PERSPECTIVE:

IMPRACTICABILITY & FRUSTRATION IN A TIME OF COVID-19

By Prof. Michael Van Alstine

THE COVID-19 pandemic has brought economic devastation on a scale scarcely imaginable only a few months ago. In the process, it also has undermined the rights and obligations under innumerable contracts. Tenants now struggle to make lease payments and homeowners to keep current on mortgage obligations. Businesses small and large have seen their revenues evaporate, but grapple with continuing payments under long-term loans. And whole industries—airlines, restaurants, hotels—are facing an existential crisis.

As a general proposition, however, contract liability is strict liability. That is, a person is obligated to fulfill contractual promises—to make rental payments, repay loans, pay for ordered supplies—"even if circumstances have made the contract more burdensome or less desirable" than anticipated (as stated by the Maryland Court of Appeals, quoting the Second Restatement of Contracts). The COVID pandemic nonetheless has brought to the fore two relatively obscure doctrines of contract law that may be relevant in such circumstances: impracticability of performance and frustration of purpose.

Essentially flip sides of the same conceptual coin, these twin "excuses" proceed from the same premise: A person is not liable for breach of contract if an unforeseeable event fundamentally undermines the parties' shared expectations at the time the contract was formed. "Impracticability" applies if the event is an impediment to a party's performance under the contract. "Frustration" applies if the event destroys a party's purpose for entering into the contract in the first place. To prevail under either excuse, the affected party also must show that it was not at fault for causing the event and that the event was not reasonably foreseeable at the time of contract formation.

The doctrines are obscure for the simple reason that they almost never succeed. Most often, a claimant fails because a court concludes that the event in fact was reasonably foreseeable (or in other words, that the affected party assumed the risk that it would occur). They have reasoned in this vein that a party should not be able to escape freely assumed obligations if it could have protected itself—through an appropriate contractual provision—from the effects of the foreseeable event.

The COVID-19 pandemic, however, may be different. For many recent contracts, courts quite likely will conclude that the occurrence of the pandemic was contrary to the shared expectations of parties, that the event has had a fundamental effect on a party's performance or purpose under the contract, and (obviously) that neither party was at fault for causing it. And, unusually, the courts very well may conclude that the pandemic was not "reasonably" foreseeable for contracts concluded before early this year (except for specialist epidemiologists).

Even if that is the case, the remedy may not be all that appealing. Some parties may well have a right to cancel contracts for the future. Otherwise, however, the courts have substantial discretion to grant relief "as justice requires"—and this certainly involves consideration of the interests of the other party. Thus, even if they apply, the excuses likely will not extinguish, for example, the obligation of an occupying tenant to pay accrued rent, or of a homeowner to become current on overdue mortgage payments, or of a restaurant to pay for delivered supplies.

In any event, the doctrines are certain to rise from obscurity in the weeks and months to come. Indeed, it is quite probable that notions of "impracticability of performance" and "frustration of purpose" will take center stage as our society continues to grapple with the economic impacts of the most significant public health crisis in modern history. ■