NOTE

Abolishing the Doctrine of Frustration

Lavneet Dhillon[*]

TABLE OF CONTENTS

INTRODUCTION

The common law doctrine of frustration serves as a defense to the enforceability of a contract in the event of a supervening circumstance that renders the value of one party's performance essentially worthless to the other.[1] It has been codified in section 265 of the *Restatement Second of Contracts* ("section 265"), which reads as follows:

 Many thanks to Professor William Dodge and my Senior Notes & Comments Editor Veronika Morrison for their comments, suggestions, and insights throughout this process.

[1] *See* RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981).

> 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.[2]

A commonly held preconception appears to exist regarding this defense — namely, that it is rarely successful as a means of discharging a party's performance under a contract.[3] As one author aptly asked, "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?"[4] Despite the seemingly widespread acceptance of this assumption,[5] there appears to be no recent data that either supports or disproves it.[6] The most recent study on the doctrine of frustration was conducted in 1960.[7] This belief, in turn, raises further questions. If it is true that the defense is rarely successful, what purpose, if any, does it actually serve? In light of this, should the defense be modified or restructured in some way to increase its success? Or, better yet, should it be abolished altogether?

Part I of this Note discusses the current status of the doctrine of frustration and explores the results of a fifty-state survey of the doctrine's application.[8] This survey reveals that the doctrine has been successfully invoked in eighteen states, and has never been successful in the remaining thirty-two states. Additionally, it has been explicitly rejected by one state and cited with disapproval by two others.[9] Part II presents a more detailed discussion of the doctrine's application, putting forth two ways in which the decisions of courts across the

---

[2] *Id.*

[3] *See, e.g.*, Arthur Anderson, *Frustration of Contract — A Rejected Doctrine*, 3 DEPAUL L. REV. 1, 3 (1953) (noting that courts have rarely applied the doctrine of frustration, despite circumstances that exhibited extreme frustration); Nicholas R. Weiskopf, *Frustration of Contractual Purpose — Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 267-71 (1996) (offering several rationales for why relief appears to be more readily available for cases of impossibility/impracticability than frustration); T. Ward Chapman, Comment, *Contracts — Frustration of Purpose*, 59 MICH. L. REV. 98, 98 (1960) (discussing both the treatment of the doctrine of frustration in American courts and the limitations of the doctrine).

[4] Weiskopf, *supra* note 3, at 242.

[5] *See id.* at 242, 247.

[6] *See* Chapman, *supra* note 3, at 106.

[7] *See id.* at 106.

[8] *See infra* Part I.

[9] *See infra* Part I.

nation are inconsistent, even among those states that have adopted the doctrine.[10] These two ways include misinterpreting the foreseeability factor in the frustration analysis, and confusing the doctrine of frustration with that of impossibility.[11] Part III suggests that the doctrine should be abolished entirely, and that parties to a contract should simply draft their agreements to include an additional "force-majeure" type of clause that provides for rescission of the contract given the occurrence of certain agreed-upon, supervening events.[12]

I. BACKGROUND

A. Origins of the Doctrine

The common law doctrine of frustration finds its roots in a group of English law cases known as the Coronation Cases.[13] Among those cases, *Krell v. Henry*[14] remains one of the most influential.[15] Krell, the plaintiff, contracted with Henry, the defendant, to rent out rooms owned by the latter from which the upcoming coronation of the King of England could be viewed.[16] Before the coronation was set to occur, however, the King fell ill and the coronation was canceled.[17] In light of the cancellation, the particular purpose for which the parties had entered into the contract, the viewing of the coronation processions, could no longer be realized.[18] This led the court to conclude that performance of the contract could not be carried out satisfactorily, and the contract should thus be discharged.[19] The facts of that case, along with the judgment obtained, eventually gave rise to the doctrine of frustration.[20] The origin of the doctrine is evidence of a general consensus among

[10] *See infra* Part II.

[11] *See infra* Part II.

[12] *See infra* Part III.

[13] *See* Anderson, *supra* note 3, at 1 ("The doctrine of frustration is the doctrine which grew from the *Coronation Cases*."); *see also* Weiskopf, *supra* note 3, at 243 (stating "[i]t is in these cases that the doctrine is said to have been recognized for the first time").

[14] Krell v. Henry [1903] 2 KB 740 (Eng.).

[15] *See* Weiskopf, *supra* note 3, at 243 ("Of the 'Coronation Cases,' *Krell v. Henry* is by far the best known.").

[16] *Krell*, 2 KB at 740.

[17] *Id.*

[18] *See id.*

[19] *See id.* at 747.

[20] Anderson, *supra* note 3, at 2 (noting that "the doctrine of frustration came to take form, as a view that events such as occurred in the *Coronation Cases* should discharge the party in the position of the hirer from all further duty under the contract").

legal scholars that events such as those giving rise to the Coronation Cases should result in the discharge of the parties' respective responsibilities.[21]

The doctrine was originally codified in 1932 in section 288 of the first *Restatement of Contracts*, and read as follows:

> 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.[22]

Today, the doctrine is presented in section 265 of the *Restatement (Second) of Contracts*, originally published in 1981.[23]

The doctrine of impossibility or impracticability is a similar defense, but differs from the doctrine of frustration with regard to the circumstances in which it applies.[24] Under the doctrine of impossibility, a party's performance under a contract may be discharged if, without their fault, an event occurs that renders performance either impossible or extremely impracticable.[25] In contrast, under the doctrine of frustration, while performance may still be possible, it has lost all value for one of the parties to the contract.[26] Returning to the case of *Krell v. Henry*, Krell's performance had by no means been rendered impossible — he still could have paid for the rooms he sought to rent.[27] Nevertheless, the value of Henry's performance in conveying the rooms had become worthless to Krell with the cancellation of the coronation parade.[28] Thus, for Krell, the doctrine of frustration was the only defense of the two capable of discharging his duties to perform under the contract.

---

[21] *Id.*

[22] RESTATEMENT (FIRST) OF CONTRACTS § 288 (AM. L. INST. 1932).

[23] RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981).

[24] *See infra* Part II.

[25] *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).

[26] *Id.* § 265 ("This Section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other . . . .").

[27] *See* Krell v. Henry [1903] 2 KB 740 at 743 (Eng.).

[28] *See id.* at 746.

