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FRUSTRATION OF CONTRACTUAL PURPOSE — DOCTRINE OR MYTH?

NICHOLAS R. WEISKOPF*

INTRODUCTION

Should a contractual promise to pay for goods or services be excused by operation of law because supervening events have destroyed the utility of the bargain for the party slated to receive them? Many will recall law classroom debate on whether the bride-to-be must take and pay for her wedding dress even though the prospective groom has met a sudden and tragic pre-nuptial end, or on whether the blind person who suddenly recovers sight must honor the commitment to pay for seeing eye lessons for his dog. Does the bargain bind, even in the event of such exceptional and unexpected supervening events?

The seemingly apparent answer, provided by the so-called doctrine of frustration of purpose, is that the total or virtual thwarting of a party's bargaining motivation due to exceptional supervening circumstance should permit that party to avoid the affected contract unless the parties have otherwise explicitly or implicitly agreed. Such avoidance would typically be subject to the obligation to compensate in restitution for part performance already rendered to and received by the avoiding party.

Precisely defined, frustration of purpose is to be distin-

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guished from the concept of impossibility (or impracticability) of performance. In a true case of frustration, it is not that either party's performance has become impossible or significantly more difficult than originally contemplated. Rather, the party seeking discharge on frustration grounds (the paying party in the non-barter transaction) can still do that which the contract requires, but no longer has the motivation to do so which originally induced its participation in the bargain.¹ So too, at least for purposes of this article, frustration of purpose does not subsume those instances where a party seeks discharge, or reformative modification of obligations, on grounds that a contractual price adjustment provision no longer serves its alleged essential purpose of tracking market price or otherwise no longer permits profitable use of the goods or entitlements to be supplied.² Such

¹ See RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979). As explained in the comment, "[t]his Section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract. It is distinct from the problem of impracticability ... because there is no impediment to performance by either party." *Id.*; accord *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N.W. Transp. Co.*, 263 N.W.2d 189, 192-94 (Wis. 1978) (stating that although impossibility and frustration are similar, performance of contract is not necessarily impossible or impracticable under frustration doctrine; rather commercial purpose is frustrated); see also *Lloyd v. Murphy*, 153 P.2d 47, 50 (Cal. 1944) (holding that lessee was not excused from performance because government regulations merely restricted, not destroyed, use of leased premises). As stated by the *Lloyd* court:

Although the doctrine of frustration is akin to the doctrine of impossibility of performance ... since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration.

Id. (citations omitted).

² Cases of this type are legion and often confuse concepts of cost impracticability with frustration. Whether it is buyer or seller seeking relief, the firm decisional trend is to refuse relief on assumption of risk and/or foreseeability grounds. See, e.g., *United States v. Southwestern Elec. Coop., Inc.*, 869 F.2d 310, 315-16 (7th Cir. 1989) (stating that misprojection of construction cost component of price for electric power did not excuse requirements purchaser); *United States v. Great Plains Gasification Assocs.*, 819 F.2d 831, 835 (8th Cir. 1987) (finding that pipeline purchasers of natural gas output were not excused because of allegedly unanticipated low energy prices); *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 276-78 (7th Cir. 1986) (holding that utility purchaser under long-term coal contract was not excused even though escalated price of coal could not be passed through to its customers); *Waegemann v. Montgomery Ward & Co.*, 713 F.2d 452, 454-55 (9th

cases involve possible cost impracticability, not the supervening vitiation of the paying party's need, or perceived need, for the bargain. It is fairly common, however, for the courts and commentators to use the term "frustration" in cases where performance by the seller or service provider has become impossible (the entire contract becomes "frustrated")³ and in cases where the purpose of a key contractual provision itself has allegedly been "frustrated,"⁴ but such references only serve to obscure.

Even within the definitional confines just presented, frustration of purpose is recognized as doctrine in the treatises,⁵ in the casebooks, in the hornbooks and in other legal references. Both the First⁶ and Second Restatement of Contracts⁷ elevate

Cir. 1983) (holding that lessors were not excused under frustration doctrine when, due to enactment of Proposition 13 in California, rentals linked to reduced assessed property valuations fell significantly below fair rental value). *But see*, Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980). In that case, an indexed pricing formula was reformed to prevent the seller from having to continue to supply aluminum under a long-term contract at a significant loss. The decision, popularly known as "ALCOA," alternately employed (or misemployed) principles of mutual mistake, impracticability and frustration to reach a result which has been roundly criticized. *See, e.g.*, Beaver Creek Coal Co. v. Nevada Power Co., No. 89-4114, 1992 WL 113747, at *4 (10th Cir., May 27, 1992); *Southwestern Elec. Coop., Inc.*, 869 F.2d at 315 n.7 (stating ALCOA "is inapposite because it was purportedly controlled by Indiana law" and has since "faded into obscurity.") (citations omitted); *Printing Indus. Ass'n v. International Printing & Graphic Communications Union*, 584 F. Supp. 990, 998 (N.D. Ohio 1984) (stating disagreement with ALCOA decision and rationale); *Wabash, Inc. v. Avnet, Inc.*, 516 F. Supp. 995, 999 n.6 (N.D. Ill. 1981).

³ In 1943, the British Parliament enacted legislation requiring a party whose performance had become impossible to make restitution of down payment subject to possible set-off for reliance expenditures. That legislation was called the Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, ch. 40, § 1 (Eng.).

⁴ *See, e.g.*, *Molnar v. Molnar*, 313 N.W.2d 171, 173-74 (Mich. Ct. App. 1981) (holding that where minor child died, former husband was not bound by terms of property settlement, as incorporated in divorce judgment, requiring payment of half of expenses of maintaining marital home until minor child attained age of 18); *Nash v. Board of Educ.*, 345 N.E.2d 575, 576 (N.Y. 1976) (stating that once statute extended probation period for teachers from three to five years, Board was not obligated to satisfy provision of collective bargaining agreement, which required notification of denial of tenure by May 1 of teacher's third year of service). While both of these decisions referenced and purported to apply principles of frustration, they also engaged in purpose construction.

⁵ *See* 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1353-61 (1962). Professor Williston discusses frustration of purpose in Chapter 58 of his treatise, a chapter which deals more generally with impossibility of performance. 18 SAMUEL WILLISTON, WILLISTON ON CONTRACTS §§ 1954-55 (3d ed. 1978).

⁶ RESTATEMENT (FIRST) OF CONTRACTS § 288 (1932); *see infra* notes 37-40 and accompanying text (discussing same).

⁷ RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979); *see infra* notes 89-95 and

frustration of purpose to black letter status. Particularly in more recent years, the highest and intermediate appellate courts of many states have voiced recognition of the concept,⁸ often by citing approvingly to Section 265 of the *Restatement (Second) of Contracts*, which will be discussed in detail later in this article.⁹

It is only when one searches for decisional holdings squarely based on frustration grounds that doubts emerge as to whether we are dealing with true legal doctrine or shibboleth. Based on the research summarized in this article, the inescapable conclusion is that the courts typically do not permit purchasers of goods and services to escape contractual liability because of supervening frustration of bargaining objective unless, of course, the parties are found to have so agreed.

If the conclusion just voiced is correct, very interesting issues are presented. Why would the courts identify the frustration concept, pay lip service to its viability, and then virtually always refuse to apply it? How does such a concept ingrain itself so deeply into the legal literature under such circumstances? Why are the courts, however willing to recognize frustration of purpose in the abstract, so staunch in their refusal to use it as a predicate for relief?

Part I of this article focuses on the very limited actual role the frustration concept, as properly and strictly defined, has played in the decisional calculus from the time of what is regarded as its earliest enunciation in the English Coronation cases, through the present, a period spanning almost all of the twentieth century. Part I will also explain how frustration has emerged as a "pseudo doctrine" by demonstrating that many of the cases referencing or regarded as invoking frustration of purpose actually implicate conceptually distinct legal concepts. Many of these cases deal with nothing more than failure of the constructive condition of exchange to payment because the required counterparty performance has not been rendered due to literal impossibility.¹⁰ Still additional cases in this category, many of which involved leases, are in turn merely examples of judicial refusal on policy grounds to enforce contracts requiring or actively contemplating party conduct which has become pro-

accompanying text (discussing same).

⁸ See *infra* notes 100-12 and accompanying text.

⁹ See *infra* Part I(C).

