance to be "objectively impossible by law."); YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 933 N.E.2d 860, 884-85 (Ill. App. Ct. 2010) ("The doctrine excuses performance where performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law . . . The party advancing the doctrine must show that the events or circumstances which he claims rendered his performance impossible were not reasonably foreseeable at the time of contracting. Where a contingency that causes the impossibility might have been anticipated or guarded against

Under New York contract law, the impossibility defense is unavailable if the party invokes only economic hardship as the sole excuse for nonperformance.[217]

The economic hardship inquiry leads to a question in the age of COVID-19: if the government's stay-at-home order and social distancing requirements make contract performance more expensive, is the increased cost sufficient to render the contract impossible to perform? Turning to New York contract law, for purpose of answering the question, the high cost of a contract performance caused by a government's stay-at-home order and social distancing requirements may not be accepted as a successful impossibility defense.[218] Again, cost-based hardship alone is not a viable impossibility defense.[219] On the other hand, if the government stay-at-home order and social distancing requirements specifically prevent a party to a

in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance.") Unlike New York, other jurisdictions do not view foreseeability as a key factor in evaluating impossibility excuse. *See* Centex Corp. v. Dalton, 840 S.W.2d 952, 954 (Tex. 1992) (noting that although foreseeability is one factor used to decide which party assumed risk of supervening impossibility or impracticability, this factor has decreased in importance).

217. *See, e.g.*, 407 E. 61st Garage v. Savoy Fifth Ave. Corp, 244 N.E.2d 37, 41 (N.Y. 1968) ("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused."); Local 338, RWDSU v. Farmland Dairies, Inc., No.02Civ.2705(LTS)(HBP), 2003 WL 1213422, at *4 (S.D.N.Y. Mar. 13, 2003) ("Financial difficulties or economic hardship . . . cannot constitute a defense of impossibility."); Macalloy Corp. v. Metallurg, Inc., 728 N.Y.S.2d 14, 14-15 (N.Y. App. Div. 2001) ("[F]inancial hardship is not grounds for avoiding performance under a contract.").

218. *See, e.g.*, Maple Farms, Inc. v. City Sch. Dist. of Elmira, 352 N.Y.S.2d 784, 787 (N.Y. Sup. Ct. 1974) (rejecting the plaintiff's argument that contract nonperformance should be excused because it was caused "in large measure from the agreement of the United States to sell huge amounts of grain to Russia"); Barclays Bus. Credit, Inc. v. Inter Urban Broad., Inc., 1991 WL 258751, at *8 (S.D.N.Y. Nov. 27, 1991) (rejecting the defendants' impossibility defense caused by the slowdown in the New Orleans economy); Bank of America Nat'l Trust & Sav. Ass'n v. Envases Venezolanos, S.A., 740 F. Supp. 260, 263–67 (S.D.N.Y. 1990) (rejecting the defendant's defense of impossibility where the defendant's obligations to pay increased five times due to the Central Bank of Venezuela's refusal to provide favorable exchange rates per the President of Venezuela's decree).

219. Bierer v. Glaze, Inc., 2006 WL 2882569, at *7 (E.D.N.Y. Oct. 6, 2006) (stating that impossibility of performance must be more than mere financial difficulty or economic hardship); Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 728 (noting that some courts refuse to excuse performance impossibility due to financial hardship, including insolvency); Bank of N.Y. v. Tri Polyta Fin. B.V., 2003 U.S. Dist. LEXIS 6981, at *12–14 (S.D.N.Y. Apr. 28, 2003) (rejecting defendant's impossibility defense based on the economic collapse in Asia and Indonesia, which rendered the defendant bankrupt).

contract from taking the required steps to fulfill its obligations per the agreement, the impossibility defense may have a chance of success.[220]