B. Current Status of the Law

In 1953, a survey of the available caselaw returned no cases in which the defense of frustration had been successful.[29] Although there were many cases that either mentioned or discussed the doctrine, no case was found in which the doctrine was expressly followed.[30] In 1960, another study was conducted to examine the successfulness of the doctrine.[31] It revealed that the doctrine was successfully asserted in only twenty-nine published decisions by any American court.[32] These studies, along with a few others that discuss the doctrine, lend support to the commonly held belief that the defense of frustration is rarely successful.[33] As put by one scholar, "[i]t 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."[34]

Despite the support these studies lend to the argument that the defense of frustration is rarely successful, decades have gone by since research on the doctrine was last collected.[35] Nevertheless, the notion persists.[36] This lack of current data begs the question: what is the *current* status of the doctrine of frustration?

After conducting an expansive survey of the doctrine's application across the fifty states,[37] some general statistics are worth highlighting. The doctrine has been successfully invoked in at least one instance in

[29] Anderson, *supra* note 3, at 1.

[30] *Id.*

[31] Chapman, *supra* note 3, at 98.

[32] Weiskopf, *supra* note 3, at 247.

[33] *See, e.g.*, Anderson, *supra* note 3, at 3 (noting that courts have rarely applied the doctrine of frustration, despite circumstances that exhibited extreme frustration); Weiskopf, *supra* note 3, at 267-71 (offering several rationales for why relief appears to be more readily available for cases of impossibility/impracticability than frustration); Chapman, *supra* note 3, at 98 (discussing both the treatment of the doctrine of frustration in American courts and the limitations of the doctrine).

[34] Weiskopf, *supra* note 3, at 242.

[35] The most recent study on the doctrine of frustration was conducted in 1960. *See* Chapman, *supra* note 3, at 106.

[36] *See* Weiskopf, *supra* note 3, at 242.

[37] In order to collect this research, I conducted Westlaw searches for state court cases using the phrases "doctrine of frustration," "defense of frustration," "commercial frustration," and "frustration /p 265," filtering my results one state at a time.

eighteen states: Arizona,[38] California,[39] Connecticut,[40] Florida,[41] Illinois,[42] Iowa,[43] Louisiana,[44] Massachusetts,[45] Michigan,[46] Minnesota,[47] Missouri,[48] New Jersey,[49] New York,[50] North Dakota,[51]

[38] *See* Matheny v. Gila Cnty., 710 P.2d 469, 472 (Ariz. Ct. App. 1985) ("These facts compel our conclusion that it was impossible to foresee in July 1980 that legislation would become law causing the contract to be commercially frustrated and useless to the county.").

[39] Johnson v. Atkins, 127 P.2d 1027, 1030 (Cal. Dist. Ct. App. 1942) (noting "that this purpose was thus frustrated by conditions beyond the control of the buyer").

[40] Willis Pool Co. v. Maurath, No. DBDCV126015400S, 2014 WL 7671664, at *5 (Conn. Super. Ct. Dec. 2, 2014) ("Accordingly, the court finds in favor of the defendant with respect to the first special defense of frustration of purpose.").

[41] Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A., 493 So. 2d 548, 548 (Fla. Dist. Ct. App. 1986) (per curiam) ("This showing, in our view, rendered the contract unenforceable based on the contract doctrine of frustration of purpose.").

[42] Olson v. Carbonara, 157 N.E.2d 273, 278 (Ill. App. Ct. 1959) (noting "that the contract was frustrated by the B.C. International's expulsion from the AFL-CIO").

[43] Larken, Inc. v. Larken Iowa City Ltd. P'ship, 589 N.W.2d 700, 704 (Iowa 1998) (holding "that they frustrated one of the principal purposes of the management agreement").

[44] Pac. Trading Co. v. La. State Rice Milling Co., 42 So. 2d 855, 859 (La. 1949) ("Our conclusion that there was a frustration of the contracts makes unnecessary a determination of the other contentions of defendant.").

[45] Saab v. Norton Family, Inc., 2000 Mass. App. Div. 200, 201 (2000) ("Under these circumstances, performance may well have been rendered impossible, not merely frustrated.").

[46] Molnar v. Molnar, 313 N.W.2d 171, 173 (Mich. Ct. App. 1981) ("The purpose of the judgment was basically frustrated by the death of the child . . . .").

[47] City of Savage v. Formanek, 459 N.W.2d 173, 177 (Minn. Ct. App. 1990) ("The non-occurrence of the Corps taking discretionary authority of the Project was a basic assumption on which the contract was made.").

[48] Howard v. Nicholson, 556 S.W.2d 477, 483 (Mo. Ct. App. 1977) ("The bankruptcy of Honey's was a fortuitous and unexpected supervening event over which neither party had any control.").

[49] Capparelli v. Lopatin, 212 A.3d 979, 994 (N.J. Super. Ct. App. Div. 2019) ("[W]e agree with the judge's finding that there was clear and convincing evidence of frustration of purpose . . . .").

[50] Arons v. Charpentier, 828 N.Y.S.2d 482, 483 (App. Div. 2007) ("Thus, enforcement of the alleged contract is barred by the doctrine of frustration of purpose . . . .").

[51] City of Harwood v. City of Reiles Acres, 859 N.W.2d 13, 23 (N.D. 2015) ("Therefore, the district court did not err in applying frustration of purpose to the 1985 agreement . . . .").

Pennsylvania[52] Utah,[53] Washington,[54] and Wisconsin.[55] Conversely, in the remaining thirty-two states, the defense has never been successful in a state court case.[56] Of those thirty-two states, there are seven in

[52] Lichtenfels v. Bridgeview Coal Co., 531 A.2d 22, 25-26 (Pa. Super. Ct. 1987) ("Because events beyond the parties' control frustrated the purpose of the 1979 agreement, the situation is governed by the doctrine of 'frustration of contractual purpose' . . . .").

[53] Western Props. v. S. Utah Aviation, Inc., 776 P.2d 656, 659 (Utah Ct. App. 1989) ("Without a way of productively using the land, the purpose of the leasehold was effectively frustrated.").

[54] Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc., 637 P.2d 647, 650 (Wash. 1981) ("Stoneway was without fault in the occurrence of the supervening event causing the frustration of its purpose.").

[55] Wm. Beaudoin & Sons, Inc. v. Milwaukee Cnty., 217 N.W.2d 373, 377 (Wis. 1974) ("Under this rule the principal purpose of Item 21 was frustrated by the intervening act of Northwestern and Beaudoin's duty of performance was discharged.").