¹⁰ See *infra* notes 41-65 and accompanying text.

hibited by law.¹¹ Absent one of these special factors, the thwarting of contractual purpose by exceptional supervening events has typically remained an unshared risk of doing business. Finally, Part I discusses the basic "gap filler" status the frustration concept currently enjoys under the Second Restatement. If the absence of substantial frustration of purpose by exceptional supervening circumstance were truly recognized as an implied at law condition to the remaining contractual obligations of the adversely affected party, one would expect to see a broadened and liberalized application of the frustration concept in the cases decided in recent decades. The reality, however, is that there has been no firm doctrinal trend elevating discharge for frustration in fact to true "gap filler" status.

Part II of this article will identify and examine possible reasons for judicial reluctance to apply the frustration concept. Some of these reasons will already have been identified in the discussion of cases in Part I. This section will also introduce additional policy implications, and policy distinctions will be drawn between the frustration concept and others, such as impossibility and mistake, which operate far more commonly as bases for the avoidance of bargains.

I. STATE OF THE LAW

A. *Krell v. Henry*—*The Coronation Cases*

It is generally recognized that the frustration doctrine, as contract law concepts go, is of recent origin. Discussion and purported application of frustration of purpose is found in a series of English cases decided early in this century and dubbed the "Coronation Cases." It is in these cases that the doctrine is said to have been recognized for the first time. Of the "Coronation Cases," *Krell v. Henry*¹² is by far the best known. Yet it can convincingly be argued that *Krell*, while it involved frustration in fact of the paying party's bargaining motivation, offers little if any support for excusing performance in situations where performance by both parties is still possible. Detailed discussion of *Krell* is warranted, in part because it illustrates and discusses the very concepts that have served as obstacles to broad applica-

¹¹ See *infra* Part I (B)(2).

¹² 2 K.B. 740 (C.A. 1903).

tion of the frustration concept.

Following the typical fact pattern of the "Coronation Cases," *Krell* involved the hire of a flat along Pall Mall, London, for a two day period during which processions for the coronation of King Edward VII were scheduled to occur.¹³ Defendant Henry was found to have been induced by an announcement exhibited by plaintiff in the windows of the flat to hire the rooms for the significant sum of 75£; 25£ had been paid as a deposit, with the balance due two days before the processions were to commence.¹⁴ The announcement stated that windows to view the coronation festivities were for hire, and this was confirmed by plaintiff's housekeeper upon defendant's inquiry.¹⁵ Correspondence confirming the hire ensued, but it made no reference to the coronation.¹⁶

When the coronation was canceled, defendant refused to pay the remaining 50£ of the contract price.¹⁷ Such refusal was upheld.¹⁸ While it is certainly true in the vernacular that Henry's purpose in hiring was frustrated, careful scrutiny of the *Krell* opinion shows an analysis based on Krell's contractual performance as agreed becoming impossible due to the failure of a shared basic assumption of the parties that the Coronation events would proceed on schedule.¹⁹

Treating the contract as one of "license to use rooms for a particular purpose and none other,"²⁰ and hence finding that timely holding of the processions was at the "foundation of the contract"²¹ and thus regarded by both parties, the key conclusion was that "both parties are discharged from further performance of the contract."²² The plaintiff was no more obligated to make the rooms available than was the defendant to pay for them, because the "non-happening [of the procession] prevented the per-

¹³ *Krell*, 2 K.B. at 741. Many of those letting rooms along Pall Mall did so with plans to erect temporary seating which would be sold to members of the viewing public. See, e.g., *Chandler v. Webster*, 1 K.B. 493 (C.A. 1904).

¹⁴ *Krell*, 2 K.B. at 741.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 754-55.

¹⁹ *Krell*, 2 K.B. at 745-47.

²⁰ *Id.* at 750.

²¹ *Id.*

²² *Id.* at 751.

formance of the contract"²³ so as to discharge both parties. The *Krell* decision is laced with references to *Taylor v. Caldwell*,²⁴ the classic precedent for the proposition that unanticipated destruction of a thing essential to performance as agreed creates an implied at law excuse for non-performance. Indeed, much of the judicial focus in *Krell* was on whether the rule of *Taylor v. Caldwell* applied, at least by logical extension, to the cancellation and postponement of the coronation processions.²⁵

That *Krell* is not a case of true frustration analysis can be seen directly from the fascinating discussion in the main opinion itself. In *Krell*, the court conjured up what is known in some classrooms as the "Derby Day" hypothetical, and, in so doing, directly suggested that the unanticipated thwarting of the contractual purpose of the paying party, even where obvious and known to the counterparty, will not excuse payment so long as the counterparty's performance remains possible. Under the hypothetical, a party wishing to go to Epsom racecourse for its famous Derby race engages a cab at 10£, an "enhanced" price suggesting and consistent with the special circumstances (shortage of transport for special event versus shortage of vantage points for Coronation). The race is canceled before the transport is to be performed, but discharge of the parties does not result as in the rooms-for-hire case before the court. The court reasoned:

[U]nder the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the license in this case. Whereas in the present case, where the rooms were offered and

²³ *Id.*

²⁴ 122 Eng. Rep. 309 (K.B. 1863).

²⁵ *Krell*, 2 K.B. at 743-48.

taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract.²⁶

A fair reading of *Krell*, then, is that the paying party's ultimate ability to realize some portion of his or her manifest purpose in contracting is not integral to the contract's enforcement unless the parties evidence the shared objective intent to make it such. Whether there has been such an evidencing is an essentially interpretive inquiry. In *Krell*, the rooms were "offered and taken" for a particular purpose, via principles of offer and acceptance, thus creating the failed "foundation of the contract" so that "performance of the contract [was prevented]."²⁷ The correspondence referencing the hire did not refer to the Coronation, but extrinsic evidence had to be received "to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers"²⁸ These interpretive analyses, showing an intended contract to hire rooms to view a particular event, point to *performance as agreed* having become literally impossible. The parties did not spell out this highly particularized purport in their written correspondence, because neither party should "be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract."²⁹ Neither party, then, could be deemed to have assumed the risk of destruction of the means of performance as agreed through silence of correspondence regarding hire. The net result is a "frustrated contract"—the licensor's inability to perform excuses both it and the licensee.

A companion decision to *Krell*, decided by the same three law judges, supports the conclusion advanced that discharge of the licensee's remaining payment obligation in that case was not based on frustration of one party's purpose, but rather on the literal impossibility of performance as agreed which provoked the frustration and was sufficient to discharge both parties. In

²⁶ *Id.* at 751.

²⁷ *Id.*

²⁸ *Id.* at 753-54.

²⁹ *Id.* at 752.

Herne Bay Steamboat Co. v. Hutton,³⁰ defendant had hired a steamboat so as to be able to view naval exercises to be held as part of the Coronation festivities.³¹ Defendant's purpose in hiring the steamboat was known to the plaintiff; indeed, that purpose was expressly referenced in the parties' written contract.³² Nonetheless, the King's Bench refused to excuse the defendant's obligation to pay the charter fee, effectively finding that plaintiff had not offered use of the boat for a particular purpose so that plaintiff's contractual obligation was still possible to perform despite the ensuing cancellation of the celebration.³³ In finding that contemplated use of the steamship was not at the contract's "foundation," the King's Bench employed the same Derby Day hypothetical it had used in *Krell*, and concluded that the chartering of the steamship, unlike the licensing of the rooms in *Krell*, fell within its parameters.³⁴

B. American Authorities

The concept of frustration, used and misused, has been discussed in thousands of contract cases decided by American courts. While a complete canvas, to the extent possible, is beyond the scope of this article, it is noteworthy that a detailed survey of the case law published in 1953 concluded that "[a] careful search [had] uncovered no instance in which an American court of last resort [had] expressly followed the doctrine of frustration in making its decision."³⁵ In another study, published in 1960, the conclusion was that relief for frustration of purpose could be found in only twenty-nine published American decisions from any court.³⁶

By the time of its promulgation in 1930, however, the First Restatement of Contracts, in section 288, advocated discharge for frustration of purpose, absent agreement to the contrary or contributory fault, but only where the contractual "object or effect" at issue was "the basis on which *both* parties" had bar-

³⁰ 2 K.B. 683 (C.A. 1903).

³¹ *Id.* at 683.

³² *Id.* at 684.

³³ *Id.* at 686-88.

³⁴ *Id.* at 689, 691.

³⁵ Arthur Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1, 1 (1953).

³⁶ T. Ward Chapman, Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98, 106 (1960).

gained.³⁷ Comment a to section 288, while adopting the *Krell* requirement that the purpose frustrated be at the contract's very foundation, nonetheless advocated possible discharge for frustration even if "literal performance is still possible" by the counterparty.³⁸ Section 288, then, as putatively clarified by comment a, seemed to raise more questions than it answered.