In other words, contrary to assertions advocated by law firms, uncertainty abounds in assessing whether the impossibility defense is viable in the myriad of contract nonperformance cases caused by COVID-19. As in the recent H1N1 and SARS pandemics, the COVID-19 pandemic has instilled the lesson that all parties to contracts should consider, anticipate, and include provisions to cover risks related to contagion.[221] Such planning would yield much more certainty than reliance upon the common law doctrine of impossibility.[222]

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220. *See, e.g.*, Studio 54 Disco, Inc. v. Pee Dee Jay Amusement Corp., 439 N.Y.S.2d 395 (N.Y. App. Div. 1981) (recognizing the impossibility defense where a judicial order specifically blocked the sale of the property and rendered the contract unperformable); Bush v. Protravel Int'l, Inc., 746 N.Y.S.2d 790 (N.Y. Civ. Ct. 2002) (applying war precedents and finding that the September 11th event potentially excused performance as the plaintiff could not timely cancel the trip within specified time due to disruptions to phone communications and transportation); Moyer v. Little Falls, 510 N.Y.S.2d 813 (N.Y. Sup. Ct. 1986) (finding impossibility caused by government action in closing local landfill that increased defendant's cost by 666%). *See also* Centex Corp. v. Dalton, 840 S.W.2d 952, 954 (Tex. 1992) (accepting the impossibility defense in a contract case where the defendant was obligated to pay fees to the plaintiff under the letter agreement, but the defendant had to comply with the government's bank regulation which prohibited the defendant from paying the fees to the plaintiff).

221. *See generally* Johnathan T. Howe, *Force Majeure vs. Swine Flu: How Contracts Should Deal with Fears of the Spread of Diseases*, MEETINGS & CONVENTIONS (June 1, 2009), http://www.meetings-conventions.com/Resources/Force-Majeure-vs--Swine-Flu/ [HTTPS://PERMA.CC/DYP6-7YNX]; Martha Collins, *Cancellation and Force Majeure Issues in the SARS Era*, MEETINGS NET (Mar. 1, 2005), https://www.meetingsnet.com/negotiatingcontracts/cancellation-and-force-majeure-issues-sars-era [https://perma.cc/K6LN-UKXN]; *2009 H1N1 Pandemic Timeline*, CDC (last visited June 15, 2020), https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html [https://perma.cc/6KL9-GN8T]; Gail Dutton, *Compare: 2003 SARS Pandemic Versus 2020 COVID-19 Pandemic*, BIOSPACE (Apr. 3, 2020), https://www.biospace.com/article/comparison-2003-sars-pandemic-vs-2020-covid-19-pandemic/ [https://perma.cc/Y3RK-DKNM].

222. Janice M. Ryan, *Interpreting* Force Majeure *Clauses*, VENABLE LLP (Mar. 18, 2020), https://www.venable.com/insights/publications/2020/03/interpreting-force-majeure-clauses [https://perma.cc/2WNM-7P3L]; John S. Foster, *6 Tips for Covering Catastrophes in Contracts*, PCMA COVENE (Jan. 1, 2015), https://www.pcmaconvene.org/departments/covering-catastrophes-in-contracts/ [https://perma.cc/QG83-NBPN].

CONCLUSION

This Article concludes that the success of the impossibility defense to contract nonperformance in the age of COVID-19 will be highly variable. As contract law is state law, the impossibility defense is highly unpredictable. What may be viable for one state may not be for the others, as the Supreme Courts in North Dakota, Ohio and Oregon demonstrated in their respective opinions concerning the impossibility defense under circumstances of government shutdowns during the Spanish influenza. Moreover, courts want neither to redraft nor to add new terms to a contract because courts wish to preserve the freedom to contract and freedom from contract for the parties. Drawing from both contract law precedents and best practices in contract drafting, parties to contracts should anticipate and allocate risks by including contingencies in their agreements to prepare for pandemics like SARS, H1N1 and COVID-19. Otherwise, disappointment awaits parties who wish for a viable impossibility defense.