[56] *See, e.g.*, Stormont v. Astoria Ltd., 889 P.2d 1059, 1063 (Ala. 1995) ("Thus, we conclude that Stormont has not met his burden of proving frustration."); Pete Smith Co. v. City of El Dorado, 529 S.W.2d 147, 149 (Ark. 1975) ("[T]he chancellor did not err in denying appellant relief under the commercial frustration doctrine . . . ."); Beals v. Tri-B Assocs., 644 P.2d 78, 81 (Colo. App. 1982) ("[F]ailure to develop was not such a severe frustration of purpose as to warrant rescission."); CRS Proppants LLC v. Preferred Resin Holding Co., No. N15C-08-111, 2016 WL 6094167, at *9 (Del. Super. Ct. Sept. 27, 2016) ("Preferred's performance is not excused by commercial impracticability or frustration of purpose."); Twin Harbors Lumber Co. v. Carrico, 442 P.2d 753, 758 (Idaho 1968) ("[S]trictly speaking that doctrine is not applicable here."); Berline v. Waldschmidt, 156 P.2d 865, 869 (Kan. 1945) (holding that the parties are "not now in a position to avail themselves of the benefits of the doctrine of commercial frustration"); Frazier v. Collins, 187 S.W.2d 816, 819 (Ky. 1945) (holding that the lessees had no right to terminate their lease); Md. Tr. Co. v. Tulip Realty Co. of Md., 153 A.2d 275, 286 (Md. 1959) ("Acme was precluded from asserting the defense of frustration as an excuse for non-performance."); Bain v. Williams, 800 P.2d 693, 696 (Mont. 1990) ("[T]he defendants did not have a right to rescind the contract."); Kunkel Auto Supply Co. v. Leech, 298 N.W. 150, 152 (Neb. 1941) ("His performance is not excused by the mere fact that the purpose for which he purchased the goods turned out to be unprofitable."); Graham v. Kim, 899 P.2d 1122, 1124 (Nev. 1995) (holding the defense of commercial frustration inapplicable); Gen. Linen Servs., Inc. v. Smirnioudis, 897 A.2d 963, 966 (N.H. 2006) ("[T]he doctrine of commercial frustration does not apply to this case."); Hartman v. El Paso Nat. Gas Co., 763 P.2d 1144, 1151 (N.M. 1988) (holding the trial court was correct to strike the affirmative defenses of commercial impracticability and frustration of purpose); McCay v. Morris, 266 S.E.2d 5, 7 (N.C. Ct. App. 1980) ("Difficulty of performance does not make the doctrine of frustration applicable."); RJB Gas Pipeline Co. v. Colo. Interstate Gas Co., 813 P.2d 1, 10 (Okla. Civ. App. 1989) ("The trial court did not err in striking CIG's defenses based on commercial impracticability and frustration of purpose."); Tindula v. Bauman, 532 P.2d 785, 786 (Or. 1975) ("The evidence does not support the applicability of the doctrine in the instant case."); City of Warwick v. Boeng Corp., 472 A.2d 1214, 1220 (R.I. 1984) ("Boeng's purpose in entering the contract was not frustrated by the subsequent amendment to the municipal-approval requirement."); Sanchez v. Tilley, 330 S.E.2d

which there are either no state court cases that mention the doctrine, or merely a few that allude to it briefly but fail to discuss it in any detail: Alabama, Georgia, Hawaii, Maine, Vermont, Virginia, and West Virginia.[57] Additionally, there are two states in which the courts appear to have explicitly rejected the doctrine, and one in which the doctrine has been cited with disapproval. These three states are Indiana, Mississippi, and Ohio, respectively.[58]

In *City of Starkville v. 4-County Electric Power Association*, the Supreme Court of Mississippi effectively rejected the doctrine of frustration.[59] The case involved a Service Area Agreement between two parties.[60] At the time the contract was entered into, "the City had a right of eminent domain to acquire power association properties upon annexation."[61] During the course of the agreement, a law was enacted that effectively stripped the City of its right to exercise eminent domain.[62] Although the court analyzed the applicability of the frustration of purpose doctrine before rejecting the defense, it began its discussion by stating the following: "This Court has not recognized frustration of purpose as a defense to a breach of contract action."[63] With these words, the Supreme Court of Mississippi effectively rejected

319, 320 (S.C. Ct. App. 1985) (rejecting Appellant's doctrine of frustration argument); Mueller v. Cedar Shore Resort, Inc., 643 N.W.2d 56, 69 (S.D. 2002) ("[T]he record fails to support their claim by containing evidence of its elements."); N. Am. Cap. Corp. v. McCants, 510 S.W.2d 901, 905 (Tenn. 1974) (holding the defense of frustration to be inapplicable); Philips v. McNease, 467 S.W.3d 688, 696 (Tex. App. 2015) ("[W]e conclude that his frustration of purpose theory fails as a matter of law."); Downing v. Stiles, 635 P.2d 808, 816 (Wyo. 1981) ("Accordingly, it was error to apply the doctrine of commercial frustration to the circumstances of this case."). This listing does not include the seven states in which there are either no state court cases that mention the doctrine (or merely a few that allude to it briefly but fail to discuss it in any detail), or the three states in which the doctrine has either been explicitly rejected or disapproved.

[57] Westlaw searches for the phrases "doctrine of frustration," "defense of frustration," "commercial frustration," and "frustration /p 265" yielded no pertinent results.

[58] *See* Justus v. Justus, 581 N.E.2d 1265, 1275 (Ind. Ct. App. 1991); City of Starkville v. 4-Cnty. Elec. Power Ass'n, 819 So. 2d 1216, 1225 (Miss. 2002); Am. Premier Underwriters, Inc. v. Marathon Pipe Line Co., No. 10-2001-08, 2002 WL 437998, at *4 (Ohio Ct. App. Mar. 20, 2002).

[59] *City of Starkville*, 819 So. 2d at 1225.

[60] *Id.* at 1218.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1225.

the doctrine of frustration.[64] Furthermore, this is the only state court case in Mississippi that makes any mention of the doctrine at all.[65]

Similarly, in Indiana, there are only three state court cases that discuss the doctrine, all from the Court of Appeals for the Third District.[66] In the first of these cases, a 1976 case known as *Kruse, Kruse, & Miklosko, Inc. v. Beedy*,[67] the Court of Appeals appeared to engage in a standard frustration of purpose analysis. The court rejected the frustration defense, finding that the risk of fire was a foreseeable event that had been provided for in the agreement between the parties.[68] Five years later, the court was presented with the case *Ross Clinic, Inc. v. Tabion*.[69] In holding that the lower court had erred in instructing the jury on the doctrine of frustration, the court referred back to its decision in *Kruse*, framing it in this way:

> It is essential to note that the doctrine of frustration of purpose was not specifically adopted by this Court in the Kruse case. It was discussed as one of the issues presented in that matter; however, research reveals that in no other cases have the courts of this state specifically adopted that doctrine and made it a part of Indiana law.[70]

Finally, in 1991, the court saw its last frustration of purpose case to date.[71] In that case, *Justus v. Justus*, the court was quite explicit in stating that the doctrine was not recognized in Indiana.[72]

Like Indiana, there have only been three state court cases in Ohio that discuss the doctrine of frustration.[73] The earliest case was decided by employing the standard frustration analysis, and the defense was held

---

[64] *See id.*

[65] A Westlaw search for "doctrine of frustration" yielded only one result. Searches for "defense of frustration" and "frustration /p 265" yielded no relevant results.