According to comment a, frustration would not apply merely because the motivation inducing the party seeking discharge to enter the contract was known to the other.³⁹ Frustration would apply only if that motivation was "so completely the basis of the contract that, as both parties know, without it the contract would have little meaning."⁴⁰ If this caveat from comment a was intended to require something more than that the claimed frustration be total or close to total, its meaning was elusive. The contractual manifestations of the party resisting discharge affirmatively linking its contractual performance to the achievement of a particular end by its counterparty receive no direct attention in the comments to section 288. Such manifestations, in cases like *Krell*, permit defining "performance as agreed" with the breadth required to subsume the counterparty's contractual purpose—the licenser was obligated to supply rooms from which the coronation procession could actually be viewed. Thus, as seen from the ensuing discussion, the presence of such manifestations appeared to have a rather significant ongoing role in the more chronicled of the earlier American decisions.

1. Representative Earlier Cases

For the most part, earlier cases commonly cited in support of frustration of purpose as a ground for contractual discharge in-

³⁷ RESTATEMENT (FIRST) OF CONTRACTS § 288 (1932). Section 288 provided: Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

Id.

³⁸ RESTATEMENT (FIRST) OF CONTRACTS § 288 cmt. a (1932).

³⁹ *Id.* Comment a specifically provided that "[i]t is not enough in order to make the rule stated in the Section applicable, that one party to the contract has in view a specific object or effect without which he would not enter into the contract, and the other party knows this." *Id.*

⁴⁰ *Id.*

volved, instead, the literal impossibility of performance as agreed caused by the supervening vitiation of what the English courts, in the various Coronation cases, referred to as the "foundation" of the contract.

Thus, for example, in two appellate opinions by the New York courts in 1915, advertisers who were to pay for advertisements in a yacht race souvenir program were held discharged when the race was canceled because of World War I.⁴¹ These cases serve as the basis for Illustrations to the frustration formulations in both Restatements,⁴² and are referenced in the previously discussed Anderson survey as providing "probably the strongest case law support the doctrine has ever had."⁴³ However, in each of these cases, despite references to the frustration in fact of the advertisers, the core reasoning employed by the courts was that the "publication" required by the contract as interpreted had been prevented by cancellation of the race. Both decisions noted that the contemplated program was inextricably linked to the events to which it related, and that a souvenir item of the type contemplated by the contract "cannot recall what has not taken place."⁴⁴ One of the opinions, eschewing a true frustration of purpose analysis, noted:

This is not where a promisor has failed to guard himself against a vis major. It is not a performance on one side, the other having no appropriate clause to excuse default; but it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment.⁴⁵

A similar result was reached in an intermediate appellate decision in California,⁴⁶ which serves as the basis for Illustration 4 to the frustration formulation found in section 265 of Restate-

⁴¹ *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 156 N.Y.S. 179 (App. Div. 1915); *Alfred Marks Realty Co. v. "Churchills"*, 153 N.Y.S. 264 (App. Term 1915); see also Chapman, *supra* note 36, at 106 n.49 (citing additional lower court opinions dealing with same facts).

⁴² RESTATEMENT (FIRST) OF CONTRACTS § 288, illus. 2 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 265, illus. 2 (1979).

⁴³ Anderson, *supra* note 35, at 7.

⁴⁴ *Hotel Hermitage*, 156 N.Y.S. at 180 (quoting "*Churchills*", 153 N.Y.S. at 265).

⁴⁵ *Id.*

⁴⁶ *20th Century Lites, Inc. v. Goodman*, 149 P.2d 88 (Cal. App. Dep't Super. Ct. 1944).

ment (Second). In that case, a lessee of external neon signs for its place of business was held relieved from its monthly lease payments after an emergency war measure totally banned their use other than in daytime hours, when their illumination was useless.⁴⁷ The decision, while citing approvingly to section 288 of the First Restatement, references the destruction of the very means of required performance.⁴⁸ Via interpretation, the lease contract was deemed to be one for the ongoing provision of lighted signage, a performance obligation on the part of the lessor prohibited by supervening legal enactment.⁴⁹ Based on the very type of impossibility of performance as agreed analysis employed in *Krell*, both parties were held discharged.⁵⁰ Most interestingly, the opinion cites approvingly and distinguishes an older California case refusing relief to owners of a factory which had contracted for the delivery of electricity to that factory's premises.⁵¹ A fire had destroyed the factory, and the supplier had clearly known of the intended use of its product. Nonetheless, performance as agreed in that case was merely "to deliver electrical energy to a certain described piece of land irrespective of its use."⁵² Thus defined, the supplier's performance remained possible, and the frustration in fact of the purchaser was an insufficient predicate for discharge.⁵³

The same "impossibility of performance as agreed" analysis was used by the Supreme Court of California in a 1928 decision⁵⁴ which is the basis for Illustration 3 to the frustration of purpose provision in section 265 of Restatement (Second). In that case, under a contract to cover a period of more than three years, a hotel was to pay a monthly fee to a golf and country club in return for golfing privileges for its hotel guests.⁵⁵ The hotel was destroyed by fire, and remaining monthly contractual payments

⁴⁷ *Id.*

⁴⁸ *Id.* at 91-92.

⁴⁹ *Id.* at 92-93.

⁵⁰ *Id.* at 92 (stating that upon regulation's enactment, "the contract was terminated and both parties thereto were excused from further performance.").

⁵¹ *San Joaquin Light & Power Corp. v. Costaloupes*, 274 P. 84 (Cal. Dist. Ct. App. 1929).

⁵² *20th Century Lites, Inc. v. Goodman*, 149 P.2d 88, 93 (Cal. App. Dep't Super. Ct. 1944).

⁵³ *Id.*

⁵⁴ *La Cumbre Golf & Country Club v. Santa Barbara Hotel Co.*, 271 P. 476 (Cal. 1928).

⁵⁵ *Id.* at 476.

were held excused.⁵⁶ Both parties to the contract were deemed to have intended and understood, at contract formation, that the ongoing existence of the hotel and its guests was essential to performance of the contract.⁵⁷

Similarly, in a 1945 decision by the Seventh Circuit, an exclusive licensee of a patented transmission used in the manufacture of washing machines suffered frustration in fact when the federal government promulgated a war measure banning said manufacture.⁵⁸ The court held that defendant's obligation to pay a minimum royalty was discharged during the pendency of the regulation, but that plaintiff could not cancel the exclusive license.⁵⁹ While citing approvingly to section 288 of the First Restatement, the court defined contractual performance as agreed to be the permitting of continued use of the transmission device in manufacture.⁶⁰ Finding such performance as agreed to have been rendered impossible by virtue of supervening illegality, the court concluded that both parties were relieved of performance.⁶¹

Common to the decisions just discussed, and, in fact, most of the additional earlier cases traditionally cited in support of frustration of purpose, is the involvement of more than just frustration in fact of the paying party's essential motivation in entering into a contractual bargain.⁶² Common in these cases is reference to destruction of the means of performance as agreed. To determine "performance as agreed," courts have distilled the essence or "foundation" of the contract at issue via interpretation of shared party intent. The processes employed to determine "performance as agreed" are precisely those used in cases more squarely cubbyholed as precedents for the doctrine of impossibility/impracticability of performance. The results reached are no doubt tinged by equitable considerations, but the dominant ra-

⁵⁶ *Id.* at 477.

⁵⁷ *Id.* at 477 (holding that enforcement of contract would be "unreasonable and contrary to the intent of persons situated as were the plaintiff and defendant at the time this contract was entered into").

⁵⁸ *Patch v. Solar Corp.*, 149 F.2d 558, 559 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945).

⁵⁹ *Id.* at 560-61.

⁶⁰ *Id.* at 560 ("[T]he parties contracted for the continued use of the patented transmission in the manufacture of washing machines ...").

⁶¹ *Id.* (finding that "[i]n such a case, neither party was bound to the performance of the contract. Indeed, neither party could perform it.>").

⁶² See case citations compiled and summarized in Anderson, *supra* note 35, at 5-7, 9-14; see also, case citations compiled in Chapman, *supra* note 36, at 106-07.

tionale for the relief provided, as noted by Professor Williston, is really nothing more than a failure of consideration.⁶³ "Performance as agreed" is that which was promised and sought in return for payment.⁶⁴ Once such performance cannot be rendered because of supervening events outside the control of either party, both are discharged.⁶⁵

Not yet discussed are the earlier cases involving frustration in fact of a tenant's intended use of real property. These cases, because they implicate principles of the law of real property as well as principles of general contract law, are discussed separately in the section to follow.

