

Can Performance Under Contracts be Discharged as a Result of the Coronavirus and Associated Government Orders?

Pennsylvania law recognizes the doctrine of frustration of contractual purpose or impracticability of performance as a valid defense to performance, such as the occurrence of coronavirus pandemic and associated government orders.

This issue was addressed in *Hart v Arnold*, 884 A2d 316 (Pa. Super. 2005), where the Court wrote that once impracticability of performance or frustration of purpose occurs, it is up to the parties to waive the difficulties or seek to terminate the agreement. If, however, a party proceeds under the original contract, despite the impracticability that would otherwise justify non-performance, and is then unable to perform as previously agreed, that can be liable for damages.

Therefore, while frustration of purpose or impracticality can be grounds to excuse performance, subsequent action by the party seeking to waive performance is of significant importance in determining future liability.

A classic example of frustration of purpose is the parade cancellation: Party A rents a space from Party B to watch a parade, but the parade is cancelled. Under the common law, Party A may be excused from payment, but only if Party B understood that Party A's only reason for renting the space was to watch the parade. If a contract's purpose is totally frustrated by cancellations caused by the pandemic and outside of the parties' control, then a party may have an excuse for nonperformance based on frustration of purpose. But as with any of these excuse doctrines, the parties may alter by contract the availability of this excuse.

Parties to contracts that have yet to be performed or have continuing performance obligations should be mindful of this doctrine, both for the party obligated to perform, and for the party expecting performance, because the original expectations of the parties are likely to be frustrated. The party unable to perform due to the impracticability will not receive payment and the counter-party will not receive the expected performance. Both parties should be proactive in discussing the changed circumstances and in anticipating the resulting consequences.