[66] Justus v. Justus, 581 N.E.2d 1265, 1275 (Ind. Ct. App. 1991); Ross Clinic, Inc. v. Tabion, 419 N.E.2d 219, 223 (Ind. Ct. App. 1981); Kruse, Kruse & Miklosko, Inc. v. Beedy, 353 N.E.2d 514, 527 (Ind. Ct. App. 1976).

[67] *Kruse*, 353 N.E.2d at 514.

[68] *Id.* at 529.

[69] *Ross Clinic*, 419 N.E.2d at 219.

[70] *Id.* at 223.

[71] *See Justus*, 581 N.E.2d at 1275.

[72] *Id.* ("However, Indiana does not recognize the doctrine of frustration of purpose.").

[73] Donald Harris L. Firm v. Dwight-Killian, 853 N.E.2d 364, 368 (Ohio Ct. App. 2006); Am. Premier Underwriters, Inc. v. Marathon Pipe Line Co., No. 10-2001-08, 2002 WL 437998, at *4 (Ohio Ct. App. Mar. 20, 2002); Mahoning Nat'l Bank of Youngstown v. State, No. 75AP-532, 1976 WL 189757, at *1, *2 (Ohio. Ct. App. May 27, 1976).

to be inapplicable.[74] Almost thirty years later, when presented with its first case concerning the doctrine, the Court of Appeals for the Third District began its analysis by stating that the doctrine of frustration was not widely accepted in Ohio.[75] This statement was then reaffirmed by the Court of Appeals for the Sixth District only four years later.[76]

Upon studying the available caselaw, it becomes apparent that courts across the nation vary significantly in their treatment of the doctrine of frustration.[77] As a result of these differences in application across jurisdictions, the decisions reached by courts are inconsistent.[78]

II. INCONSISTENCIES IN APPLICATION OF THE DOCTRINE

Even among the states that have adopted the doctrine, there are inconsistencies in its application. This lack of uniformity can be accounted for in at least two ways. First and foremost, many courts differ in their treatment of the foreseeability component of section 265 of the Restatement.[79] Differences in the application of section 265 can lead courts to reach different results, notwithstanding similar fact patterns.[80] Secondly, there are a handful of courts that confuse the doctrines of frustration and impossibility, treating the two as if they were synonymous.[81] This is particularly problematic, as the doctrines are distinct and meant to apply to different sets of circumstances.[82]

A. Incorrect Application of Section 265's Foreseeability Factor

Comment a to section 265 of the Restatement discusses in greater detail some of the requirements that must be met in order to succeed with the defense of frustration.[83] The first of these requirements

[74] *See Mahoning National Bank of Youngstown*, 1976 WL 189757, at *2.

[75] *Am. Premier Underwriters, Inc.*, 2002 WL 437998, at *4.

[76] *Donald Harris L. Firm*, 853 N.E.2d at 368.

[77] *See* discussion *supra* Part I.B.

[78] *See infra* Part II.

[79] RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981); *see infra* Part II.A.

[80] *Compare* Harford Cnty. v. Town of Bel Air, 704 A.2d 421, 432 (Md. 1998) ("[I]t is evident that the change in state and federal environmental regulations concerning recycling neither frustrates, nor makes legally impossible, compliance with the 1969 agreement."), *with* Matheny v. Gila Cnty., 710 P.2d 469, 472 (Ariz. Ct. App. 1985) ("These facts compel our conclusion that it was impossible to foresee in July 1980 that legislation would become law causing the contract to be commercially frustrated and useless to the county.").

[81] *See infra* Part II.B.

[82] *See* discussion *supra* Part I.

[83] RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981).

maintains that the purpose that has been frustrated must have been the party's principal purpose for entering into the contract.[84] As the comment describes, "[i]t is not enough that [the party] had in mind some specific object without which [it] would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."[85] The second requirement for a successful frustration defense is that the frustration must be substantial.[86] The fact that a transaction has proven to be less profitable than expected, or even caused the affected party to sustain a loss, is not enough to satisfy this requirement.[87] A third requirement is that "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made."[88] This is where the divergence occurs. Comment a states that the foreseeability of an event is one factor to be considered when determining whether its non-occurrence was a basic assumption relied upon by the parties.[89] However, it also notes that the mere fact that an event was foreseeable does not preclude the possibility that the non-occurrence of the event was a basic assumption that the parties relied upon.[90] In other words, while the foreseeability of the frustrating event is one factor in the analysis, it is not meant to be dispositive.

Despite this warning, there are many cases in which courts have made the determination that frustration does or does not exist based solely upon whether or not the supervening circumstance was foreseeable.[91] In *O'Hara v. State*, an agreement was entered into between the parties whereby the defendant was to convey a parcel of real property to the plaintiffs.[92] Before the conveyance could occur, the commissioner of transportation sought the approval of the Superior Court to purchase a portion of the same parcel on behalf of the state of Connecticut.[93] The proposed acquisition of property was approved, and the defendant

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *See, e.g.*, Next Gen Cap., LLC v. Consumer Lending Assocs., 316 P.3d 598, 601 (Ariz. Ct. App. 2013) (holding frustration of purpose did not apply because the supervening circumstance was reasonably foreseeable); O'Hara v. State, 590 A.2d 948, 954 (Conn. 1991) (holding the defendant's duty to perform was not excused because the supervening circumstance was foreseeable).

[92] *O'Hara*, 590 A.2d at 950.