2. Lease Cases

Most of the earlier cases involved tenant obligations to pay rent when supervening legal regulation, or other remote and typically war-related contingency, prevented the use of the premises contemplated at lease formation. In several such cases, judicial refusal to relieve the tenant was based on the common law conceptualization of a real property lease as a conveyance subject to reversion, with the supervening inability to put the property to contemplated use and the other attendant risks of ownership passing to the conveyee during the lease term.⁶⁶ Even

⁶³ WILLISTON, *supra* note 5, § 1954 at 129.

⁶⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 231 cmt. a (1979). Comment a states:

Ordinarily when parties make [an agreement involving an exchange of promises], they not only regard the promises themselves as the subject of an exchange, but they also intend that the performances of those promises shall subsequently be exchanged for each other. Even without a showing of such an actual intention, a court will often, out of a sense of fairness, assume that it was their expectation that there would be a subsequent exchange of the performance of each party for that of the other.

Id.

⁶⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979) (stating that where, subsequent to contract formation, party's performance is made impracticable without his or her fault by occurrence of event, non-occurrence of which was basic assumption on which contract was made, his or her duty to render performance is discharged absent language or circumstances indicating contrary).

⁶⁶ See generally, Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 4 HASTINGS L.J. 1, 26-27 (1991) (stating that traditional property law holds tenant as true "owner" of property, thus placing risk on lessee during lease term). The conception of the lessee's obligation to pay rent being absolute is said to date back to *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1647), which held that a lessee ousted from possession by an invading army was nonetheless bound to pay rent. That decision, which effectively placed the risks of property ownership on the

in those cases decided without reference to lease estate concepts, the emerging trend was against grant of relief for lessee frustration.⁶⁷

Until the early 1930s, the courts showed a certain willingness to relieve a lessee where the sole commercial activity permitted by the lease was or became illegal because of local or state regulation or national prohibition of the sale of liquor.⁶⁸ Most of the decisions were by lower courts, and relief to the tenant was typically predicated on "constructive eviction" or "implied condition" without reference to frustration.⁶⁹ By the mid-1940s and thereafter, however, the cases generated by the events of World War II were decidedly unreceptive to relief for lessee frustration caused by direct and indirect governmental restraints on the commercial activity for which the premises had been leased.⁷⁰ Even when such relief was deemed theoretically available, it was invariably denied where the lease permitted any meaningful commercial use that was not totally banned by wartime regulation.⁷¹ Both earlier and later cases also denied

lessee during the lease term absent express agreement to the contrary, has retained an almost mystical precedential presence for centuries.

⁶⁷ See Anderson, *supra* note 35, at 15-17. Professor Farnsworth, while discerning general acceptance of the frustration concept by American courts, notes that "[t]he judicial reluctance to excuse on the ground of frustration is most evident in cases where lessees have sought to be excused on this ground." E. ALLAN FARNSWORTH, *CONTRACTS* § 9.7, at 724 (2d ed. 1990).

⁶⁸ Many of these cases were decided in New York. See, e.g., *Hart v. City Theatres Co.*, 215 N.Y. 322, 330 (1915) (stating that where contract on its face offends against statutes intended to promote public safety, courts will not enforce it); *H.B. Shontz Co. v. Laffay*, 232 N.Y.S. 614, 617 (App. Div. 1929); *Doherty v. Monroe Eckstein Brewing Co.*, 191 N.Y.S. 59, 62 (App. Div. 1921) ("It is well settled that a lease of premises for an illegal purpose is void."). For additional older lease of realty cases, see Anderson, *supra* note 35, at 15-17.

⁶⁹ See *Shepard v. Sullivan*, 162 P. 34, 35 (Wash. 1916) (stating that leases are conveyances with conditions attached to them); Anderson, *supra* note 35, at 14 (concluding that twenty-one cases involving leases did not mention frustration of purpose, but are consistent with doctrine).

⁷⁰ See Anderson, *supra* note 35, at 15 (summarizing such cases). *But see Canrock Realty Corp. v. Vim Elec. Co.*, 37 N.Y.S.2d 139, 141 (Sup. Ct. 1942) (stating that if tenant is deprived by laws adopted after making of lease from using property for purposes for which it was rendered, lease is terminated although other incidental uses may be made thereof); *Schantz v. American Auto Supply Co., Inc.*, 36 N.Y.S.2d 747, 752 (Sup. Ct. 1942) (finding government's prohibition of use of premises for particular purpose, as specified in lease, sufficient against landlord's complaint for rent).

⁷¹ See *Lloyd v. Murphy*, 153 P.2d 47, 52 (Cal. 1944); see also *Frazier v. Collins*, 187 S.W.2d 816, 817-18 (Ky. Ct. App. 1945) (finding that party should not be relieved of obligations merely because supervening events rendered lease unprofit-

relief where regulatory impediment was sufficiently foreseeable at lease formation as to permit the inference that the tenant had assumed the concomitant risks.⁷²

Regarding those earlier cases which did purport to relieve lessees, there is ample room to argue that the frustration analysis, even when judicially employed, was superfluous. The dominant reasoning utilized in many of these cases was that tenants forbidden by law from putting demised premises to contemplated use were absolved from further performance on grounds of supervening illegality.⁷³ Such was the prevalent reasoning employed in New York, the jurisdiction giving rise to such a significant share of the so-called lease cases. The New York cases hence refer to judicial refusal to enforce tenant obligations to pay rent as furthering "the efficacy of a regulation designed for the protection of property or human life,"⁷⁴ to voidness for illegality,⁷⁵ and to an implied condition in leases that change in law not render contemplated use illegal.⁷⁶

Just as *Krell v. Henry* involved a license to use rooms for a particular purpose and none other, the "frustration of lease" cases just surveyed typically involved demises for specified commercial purposes spelled out in use restriction provisions or otherwise obvious from the structural nature of the improved premises themselves. The premises had been offered by the

able); *Wood v. Bartolino*, 146 P.2d 883, 890 (N.M. 1944) (granting lessor rent when government regulations did not completely deprive lessee of use of premises).

⁷² See, e.g., *56-70 58th St. Holding Corp. v. Fedders-Quigan Corp.*, 159 N.E.2d 150, 154 (N.Y. 1959) (denying relief where tenant failed to inquire about certificate for occupancy); *Raner v. Goldberg*, 155 N.E. 733, 734 (N.Y. 1927) (stating that where promisor knowingly chose to make absolute promise, he or she may not afterwards claim relief because subsequent events show that choice was ill advised).

⁷³ See, e.g., *Doherty v. Monroe Eckstein Brewing Co.*, 191 N.Y.S. 59, 61 (App. Div. 1921) ("When ... the principal use of the premises for saloon purposes became unlawful, the lease became terminated by operation of law ..."); *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 167 P. 58, 60 (Wash. 1917) (finding that lease for use of premises for saloon cannot be enforced when sale of intoxicants was made illegal).

⁷⁴ *Hizington v. Eldred Ref. Co. of New York*, 257 N.Y.S. 464, 467 (N.Y. App. Div. 1932).

⁷⁵ See *H.B. Shontz Co. v. Laffay*, 232 N.Y.S. 614, 617 (App. Div. 1929) (finding that use of premises specified in lease was illegal and lease was void); see also, *56-70 58th Street Holding Corp.*, 159 N.E.2d at 156 (granting relief for tenant only where it was "impossible" for tenant to put premises to legal use).

⁷⁶ See *Raner*, 155 N.E. at 734 ("We assume for the purpose of this appeal that where parties enter into a lease exclusively for a use which is not illegal when the contract is made but such use becomes illegal by change of law, the lease is thereby terminated.").

landlord for a specific purpose and thus accepted. Once the lease in question is treated as a lease to conduct a particular commercial activity on the demised premises, supervening governmental prohibition of that activity could be deemed to vitiate a truly shared "foundation"—the contract's very subject matter. To the extent that the lease is not treated as a one-shot conveyance, but as an instrument creating an ongoing relationship of permitted use and occupancy between the parties, that policy, of course, became more readily applicable.

The older lease cases are hard cases to cubbyhole exclusively under any particular doctrinal heading. Theoretically, and with a heavy dosage of abstraction, one can divorce a leasing from stipulated use of premises and conclude that the tenant's obligation to pay rent is, absent a covenant to use affirmatively the premises at all, the tenant's sole obligation and one that remains wholly possible to perform even though the leasehold interest is valueless. One can pursue this analysis, overlook application of the public policy against furtherance of contemplated illegal contractual behavior, overlook effective destruction of the means of "performance as agreed" (the ongoing provision by lessor and operation of the premises by lessee for a particular purpose as placed at the foundation of the bargain) by operation of supervening illegality, and conclude from the tenor of certain of the decisions that frustration of purpose, however gratuitously, has been chosen as the governing rationale if the tenant is to be discharged. The reality, however, is that myriad legal forces are at work in the lease cases and that they hardly stand for doctrinal acceptance of frustration of purpose as a general principle of contract law.

3. Sale of Goods

Many of the so-called frustration cases involving the sale of goods are nothing more than price impracticability cases in which one of the parties, typically without success, seeks relief because the pricing adjustment mechanism under a long-term contract wholly fails to track prevailing market price.⁷⁷ To have a true case of frustration in fact involving the paying party under a goods contract, one must turn to those in which the buyer, due to supervening circumstance, cannot put the goods to the use for

⁷⁷ See cases cited *supra* note 2 and accompanying text.

which they were purchased.

As the ensuing discussion reveals, the law has not been prone to grant relief to frustrated buyers, except in those rare instances where the intended use of the goods to be furnished under the executory contract of sale was not only known to the seller, but at the very "foundation" of the contract—an essentially interpretive determination of shared party intent of the type employed in *Krell*. A rationale often used to deny relief, which also appears in various cases refusing to find lessee frustration, is that complete or virtually complete frustration of purpose is required for that defense to be available. A buyer cannot establish complete frustration, so the reasoning goes, so long as value can be derived from the goods through alternative use or resale.⁷⁸

Thus, it has been broadly recognized that the total inability of a buyer to put goods to contemplated use, even because of supervening government restriction on export or import, is the buyer's risk unless the parties have agreed otherwise. In *Swift Canadian Co. v. Banet*,⁷⁹ a buyer of lamb pelts for use in its factory in Philadelphia was to take title to them in Canada. Supervening federal regulation completely prevented importation of the pelts into the United States, but the buyer's frustration defense was summarily rejected:

Even if the goods could not be imported into the United States under the then existing regulations, the rest of the world was free to the buyer, so far as we know, as destination for the shipment. If he did not care to accept them under the circumstances and his expectation of a profitable transaction was disappointed, nevertheless, the seller having performed or being ready, able and willing to perform, was entitled to the value of

⁷⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 265, illus. 5 (1979). The reasoning is as follows:

A contracts to sell and B to buy a machine, to be delivered to B in the United States. B, as A knows, intends to export the machine to a particular country for resale. Before delivery to B, a government regulation prohibits export of the machine to that country. B refuses to take or pay for the machine. If B can reasonably make other disposition of the machine, even though at some loss, his principal purpose of putting the machine to commercial use is not substantially frustrated. B's duty to take and pay for the machine is not discharged, and B is liable to A for breach of contract.

Id.

⁷⁹ 224 F.2d 36 (3d Cir. 1955).

his bargain.⁸⁰

Buyers who, as sellers know, have purchased goods for the sole purpose of export to a particular foreign country have been unable to invoke frustration even where supervening regulation forecloses such exportation.⁸¹ So too, a buyer of goods for use in its manufacturing process was denied a frustration defense even where a fire subsequently destroyed its plant.⁸²

In the goods cases discussed and cited, it is evident that the seller knew of the buyer's contemplated use at the time of contracting, much as the celebrated hansom driver knew of his passenger's intended destination in the Derby Day hypothetical. Nevertheless, knowledge of intended use of goods is not enough under the cases to make a buyer's ability to use them accordingly a "foundation" of a goods contract.

The denial of relief to frustrated buyers is not necessarily based on the buyer's ability to resell or make some secondary use of the goods. Comment 9 to section 2-615 of the Uniform Commercial Code says the following about a buyer's supervening inability to put goods to contemplated use:

Exemption of the buyer in the case of a "requirements" contract is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see

⁸⁰ *Id.* at 38.

⁸¹ See *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103 (2d Cir. 1953) (holding that seller was entitled to retain damages from buyer's down payment even though American government enacted regulation barring exportation of printing presses to Russia without an export license and such license was refused); *Coker Int'l v. Burlington Indus.*, 747 F. Supp. 1168 (D.S.C. 1990), *aff'd*, 935 F.2d 267 (4th Cir. 1991) (*per curiam*) (holding that purchaser of used looms was not entitled to return of deposit after Peruvian regulation blocked intended resale in Peru); *Pierson & Co. v. Mitsui & Co.*, 181 N.Y.S. 273 (Sup. Ct. 1920) (directing verdict for seller despite buyer's inability to secure license to export steel plates to Japan).

⁸² *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292 (N.C. 1965) (explaining that subject of contract was special manufacture of plywood drawer bottoms, which were not burned).

such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.⁸³

Under the comment 9 approach, there is no frustration defense unless the purchase of goods should be understood by both parties to be conditioned upon the ongoing viability of a specific project or venture. For example, in *Chase Precast Corp. v. John J. Paonessa Co., Inc.*,⁸⁴ a subcontractor under contract to provide concrete median barriers for a state highway construction project sued the main contractor for lost profits on so much of their supply contract as remained totally executory. The contractor, pointing to the Commonwealth's unanticipated cancellation of that portion of the project as would have required installation of the barriers to be supplied by plaintiff, interposed the defense of frustration.⁸⁵ After findings that plaintiff knew that the barriers were for the affected project, and that plaintiff knew of the Commonwealth's conventional contractual reservation of power to alter and eliminate project specifications, the defendant contractor was held excused from paying plaintiff's lost, anticipated profits.⁸⁶ While section 265 of the Second Restatement was cited in support of granting such excuse,⁸⁷ the Supreme Judicial Court also alluded to the possible incorporation by reference into the subcontract of the Commonwealth's prerogative to alter or eliminate portions of the overall project and to plaintiff's familiarity with a practice in the construction industry whereby contract items were paid for only on the basis of the quantities of work actually accepted on the project at issue.⁸⁸

Presumably, in the rare case in which there should be a "reasonable commercial understanding" of the type discussed in

⁸³ Uniform Commercial Code § 2-615 cmt. 9 (1996).

⁸⁴ 566 N.E.2d 603 (Mass. 1991).

⁸⁵ *Id.* at 605.

⁸⁶ *Id.* at 607-08.

⁸⁷ *Id.* at 606 (stating that Restatement's formulation was consistent with court's treatment of impossibility of performance and frustration of purpose).

⁸⁸ *Id.* at 606-07.

comment 9 that the sales contract is conditioned on a specific project or venture going forward, the parties would be so charged through use of interpretive processes. Absent express condition, custom and usage or prior dealings could be so employed. Neither the cases nor Article 2 of the Commercial Code would appear to invite "gap filling" as a matter of law to excuse a buyer's performance because some remote, supervening contingency prohibits or seriously impedes intended use of goods.

C. Restatement (Second) of Contracts

At this juncture, and before turning to recent case law discussion of the "frustration doctrine," it becomes useful to focus on the Restatement (Second) of Contracts (the "Restatement") overall treatment of that subject. Chapter 11 of the Restatement treats impracticability of performance and frustration of purpose as tandem concepts, placing each squarely in the realm of inherent judicial power to do what justice requires by way of relieving contractual obligation where extraordinary circumstance so requires. The Restatement approach goes far beyond that of implementing the shared intention of the parties as interpreted. As stated in the Introductory Note to Chapter 11, "[e]ven where the obligor has not limited his obligation by agreement, a court may grant him relief."⁸⁹

Section 265 of the Restatement, headed "Discharge by Supervening Frustration," reads in full text:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.⁹⁰

Comment a to section 265, after distinguishing frustration from impracticability, reiterates and particularizes the requirements for what it calls "the rule" of frustration to apply:

First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so com-

⁸⁹ RESTATEMENT (SECOND) OF CONTRACTS ch. 11 (1979).

⁹⁰ *Id.* § 265.

pletely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.⁹¹

The Restatement couples its broad embrace of the frustration concept with a broad view of judicial power to modify, rather than wholly discharge, a frustrated party's contractual obligation. Additionally, it authorizes the award of not only restitution, but compensation for pre-supervening event reliance, so as to fully and equitably adjust the post-supervening event circumstances in which the parties find themselves. These matters are covered by section 272, which is designed to deal with situations of impossibility/impracticability as well.⁹² Comment c to section 272 again cements the Restatement's treatment of both impracticability and frustration as creating situations inviting courts to supply omitted terms (gap fillers), not necessarily on an "all or nothing" basis, to discharge or temper contractual obligation which cannot be so treated under principles of interpretation designed to identify actual party intent:

c. Supplying a term to avoid injustice.

Under the rule stated in section 204, when the parties have not agreed to a term that is essential to a determination of their rights and duties, the court will supply a term that is reasonable in the circumstances. Since it is the rationale of this Chapter that, in a case of impracticability or frustration, the contract does not cover the case that has arisen, the court's function generally can be viewed as that set out in section 204 of the Restatement of supplying a term to deal with the omitted case.⁹³

⁹¹ *Id.* § 265 cmt. a.