[93] *Id.* at 951.

conveyed the parcel of land to the state.[94] In arguing that its failure to convey the parcel to the plaintiffs did not constitute a breach of their agreement, the defendant asserted the defense of frustration of purpose.[95] In doing so, the defendant argued that because the state had sought to acquire a greater portion of the land than had originally been contemplated, the purpose of the agreement between the defendant and the plaintiffs had thereby been frustrated.[96]

Citing section 265 of the Restatement, the Supreme Court of Connecticut began its discussion of the issue with the following statement: "Under the doctrine of frustration of purpose . . . the event upon which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract."[97] This statement, purportedly made in reliance on section 265, is untenable. Comment a to section 265 explicitly states that while foreseeability is *one* factor to be considered when determining whether frustration has occurred, "the mere fact that the event was foreseeable" does not automatically render the defense inapplicable.[98] As a consequence of its own incorrect interpretation of section 265, the court effectively disposed of the issue.[99] There was no discussion of whether the principal purpose of the contract had been frustrated, or whether said frustration was substantial.[100] Relying solely upon the factor of foreseeability, the court concluded that it was entirely foreseeable that the state might seek to purchase a larger portion of land than it had originally contemplated.[101] With that, the court concluded that the defense of frustration was inapplicable.[102]

In *Next Gen Capital, LLC v. Consumer Lending Associates, LLC*, the Arizona Court of Appeals engaged in a similar analysis of the doctrine's applicability.[103] Consumer Lending Associates ("CLA") had entered into a five-year lease agreement with the predecessor of Next Gen Capital ("Next Gen").[104] CLA was in the business of transferring money,

94 *Id.*

95 *See id.* at 954.

96 *Id.*

97 *Id.*

98 RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981).

99 *See O'Hara*, 590 A.2d at 954-55.

100 *See id.*

101 *Id.* at 954.

102 *See id.*

103 *See* Next Gen Cap., LLC v. Consumer Lending Assocs., 316 P.3d 598, 600-01 (Ariz. Ct. App. 2013).

104 *Id.* at 599.

primarily through the use of short-term loans and check cashing.[105] In July 2010, the statute under which CLA had been operating expired.[106] CLA then vacated the premises it had been leasing, refusing to pay the remaining rent it owed through the end of the lease.[107] Next Gen subsequently sued CLA for breach of contract, with CLA asserting various defenses including frustration of purpose.[108]

The Arizona Court of Appeals began its discussion of the defense's applicability by delineating the four requirements found in the comments to section 265.[109] At the same time, the court also quoted language from one of its own prior decisions, maintaining that is has "required proof from the party seeking to excuse himself that the supervening frustrating event was not reasonably foreseeable."[110] Once again, this language directly conflicts with the language found in comment a, maintaining that an event having been foreseeable does not preclude the possibility that its non-occurrence was a basic assumption upon which the contract was made.[111] While the state is certainly free to depart from the Restatement, it does so without any acknowledgement or explanation of its decision.[112] Rather than explicitly rejecting the Restatement's formulation of the doctrine, the Arizona Court of Appeals applied it in conjunction with its own conflicting interpretation.[113]

Regardless of whether states are incorrectly applying section 265 itself or applying it in conjunction with contrary rules promulgated through their own case law, both methods increase the confusion and inconsistency surrounding the application of the doctrine. Treating the foreseeability of an event as a damning factor in the frustration analysis effectively creates a heightened pleading standard for defendants. In addition to pleading the three requirements presented in comment a to section 265,[114] defendants will also have to plead facts showing that the occurrence of a particular event was unforeseeable. This is crucial, because it increases the likelihood that the defense will fail in some situations in which the non-occurrence of an event was in fact a basic

105 *Id.*
106 *Id.*
107 *Id.* at 599-600.
108 *Id.* at 600.
109 *Id.*
110 *Id.*
111 RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981).
112 *See Next Gen Cap., LLC*, 316 P.3d at 600-01.
113 *See id.*
114 *See supra* text accompanying notes 84–89.

assumption upon which the parties relied. Although the principal purpose for which two parties enter into a contract may well have been substantially frustrated, if they cannot prove that the event was truly unforeseeable, they will be out of luck. Differences in the way states are interpreting and applying section 265 thus serve to erode the legitimacy of the doctrine by furthering its unreliability. Comment a to section 265 is quite clear in explaining how the doctrine should be applied.[115] The foreseeability of an event is only one factor in determining whether the requirements of the defense have been met.[116] As such, courts should be careful not to place too much emphasis on this one factor alone.

In contrast to the two examples presented above, in *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*,[117] the Supreme Court of Washington correctly applied section 265 in its analysis of the defense's applicability. Until 1985, a marketing order remained in place under the authority of the United States Department of Agriculture ("USDA") that required hop producers to obtain an allotment from the USDA.[118] This allotment was required in order to market hops and was known as "hop base."[119] Washington State Hop Producers, Inc. was a corporation engaged in the business of leasing, acquiring, and selling hop base in a secondary market which had developed for this sole purpose.[120] Upon its filing for a court supervised liquidation, a trust was created.[121] The trust made two "pools" of hop base available for sale, and began taking bids.[122] Respondents, collectively referred to as Growers, were among the successful bidders.[123] Before Growers had forwarded payment for the hop base, the USDA terminated the marketing order.[124] In spite of this, the trust sought to recover payment from Growers and other successful bidders but was unsuccessful.[125] In November 1985, the trust filed suit.[126] In

115 *See supra* text accompanying notes 84–89.

116 *See supra* text accompanying notes 84–89.

117 Wash. State Hop Producers, Inc. Liquidation Tr. v. Goschie Farms, Inc., 773 P.2d 70 (Wash. 1989).

118 *Id.* at 71.

119 *Id.*

120 *Id.*

121 *Id.* at 72.

122 *Id.*

123 *See id.*

124 *See id.*

125 *See id.*

126 *Id.*

moving for summary judgment, respondent Growers asserted the defense of commercial frustration.[127]

On appeal, the Supreme Court of Washington engaged in a thorough analysis of the issue.[128] It began by discussing the history of the doctrine, from its origins in *Krell v. Henry*[129] to its eventual codification in section 265 of the Restatement.[130] After quoting both the language of section 265 and comment a in delineating the requirements for a successful frustration defense, the court began its analysis of each individual requirement.[131] Of particular importance was its analysis pertaining to the third requirement — that the non-occurrence of the supervening event be a basic assumption upon which the parties relied when entering into the contract.[132] Relying on the findings of both the trial court and the Court of Appeals, the court reasoned that the need to obtain hop base in order to participate in the market for hops was a basic assumption "central to the subject matter of the contract."[133] In reaching this conclusion, the court was quite explicit in rejecting the trust's argument that the foreseeability of an event serves to invalidate the defense of commercial frustration.[134]

In support of its argument, the trust had relied upon a statement made by the same court in an earlier case, maintaining in part that the defense of frustration is only available in cases where the occurrence of the supervening event is not foreseeable.[135] In rejecting the trust's argument regarding foreseeability, the court began with the following statement: "Under the Restatement formula, foreseeability is merely a relevant factor in determining whether nonoccurrence of the frustrating event was a basic assumption of the frustrated party in entering the transaction. If that basic assumption is found, as it was here, the 'issue' of foreseeability becomes irrelevant."[136] Further, the court went on to refute its own prior statement, conceding that it was both unsupported and in direct conflict with section 265.[137]

---

127 *See id.* at 73.