⁹² Section 272 provides:

Relief Including Restitution

(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution . . .

(2) In any case governed by the rules stated in this Chapter . . ., the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

⁹³ RESTATEMENT (SECOND) OF CONTRACTS § 272 cmt. c; *see also* U.C.C. § 2-615

Each of the Illustrations to section 265 that purport to apply frustration of purpose is in fact drawn from a case in which not only the paying party's bargaining motivation, but also the counterparty's "performance as agreed," was thwarted by unanticipated future events.⁹⁴ The underlying decisions are those essentially involving "frustrated contracts," rather than the mere frustration of one party's bargaining motivation.

The current Restatement treatment, it must be reiterated, purports to authorize discharge for frustration when both parties' "performance as agreed" remains entirely feasible. The approach advocated by section 265 requires discharge for unilateral frustration-in-fact, posed by otherwise unallocated risk, as justice requires. This invites application in cases where impossibility of contractual performance as agreed does not present itself in tandem. In looking at fairly recent cases which cite section 265 with approval or which otherwise reference "frustration," we see that actual holdings rarely provide relief for mere frustration-in-fact on a "gap filling" theory.

D. Recent Illustrative Cases

While there are too many relatively recent cases referencing "frustration" to discuss them all, a careful look at a fairly broad representative sampling reinforces the notion that a party showing nothing more than unilateral frustration-in-fact is highly unlikely to be even partially excused from contractual performance. A good number of cases voice doctrinal allegiance to the frustration concept, only to deny the defense on grounds of foreseeability,⁹⁵ contributory fault,⁹⁶ and/or the absence of vir-

cmt. 6 (1994). Under comment 6, which deals with "impracticability" of performance, additional support is found for a court's power to adjust rather than negate performance obligations "[i]n situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse'..." Id.

⁹⁴ Comment a to section 265 contains six Illustrations drawn with some modification from actual cases cited in the Reporter's Notes. The first four such Illustrations are designed to show when relief for frustration-in-fact should be available.

Illustration 1 to section 265 is based on *Krell v. Henry*, a case involving the "destruction of the means of performance as agreed." See *supra* notes 12-29 and accompanying text. Illustration 2 to section 265 is based on the so-call souvenir yacht race program cases, shown to involve the literal impossibility of performance as agreed. See *supra* notes 41-45 and accompanying text. Illustrations 3 and 4 to section 265 are based on two California decisions discussed in the text accompanying notes 46-53 and 54-57. The argument that both these cases involve literal impossibility, as opposed to mere frustration in fact, is developed in the cited discussions.

⁹⁵ Particularly under an "omitted term" approach, lack of foreseeability of su-

tually total frustration-in-fact.⁹⁷

In those rather infrequent decisions which purport to discharge contractual obligation on frustration grounds, other defenses to non-performance are often present as well, such as mutual mistake.⁹⁸ Thus, in an intermediate appellate decision in Minnesota,⁹⁹ which also referenced section 265 of the Second Restatement, a city's attempt to collect on contractual payments from private landowners which were intended to defray part of the costs of public improvements to their land was denied on the theory that defendants' purpose had been frustrated when the

pervening events often explains a failure by the parties to provide for those events in their contract. Where events provoking frustration in fact were foreseeable, the normal presumption is that had the parties been amenable to excusing performance because of them, they would have so provided. *E.g.*, *Arabian Score v. Lasma Arabian Ltd.*, 814 F.2d 529, 531 (8th Cir. 1987) (applying Arizona law); *Columbian Nat'l Title Ins. Co. v. Township Title Servs., Inc.*, 659 F. Supp. 796, 804 (D. Kan. 1987) (applying Kansas law) (citing section 265); *VJK Prod., Inc. v. Friedman/Meyer Productions, Inc.*, 565 F. Supp. 916, 920-21 (S.D.N.Y. 1983) (applying New York law) (citing section 265); *O'Hara v. State*, 590 A.2d 948, 953-54 (Conn. 1991) (applying federal law) (citing section 265).

⁹⁶ *See, e.g.*, *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 103 (3d Cir. 1986) (stating alternate ground for denial of relief under Pennsylvania law) (citing section 265); *Rivas Paniagua, Inc. v. World Airways, Inc.*, 673 F. Supp. 708, 714-15 (S.D.N.Y. 1987) (applying New York law and holding that airline was still liable to publisher for terminating in-flight magazine contract even though airline had canceled flights); *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N.W. Transp. Co.*, 263 N.W.2d 189, 194 (Wis. 1978) (holding that attendant was not excused from performance where defendant contributed to frustrating event) (citing tentative draft of *Restatement (Second) of Contracts*).

⁹⁷ *See, e.g.*, *Karl Wendt Farm Equip. Co., v. Int'l Harvester Co.*, 931 F.2d 1112 (6th Cir. 1991) (finding, under Michigan law, defense of frustration of purpose unavailable to defendant where primary purpose of agreement was not frustrated); *United States v. Grayson*, 879 F.2d 620, 624 (9th Cir. 1989) (stating defendant could not claim substantial frustration of purpose where plaintiff fully performed) (citing section 265); *Arabian Score*, 814 F.2d at 531, 532; *Dudley v. St. Regis Corp.*, 635 F. Supp. 1468, 1471 (E.D. Mo. 1986) (applying Missouri law and citing section 265); *Downing v. Stiles*, 635 P.2d 808, 814-15 (Wy. 1981) (citing tentative draft of *Restatement (Second) of Contracts*).

⁹⁸ *See West Los Angeles Inst. for Cancer v. Mayer*, 366 F.2d 220, 225-26 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967). In this case, the Mayer family, pursuant to Oregon law, was held entitled to rescission of a sale and leaseback of their business assets on grounds that an Internal Revenue Ruling had unexpectedly deprived them of capital gains treatment on leaseback proceeds. *Id.* at 223. While the decision deals mainly with frustration, the court also emphasized that the head of the Mayer family sought pre-contractual assurances from the defendant Institute that the business property would be returned if underlying tax assumptions based on the perceived state of the law were challenged, and that such assurances were given. *Id.* at 225-26 n.10. The decision thus had interpretive elements, and also involved a possible mistake of law.

⁹⁹ *City of Savage v. Formanek*, 459 N.W.2d 173 (Minn. Ct. App. 1990).

Army Corp of Engineers unexpectedly stopped the industrial development planned by the city for the affected properties. An alternate ground for the decision was that of mutual mistake—both parties had mistakenly concluded prior to contract formation that all requisite federal permits for the industrialization project had been obtained.¹⁰⁰

In other recent decisions regarded as granting relief for frustration, there appear to be overriding special equities. For example, in *Howard v. Nicholson*,¹⁰¹ an intermediate appellate court from Missouri purported to excuse an owner on frustration grounds from paying its contractor's lost profits on work yet to be performed. A long-term tenant for a commercial building to be constructed to meet the tenant's particularized needs had, unexpectedly, gone bankrupt.¹⁰² The court, after noting that the applicability of the frustration doctrine in Missouri was a matter of first impression, emphasized that the contractor not only knew of the contemplated building's highly particularized intended use by that tenant, but had also directly solicited that tenant's participation in the project, much as the licensor in *Krell* had solicited the taking of rooms for a particular purpose.¹⁰³ The court, as an alternate ground for the decision, also found evidence that the contractor would not have been able to comply with important contractual time deadlines in any event.¹⁰⁴

So too, in *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*,¹⁰⁵ the Supreme Court of Washington used frustration as the basis to excuse a lessee of strip mining rights from having to pay certain of the minimum, annual royalties required by the lease. The court found that sustained public and regulatory resistance to strip mining had radically increased the anticipated difficulty in securing the requisite permits, so that the failure to do so justified the lessee's abandonment of the mineral leasehold.¹⁰⁶ The court further found that the lessee's purpose in entering the lease had formed "the basis on which both parties entered the [contract]."¹⁰⁷ Indeed, lessor had provided lessee with

¹⁰⁰ *Id.* at 175-76.

¹⁰¹ 556 S.W.2d 477 (Mo. Ct. App. 1977).

¹⁰² *Id.* at 478-79.

¹⁰³ *Id.* at 481, 483.

¹⁰⁴ *Id.* at 480.

¹⁰⁵ 637 P.2d 647 (Wash. 1981).

¹⁰⁶ *Id.* at 650-51.