128 *See id.* at 73-78.

129 Krell v. Henry [1903] 2 KB 740 (Eng.).

130 RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981); *see Wash. State Hop Producers*, 773 P.2d at 73.

131 *See Wash. State Hop Producers*, 773 P.2d at 74-78.

132 *See id.* at 76-78.

133 *Id.* at 76.

134 *See id.* at 76-77.

135 *Id.* at 77; Metro. Park Dist. v. Griffith, 723 P.2d 1093, 1102-03 (Wash. 1986).

136 *Wash. State Hop Producers*, 773 P.2d at 77.

137 *See id.* at 77-78.

In recognizing that its own prior interpretation of the role of foreseeability in the frustration analysis was in direct conflict with section 265, the Supreme Court of Washington engaged in an exemplary discussion of the issue.[138] Instead of attempting to attribute its own incorrect interpretation to section 265 itself, the court was quite candid in admitting that no authority had been cited in support of its earlier position.[139] Further, having concluded that the continued need for hop base was in fact a basic assumption relied upon by the parties, the court correctly disregarded the issue of foreseeability altogether.[140]

If every jurisdiction were to adopt this understanding of the role of foreseeability under section 265, much of the inconsistency surrounding the doctrine's application would be eliminated. Treating foreseeability as a factor that must yield whenever a basic assumption is found would also serve to make the defense's application more predictable, as every jurisdiction would then be engaging in a similar analysis. This, in turn, would reinforce the legitimacy of the doctrine.

B. Failure to Distinguish Between the Doctrines of Frustration and Impossibility

Another factor contributing to the haphazard application of the doctrine of frustration is the inability of courts to successfully differentiate the doctrine from the doctrine of impossibility.[141] As briefly discussed in Part I, the doctrines of frustration and impossibility are separate and distinct.[142] Though there may be some overlap in terms of the circumstances in which they apply, both the requirements and the rationale behind each of these doctrines are fundamentally different.[143]

The doctrine of impossibility or impracticability has been codified in section 261 of the *Restatement (Second) of Contracts* ("section 261"), and reads as follows:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event

[138] *See id.*

[139] *See id.* at 77.

[140] *See id.* at 76.

[141] *See, e.g.*, Panitz v. Panitz, 799 A.2d 452, 459-60 (Md. Ct. Spec. App. 2002) (showcasing the court's conflation of the doctrine of frustration with the doctrine of impossibility); Philips v. McNease, 467 S.W.3d 688, 695 (Tex. App. 2015) (demonstrating the courts inability to treat the doctrine of frustration and doctrine of impossibility as two discrete doctrines).

[142] *See supra* Part I.

[143] *See supra* Part I.

> the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[144]

Upon comparison of the two sections of the Restatement, section 261 governing impossibility and section 265 governing frustration, the differences become readily apparent.[145] In order to successfully plead the defense of impossibility under section 261, performance must have been made impracticable.[146] As comment d concedes, this does not mean that performance must have been rendered "absolutely impossible" in order for the defense to apply.[147] Instead, impracticability may result when one party's performance has been rendered extremely and unreasonably difficult or expensive.[148]

In contrast, the defense of frustration is only applicable where a party's principal purpose for entering into a contract has been substantially frustrated.[149] As stated in comment a of this section, "[the defense] is distinct from the problem of impracticability dealt with in the four preceding sections because there is no impediment to performance by either party."[150] Although performance may still be possible, this defense is applicable where the value of one party's performance has been rendered "virtually worthless" to the other.[151]

While the differences between these doctrines may seem obvious enough, many courts across jurisdictions are unable to successfully differentiate between the two.[152] In *Philips v. McNease*, the plaintiff filed a motion against his ex-spouse seeking to either modify the terms of his contractual alimony or terminate it altogether.[153] In arguing that the terms of the alimony should be set aside altogether, the plaintiff alleged

---

144 RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).

145 *Compare id.* ("Where, after a contract is made, a party's performance is made impracticable . . . ."), *with id.* § 265 cmt. a ("It is distinct from the problem of impracticability . . . because there is no impediment to performance by either party.").

146 *See id.* § 261 cmt. a.

147 *See id.* cmt. d.

148 *Id.*

149 *Id.* § 265.

150 *Id.* cmt. a.

151 *See id.*

152 *See, e.g.*, Panitz v. Panitz, 799 A.2d 452, 459-60 (Md. Ct. Spec. App. 2002) (showcasing the court's conflation of the doctrine of frustration with the doctrine of impossibility); Philips v. McNease, 467 S.W.3d 688, 695 (Tex. App. 2015) (demonstrating the court's inability to treat the doctrine of frustration and doctrine of impossibility as two separate doctrines).

153 *McNease*, 467 S.W.3d at 691.

a variety of contractual theories, including frustration of purpose.[154] The Texas Court of Appeals for the Fourteenth District began its analysis with the following statement: "'Frustration of purpose' is an excuse to performance that is sometimes described as 'impossibility of performance' or 'commercial impracticability.'"[155] Based on the discussion above, it is clear that this characterization is fundamentally incorrect.[156] Frustration of purpose and impossibility of performance are separate and distinct theories of contractual liability.[157] In spite of this distinction, the court incorrectly applied the standard for the doctrine of impossibility.[158] It stated that the plaintiff would be unable to succeed under the theory of frustration of purpose unless he could show that some supervening circumstance had rendered his performance impossible.[159] After determining that such a showing had not been made, the court concluded that his defense of frustration of purpose "fail[ed] as a matter of law."[160]

Similarly, in *Panitz v. Panitz*, a woman ("Appellee") brought an action against her former husband ("Appellant") after he unilaterally attempted to reduce the amount of monthly alimony payments owed to her.[161] In arguing that he should be excused from performance under the divorce decree, Appellant asserted the defenses of unconscionability and frustration of purpose.[162] After citing to section 265 of the Restatement and setting forth the requirements for a successful frustration defense, the court revealed the following caveat: "In order to succeed under [the doctrine of frustration], however, performance under the contract must be objectively impossible."[163] Such an interpretation is flawed in that it directly conflicts with comment a of section 265, which distinguishes the defense from the defense of impossibility by stating that no impediment to performance exists.[164]

If courts are unable to distinguish the doctrine of frustration from that of impossibility, the likelihood that they will misapply the former only

154 *Id.* at 692.
155 *Id.* at 695.
156 *See supra* text accompanying notes 145–51.
157 *See supra* note 145.
158 *See McNease*, 467 S.W.3d at 696.
159 *Id.*
160 *Id.*
161 Panitz v. Panitz, 799 A.2d 452, 456 (Md. Ct. Spec. App. 2002).
162 *Id.*
163 *Id.* at 460.
164 *See* RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981).

increases.[165] Like the two examples presented above, courts that incorrectly believe that a successful defense of frustration requires that performance have been rendered impossible will inevitably reject the defense in some situations in which it may otherwise have succeeded.[166] Such a result would seem to defeat the purpose of the doctrine altogether. The purpose of the doctrine of frustration is to alleviate a party from its burden of performance under a contract when a change in circumstances renders one party's performance essentially worthless to the other.[167] The defining characteristic of the doctrine, which sets it apart from the doctrine of impossibility, is that performance is still possible, although undesirable.[168] Requiring that performance be impossible in order to succeed with a frustration defense explicitly goes against this purpose by focusing on the physical aspect of performance itself, rather than the value of performance.[169]

In addition to the inability of some courts to distinguish between the requirements of the two doctrines, other courts employ language that, while technically correct, lends itself to inducing even greater confusion.[170] In *Wassink v. Hawkins*, the Supreme Court of Alaska described the doctrine of frustration as "excus[ing] a party from performance where the object of the contract has been rendered impossible or commercially impractical."[171] Although technically correct, such a description may be easily misconstrued to mean that a successful frustration defense requires a showing of impossibility or impracticability of *performance*. It is not the performance of the contract that must have been rendered impossible or extremely impractical to achieve (this would be the doctrine of impossibility), but the object or *purpose* of the contract.[172] Stating that the object or purpose of a contract has been rendered impossible or impractical is another way of saying that it has been frustrated. However, given the importance of these terms in section 261, such a use here is likely to give way to confusion. As previously discussed, conflating the doctrine of frustration with that of impossibility increases the likelihood that the doctrine will be

165 *See supra* text accompanying notes 152–64.

166 *See supra* text accompanying notes 152–64.

167 *See* RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981).

168 *See id.*

169 *See id.*

170 *See, e.g.*, Wassink v. Hawkins, 763 P.2d 971, 975 (Alaska 1988) (demonstrating that some courts utilize language that renders the differentiation of the two doctrines confusing).

171 *Id.*

172 RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981).

misapplied and will accordingly fail in some instances in which it otherwise should have succeeded.[173]

III. A PROPOSED SOLUTION

In light of the foregoing, it is clear that the application of the doctrine of frustration has been far from consistent.[174] Some states have adopted the doctrine, while others have rejected it, and still others seem to have adopted it in name only.[175] Even among those states that have adopted the doctrine, some courts are applying section 265 of the Restatement, perhaps knowingly or unknowingly, in ways that directly conflict with its accompanying commentary.[176] Others are failing to distinguish the doctrine from that of impossibility, effectively requiring defendants to prove more than what is actually required for a successful frustration defense.[177]

In this Part, I consider two possible solutions: modifying the doctrine,[178] or abolishing it altogether.[179] After discussing both solutions and presenting a counterargument against the second,[180] I ultimately conclude that the best solution would be to abolish the doctrine altogether.[181] In its stead, parties should draft their contracts to include a provision that provides for rescission of the contract upon the occurrence of certain agreed-upon, fortuitous events.[182]

A. Strengthening the Doctrine

One possible solution would be to modify the doctrine in a way that makes it more workable. For example, a modification could lower the level of frustration required to succeed with the defense.[183] Requiring a lower level of frustration could serve to make the differences between the doctrines of frustration and impossibility more easily discernable.

---

[173] *See supra* text accompanying notes 152–64.

[174] *See supra* Part II.

[175] *See supra* text accompanying notes 38–58.

[176] *See* discussion *supra* Part II.A.

[177] *See* discussion *supra* Part II.B.

[178] *See infra* Part III.A.

[179] *See infra* Part III.B.

[180] *See infra* Part III.B.1.

[181] *See infra* Part III.B.1.

[182] *See infra* Part III.B.1.

[183] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981) ("Where, after a contract is made, a party's principal purpose is substantially frustrated . . . .").

As it currently stands, courts may be interpreting the requirement that frustration be "substantial" to mean that the object of the contract must have been totally frustrated.[184] After all, comment a to section 265 states that "[t]he frustration must be *so severe* that it is not fairly to be regarded as within the risks that [were] assumed under the contract."[185] A belief that total frustration of purpose is required, or, in other words, that the object of the contract be impossible to achieve, is very similar to the doctrine of impossibility, which requires that performance have been rendered impossible or impracticable.[186] If a lesser degree of frustration was required, the two doctrines would be more easily distinguishable.

While such a solution might initially seem promising, it would inevitably interfere with the power of parties to contract.[187] Contractual stability is important to parties.[188] The binding and enforceable nature of contracts are largely why parties choose to enter into them in the first place.[189] Forming a contract with another party brings with it a sense of security; a contracting party can feel confident knowing that the other party is bound by the terms of the agreement and cannot just choose to withhold its own performance without legal consequences.[190] While

---

[184] *See* ALASKA PATTERN JURY INSTR. – CIV. 24.08B (1994) ("In Alaska, total frustration appears to be required."); *see also* Wassink v. Hawkins, 763 P.2d 971, 975 (Alaska 1988) ("The doctrine of frustration excuses a party from performance where the object of the contract has been rendered *impossible* or commercially impractical." (emphasis added)).

[185] RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (AM. L. INST. 1981) (emphasis added).

[186] *See id.* § 261 cmt. d ("Although the rule stated in this Section is sometimes phrased in terms of 'impossibility,' it has long been recognized that it may operate to discharge a party's duty even though the event has not made performance absolutely impossible.").

[187] *See* Next Gen Cap., LLC v. Consumer Lending Assocs., LLC, 316 P.3d 598, 600 (Ariz. 2013) ("Moreover, long ago we recognized that the doctrine [of frustration] 'has been severely limited to cases of extreme hardship so as not to diminish the power of parties to contract . . . .'" (quoting Garner v. Ellingson, 501 P.2d 22, 24 (Ariz. Ct. App. 1972) (citing Lloyd v. Murphy, 25 P.2d 47, 50 (Cal. 1944)))).

[188] *Cf.* Jay M. Feinman, *Teaching Economic Torts*, 95 KY. L.J. 893, 908 (2007) ("Contractual stability is an important social value, and it must be protected from attack . . . .").