¹⁰⁷ *Id.* at 650.

studies showing the leasehold to be rich in minerals, had undertaken to secure a use permit for lessee, and had pledged its active assistance in securing zoning and environmental permits which were not forthcoming after years of effort.¹⁰⁸ The court also referred to evidence at trial that lessor had not provided the requisite assistance to lessee in connection with securing certain of the required permits.¹⁰⁹

In another decision by the Supreme Court of Washington, hop producers who had contracted to purchase allotments, as was required by federal regulation before they could lawfully market their crops, were granted rescission against the seller of the marketing allotments on frustration grounds because of repeal of the sales quotas creating the need for the allotments.¹¹⁰ The court relied on section 265 of Restatement Second, but also placed emphasis on seller's failure to specify that the allotments were being sold on an "as is" basis despite the foreseeability of the regulatory changes that ensued.¹¹¹

At first blush, the four state court decisions just discussed would appear to have little in common. With the benefit of a bit of massaging, however, each transmutes into a case of impossibility of performance as agreed—an undertaking by a city to supply improvements integral to an industrialization project stopped dead in its tracks by federal governmental intervention,¹¹² an undertaking to build a commercial premises for the use of a specific, pre-identified long-term tenant which has subsequently gone bankrupt and is out of business;¹¹³ an undertaking to provide leasehold rights permitting the ongoing extraction of minerals where the anticipated difficulty in securing the requisite permits was radically increased;¹¹⁴ and an undertaking to supply marketing allotments under a regulatory sales quota system abrogated by repeal of regulation.¹¹⁵ Nonetheless, these

¹⁰⁸ *Id.* at 649.

¹⁰⁹ *Id.*

¹¹⁰ *Washington State Hop Producers, Inc. v. Goschie Farms, Inc.*, 773 P.2d 70 (Wash. 1989).

¹¹¹ *Id.* at 73, 75-76.

¹¹² *City of Savage v. Formanek*, 459 N.W.2d 173 (Minn. Ct. App. 1990); *see supra* notes 99-100 and accompanying text.

¹¹³ *Howard v. Nicholson*, 556 S.W.2d 477 (Mo. Ct. App. 1977); *see supra* notes 101-04 and accompanying text.

¹¹⁴ *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 637 P.2d 647 (Wash. 1981); *see supra* notes 105-09 and accompanying text.

¹¹⁵ *Washington State Hop Producers, Inc. v. Goschie Farms, Inc.*, 773 P.2d 70

cases do evidence a degree of acceptance of the frustration concept, but only where the particular or special use of the service or entitlement purchased is jointly and actively contemplated by both contractual parties engaged in a project-oriented or collaborative endeavor.

II. FURTHER ANALYSIS—IS JUDICIAL RELUCTANCE TO APPLY FRUSTRATION JUSTIFIED?

Discussion thus far points to the lack of widespread decisional support for the frustration of purpose concept, so much so that the temptation is to dismiss the notion that mere frustration in fact, even if substantial, is sufficient to discharge a contractual obligation of payment. Such notion comes closer to being a legal chimera than it does to being doctrinal.

An attempt has also been made to demonstrate that most of the commonly cited cases purporting to grant relief for frustration involve situations in which “big bang” supervening circumstance has not only posed a frustration in fact, but an insurmountable obstacle to the counterparty’s practical or legal wherewithal to render performance as agreed. By posing as such an obstacle, supervening circumstance serves to vitiate the very foundation or *raison d’être* of the contract as it should be understood by both parties.

Put another way, it is only when both contractual parties had reason to understand at contract formation that the extraordinary contingency which thereafter occurs would vitiate their contract that discharge becomes appropriate. Finding the basis for such a shared understanding is an interpretive endeavor guided by objective theory. The question is, what did the parties have reason to understand given their bargaining and other contractual manifestations to one another, prevailing custom and usage, other dealings and, of course, the language of agreement employed?

To refer to such judicial interpretive inquiry as potentially giving rise to an “implied term” of a contract excusing payment because of exceptional post-contractual occurrence has the potential to obscure, unless it is understood that the process is one of implication in fact designed to vindicate party intent. The

(Wash. 1989); see *supra* notes 110-11 and accompanying text.

cases simply do not reconcile with the Second Restatement's position that relief for frustration involves the plugging of a contractual "gap" created by exceptional supervening circumstance with an implied at law term excusing performance where judicial perceptions of what is "just" (as opposed to intended) so dictate.

The conclusion that the parties did not foresee, or otherwise failed to specifically provide for exceptional supervening events, need not mean that there is any sort of "omitted case" or "gap" requiring judicial closure. Nothing prevents parties from formulating and implementing an intent to excuse performance should the unanticipated occur. Particularly in the relatively sophisticated transaction, parties routinely resort to *force majeure* clauses to absolve or temper performance obligations. Such clauses often cover and describe foreseeable special circumstances with precision; but such clauses also typically, and far more generally, cover circumstances "outside" of the "reasonable control" of one or both parties.¹¹⁶ Under contracts containing such language, lack of foreseeability or remoteness of supervening contingency does not bespeak any sort of omitted case. Indeed, in various cases, party delimitations on *force majeure* yield the interpretive inference that the parties did not intend to excuse performance for contingencies left uncovered by the language of agreement employed.¹¹⁷

It is also possible, of course, for exceptional supervening circumstance to present situations which cannot be said to be "covered cases"—cases as to which the contract, even with the

¹¹⁶ In goods cases, the tendency has been to treat this type of exculpatory boilerplate as covering unspecified, unforeseeable supervening contingencies of a type which would create impracticability under section 2-615 of the Uniform Commercial Code. See, e.g., *International Minerals & Chemical Corp. v. Llano, Inc.*, 770 F.2d 879, 884-85 (10th Cir. 1985), cert. denied, 475 U.S. 1015 (1986) (noting effect of *force majeure* provision was to excuse party from enforcement where failure or delay in performance resulted from fire, flood, act of god or government intervention); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 957 (5th Cir. 1976) (excusing defendant from performance where government intervention came within terms of excusable delay clause).

¹¹⁷ See generally Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 281-86, n.63 (1985); see also *Northern Indiana Public Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986) (stating that long-term supply contract providing for price escalation to track market but making no such provision for market price declines, required interpretive inference of allocation of risk to buyer so that neither *force majeure* clause, nor doctrines of impracticability or frustration, can apply).

aid of interpretive inference, is truly silent. But this realization also begs the true question of whether prevailing doctrine invites the court, under the guise of implication as a matter of law, to supply a term excusing performance by the frustrated party. To some, such process would involve judicial rewriting of a contract to temper performance obligation expressed in absolute terms; to others, the absence of a "covered case" serves as a complete defense to accusations of judicial tampering.

What the debate really boils down to is whether the law is to treat contractual obligations as absolute despite frustration in fact unless interpretive disciplines yield an actual shared party intent to the contrary. There are, of course, recognized exceptions to *pacta sunt servanda*. For instance, the law has long contemplated avoidance of contracts that are the product of central and mutual mistake as to the true nature or important qualities of that which is to be purchased and supplied.¹¹⁸ Similarly, when basic misassumption occurs as to what the contractual future will bring, the law has long resorted to implied at law terms, said by the *Taylor v. Caldwell* line of authority to be consistent with the *presumed* intent of the parties. In these instances, performance is excused which has become literally or virtually "impossible" because of the death or disability of the personal services provider, the destruction of a thing essential to performance, or supervening illegality. The cases are much more stingy where the paying party can show nothing more than a defensible but ultimately wrong assumption that goods, services or other entitlements could and would be put to profitable contemplated use. Rarely, if ever, is such showing alone sufficient predicate for the supplying of a term or condition excusing the obligation to pay.

In the literature, various rationales are proffered for perceived judicial reluctance to invoke frustration of purpose as a defense.¹¹⁹ Certain commentaries, for instance, emphasize that

¹¹⁸ The traditional casebook illustration of this principle is *Sherwood v. Walker*, 33 N.W. 919, 923-24 (Mich. 1887) in which the seller avoided its contractual obligation to part with a valuable breeding cow upon discovery of the parties' mutual and mistaken belief that the cow was barren. *See also* *Beachcomber Coins, Inc. v. Boskett*, 400 A.2d 78, 80 (N.J. Super. 1979) (holding that purchaser could rescind contract for purchase of coin upon finding of mutual mistake as to genuineness of coin).

¹¹⁹ *See* Steven A. Beckleman & David J. Adler, *Forestalling Apocalypse: Contracting Defenses to Foreclosure*, 113 *BANKING L.J.* 53 (1996) (stating that application of frustration of purpose would render "primary purpose" analysis under Re-

the non-frustrated party may well have uncompensated reliance injuries which the law will not compensate or allocate between the parties.¹²⁰ While some of the perceived "all or nothing" constraints on doing essential justice in tough situations are real, this line of argument fails to reconcile the decisional authorities and statutes which, for instance, excuse the seller who cannot, for reasons beyond its control, deliver identified or other goods to the relying buyer but refuse to excuse the buyer suffering what in reality is total frustration in fact. The seller who cannot deliver because of destruction of its plant, destruction of its designated supply source, or export or import restriction is typically excused even where the buyer has materially and detrimentally changed position in contemplation of receipt of the goods.¹²¹ Moreover, relief for impossibility/impracticability, which is generally recognized as being more readily available than relief for frustration,¹²² is typically granted even where it is obvious that the paying party will have to spend more to secure substitute performance elsewhere.

An alternate explanation advanced for judicial reluctance to discharge contractual payment obligations because of frustration in fact is the law's reluctance to treat misassumptions and mis-

statement meaningless by implying "mutual profitability" as primary purpose in every contract); Randal Owings, *Output Contracts and the Unreasonably Disproportionate Clause of § 2-306*, 59 MO. L. REV. 1051, 1062 (1994) (noting courts' reluctance to apply frustration of purpose where "explicit assignment of risk" exists); Steven R. Salbu, *The Decline of Contract as a Relationship Management Form*, 47 RUTGERS L.J. 1271, 1360 (1995) (noting that exoneration from liability under frustration of purpose does not logically encourage maintenance of relationships between parties in dispute).

¹²⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 272(2) (1979), discussed *supra* at note 92. This section authorizes courts to award reliance-based compensation where necessary to "avoid injustice" potentially posed by complete contractual discharge for frustration. The cases, however, offer little if any support for such an approach. See generally, W.F. Young, *Half Measure*, 81 COLUM. L. REV. 19, 30-34 (1981) (discussing division of losses in mistake and impracticability cases).

¹²¹ The potential for leaving reliance injury uncompensated upon discharge of contractual duty for impossibility is, of course, not unique to goods cases. In cases like *Taylor v. Caldwell*, the party denied enforcement will typically incur such injury. See *supra* notes 24-25 and accompanying text.

¹²² FARNSWORTH, *supra* note 67, at 722. "Furthermore, despite the similarity of the requirements for the two doctrines, courts have been much more reluctant to hold that a party has been excused on the ground of frustration than on the ground of impracticability." *Id.*; accord, JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 561 (3d ed. 1987) (stating that "[i]t seems to be widely believed that the courts are more inclined to sustain a defense of impossibility than one based upon frustration.").

projections as to the future, whether conscious or subliminal, with any great sympathy. Permitting avoidance for crucial mistake as to the true facts existing at contract formation not only rectifies the imbalance of the resulting exchange but also implicates principles of assent. This is particularly evident where the mistake is truly shared (no "meeting of the minds" in the subjective sense) or otherwise mutual in the sense that one party knew or had reason to know of the mistake of the other (so that the mistaken party cannot be said to have assented in the objective sense). Permitting avoidance, or discharge, for failure to anticipate future events, it may be argued, would have nothing to do with failure of true assent at contract formation.

Indeed, the law is generally only a bit more inclined to grant relief for purely unilateral mistake than it is for unilateral frustration in fact. Under the unilateral mistake formulation of section 153 of Restatement (Second), a party not knowing or having reason to know of the other's material mistake faces avoidance only where enforcement would be substantively unconscionable.¹²³ Comment a to section 153 concedes that "[c]ourts have traditionally been reluctant to allow a party to avoid a contract on the ground of mistake, even as to a basic assumption, if the mistake was not shared by the other party."¹²⁴ Additionally, Comment d to section 153 notes that reliance by the non-mistaken party may preclude avoidance for unilateral mistake "although enforcement would otherwise be unconscionable."¹²⁵

In any event, distinctions between mistake as to the current facts and basic misassumption as to the future do not explain why the law avidly embraces supervening impossibility as a legal excuse but not supervening frustration. The explanation for this phenomenon may be linked to the notion that the treatment of a failure to perform as a breach creates monetary liability posing as a disincentive to breach. The law thereby encourages performance of contractual promises. But when performance is impossible, so the reasoning would go, there is nothing to encourage.

When supervening events, however, have instead eroded pre-existing incentive to perform that which remains possible, the need for "extra-contractual" incentive, in the form of liability

¹²³ RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979).

¹²⁴ *Id.* § 153 cmt. a.

¹²⁵ *Id.* § 153 cmt. d.

for damages, is arguably at its strongest. Parties rarely require judicial incentive to act out bargains which remain beneficial to all concerned under circumstances existing at the time for performance.

Where performance remains possible, as would be true in contract cases involving nothing more than unilateral frustration in fact, the issue posed is really that of permissible "pain threshold"—at what point, if any, should performance be excused because of supervening vitiation of the motive inducing the bargain from the standpoint of the frustrated party? When the controlling question is put in this way, concepts of frustration and cost impracticability evidence a very real overlap. Both concepts may then be seen to deal with the same sort of hardship, the unanticipated loss of the fancied worth or profitability of the potentially enforceable bargain. In a very real sense, the frustrated party who is no longer in a position to realize value for its payment faces the prospect of financial injury no different from that confronting the performing party who cannot perform except at substantial economic loss.

If one presses on with this "pain threshold" analogy, the sometimes curious symmetry of the law, steeped in the relative constancy of underlying fundamental human judgments, is seemingly reasserted. The frustrated party refusing payment faces a loss, in the form of damages, which will not exceed the contract price and which will often be considerably less because of mitigation stemming from the substitute transaction the performing party is now able to undertake. The performing party, pointing to an unanticipated increase in the cost of its performance less than or even equal to the contract price, is no more a likely candidate for judicial relief than is the frustrated paying party.¹²⁶ Such judicial reluctance ties in neatly with the idea

¹²⁶ Both Williston and Corbin acknowledged the traditional reluctance of American courts to excuse a performance made significantly more expensive than anticipated by supervening circumstance. WILLISTON, *supra* note 5, §1554; CORBIN, *supra* note 5, § 1360.

In the litigation provoked by the wartime closure of the Suez Canal in late 1956, impracticability defenses resting on the increased cost of performing contracts of transport via alternate shipping route did not fare well. In *American Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939 (2d Cir. 1972), additional expense of almost \$132,000 against a contract price of approximately \$417,000 was held "not sufficient to constitute commercial impracticability under either American or English authority." *Id.* at 942. The court then cited a number of British "Suez" cases, including *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.*, [1960] 2 Q.B. 318,

that courts would best leave disparities between contractual objective and contractual realization caused by unavoidable supervening circumstance as they find them, in part because forced judicial reallocation of these so-called "windfall" disparities is of little social or economic utility and could serve as a disincentive to parties who would otherwise be inclined to allocate such disparities for themselves.¹²⁷

In the end, viable legal principles governing excuse from contractual obligation must comport with prevailing commercial understanding. The basic human instinct is that one should normally not be responsible for the non-performance of an act rendered impossible without his fault. Decisional law, the desirability of contractual certainty, and the commercial mores implicated by risk allocation, suggest the contrary where the excuse proffered for non-performance is merely one of frustration in fact. However sad her predicament, the bride in the Wedding Dress Hypothetical should not be excused from her contract with the dressmaker.

348, *aff'd*, [1962] A.C., 93 (1961), in which the House of Lords refused relief even where freight costs were doubled by closure of the Suez Canal. In *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966), alleged added expense bringing the cost of performance almost \$44,000 beyond the contract price of approximately \$306,000 was also held insufficient. Said the court, "While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief here must be more of a variation" *Id.* at 319.

In *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239 (4th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988), the issue was whether defendant ought be compelled to dispose of spent nuclear fuel by long-term storage when the only method of disposal contemplated and available at contract formation was re-processing. The court first aptly distinguished the Suez cases by noting that long-term storage, unlike use of an alternate transport route in the Suez cases, was not a foreseeable and reasonable alternate means of performance. *Id.* at 276. The Court further noted, however, in excusing Westinghouse on what could have been left as a literal impossibility analysis, that compelling Westinghouse to store spent fuel once storage facilities existed in the future would result in a "cost" (loss?) to Westinghouse of "at least well over \$80,000,000" as opposed to a contemplated profit of \$18,000,000 to \$20,000,000. *Id.* at 277. The court then stated:

We know of no case where the use of the alternative not only wiped out the expected profit but resulted in a loss some four or five times greater than the expected profit and that was not found to be so excessive as to justify the application of the impossibility doctrine.

Id.

¹²⁷ See Kull, *supra* note 66, at 33-34.