[189] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. e (AM. L. INST. 1981) ("The legal remedies available when a promise is broken are of various kinds."); *id.* cmt. g ("A promise which is a contract is said to be 'binding.'"); *see also How to Form a Valid Contract*, ROCKET LAW., https://www.rocketlawyer.com/gb/en/quick-guides/how-to-form-a-valid-contract (last visited Nov. 15, 2019) [https://perma.cc/A3E5-V5E7] ("Contracts ensure that your interests are protected by law and that both parties will fulfil[l] their obligations as promised. If a party breaks the contract, there will be certain solutions available to the parties . . . .").

[190] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. g (AM. L. INST. 1981) ("[T]he word 'binding' or a statement that the promisor is 'bound' is used to indicate that the

there certainly are some situations in which the contract may be rescinded and performance nevertheless discharged, these constitute exceptions to the rule and are not readily granted.[191] By lowering the required level of frustration and thereby increasing the scope of the defense, parties would effectively be exposed to greater uncertainty. If the number of circumstances in which one party's performance could be excused and the contract left unperformed were to increase dramatically, parties would be less willing to enter into contracts to begin with.[192] Such a result would appear to be undesirable.[193]

This concern has been voiced by a handful of courts, not just with respect to the doctrine of frustration, but also in relation to other doctrines that operate to excuse performance.[194] In *Ferguson v. Ferguson*, the Florida court expressed the following opinion: "Because of the central importance placed upon the enforceability of contracts in our culture, the defense of impossibility (and its cousins, impracticability and frustration of purpose) must therefore be applied with great caution . . . ."[195] This echoes the earlier point that the binding and enforceable nature of contracts are what enhance their appeal.[196] If the occurrence of nearly any event could operate to excuse performance, the enforceability of contracts would be little more than window dressing. In a similar vein, in *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*, the Appellate Court of Illinois for the Third District

duty arises if the promisor has full capacity, if there is no illegality or fraud in the transaction, if the duty has not been discharged, and if there are no other similar facts which would defeat the prima facie duty which is stated."); *see also How to Form a Valid Contract*, *supra* note 189.

191 These exceptions include, among others, the defenses of impossibility or impracticability and frustration of purpose. *See Next Gen Cap., LLC*, 316 P.3d at 600 ("Moreover, long ago we recognized that the doctrine [of frustration] 'has been severely limited to cases of extreme hardship so as not to diminish the power of parties to contract . . . .'").

192 *See supra* text accompanying notes 190–91.

193 *See* discussion *infra* notes 195–201.

194 *See, e.g.*, Ferguson v. Ferguson, 54 So. 3d 553, 556 (Fla. Dist. Ct. App. 2011) ("Because of the central importance placed upon the enforceability of contracts in our culture, the defense of impossibility (and its cousins, impracticability and frustration of purpose) must therefore be applied with great caution if the contingency was foreseeable at the inception of the agreement."); N. Ill. Gas Co. v. Energy Coop., Inc., 461 N.E.2d 1049, 1059 (Ill. App. Ct. 1984) ("Frustration of purpose, commercial frustration as the doctrine has been called in Illinois, is a viable defense but is not to be applied liberally."); Shop 'N Save Warehouse Foods, Inc. v. Soffer, 918 S.W.2d 851, 863 (Mo. Ct. App. 1996) ("The doctrines of mutual mistake and commercial frustration are meant to have limited applications so as to preserve the certainty of contracts.").

195 *Ferguson*, 54 So. 3d at 556.

196 *See supra* notes 189–91 and accompanying text.

took the view that if a change in prices could be considered sufficient enough to excuse performance under the doctrine of frustration, "then the law binding contractual parties to their agreements [would be] no more."[197] This opinion mirrors the belief that expanding the scope of the defense of frustration would increase the uncertainty surrounding the formation and performance of contracts and render their binding nature a mere shibboleth. Finally, in *Shop 'N Save Warehouse Foods, Inc. v. Soffer*,[198] the Missouri court took a similar stance on the issue. In rejecting the defenses of mutual mistake and frustration of purpose, the court justified its conclusions on public policy grounds.[199] In doing so, it ended its discussion with the following statement: "The doctrines of mutual mistake and commercial frustration are meant to have limited applications so as to preserve the certainty of contracts."[200] Once again, this statement supports the view that if an unlimited number of circumstances were capable of excusing performance under a contract, parties would thereby be exposed to greater uncertainty. This, in turn, would cause people to be more hesitant to enter into contracts.

B. Abolishing the Doctrine

Seeing as how modifying the doctrine would interfere with the power of parties to contract, a better solution would be to abolish the doctrine altogether. In its stead, parties could simply draft their agreements to include an additional "force-majeure" type of clause providing for rescission of the contract, given the occurrence of certain agreed-upon, supervening events.[201] According to Black's Law Dictionary, a force-majeure clause is "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled."[202] As the definition indicates, the traditional force-majeure clause is designed to allocate the risk of loss that may occur if *performance* becomes impossible or impracticable.[203] It has not traditionally been thought of as a mechanism for allocating the risk of loss that may be associated with frustration of contractual purpose.[204]

197 *N. Ill. Gas Co.*, 461 N.E.2d at 1059.

198 *Shop 'N Save Warehouse Foods, Inc.*, 918 S.W.2d 851.

199 *Id.* at 863.

200 *Id.*

201 *See Force-Majeure Clause*, BLACK'S L. DICTIONARY (11th ed. 2019).

202 *Id.*

203 *Id.*

204 *See id.*

Nevertheless, this does not appear to be a novel idea — various courts have either hinted at or explicitly mentioned this possibility.[205]

In *Akorn, Inc. v. Fresenius Kabi AG*, the court reasoned that if two parties are unhappy with the default rule which only allows for the excusal of performance based upon total or nearly total frustration, they can effectively lower this bar, through a contractual provision, to instead provide for excusal whenever the value of performance has "materially" or "significantly" diminished.[206] While this court was quite explicit in encouraging parties to lower the bar for a successful frustration defense through the power of contract, other courts have taken a more subtle approach.[207] Instead of encouraging parties to lower the bar altogether, these courts have simply made it clear that if a party wanted to protect itself from the occurrence of one or more supervening events in particular, that party should have provided for such an occurrence in the contract.[208]

In *Tindula v. Bauman*, the parties entered into a contract whereby the plaintiffs agreed to sell four residential lots to the defendants.[209] The defendants purchased the first two lots under the contract, and the first home was constructed.[210] Before the remaining two lots had been purchased, the defendants were advised by the County Health Department that it would no longer approve of any septic tank sewage systems.[211] As a result, the defendants refused to pay for the remaining two lots, asserting the defense of frustration of purpose.[212] On appeal, the Supreme Court of Oregon rejected the defense of frustration and

---

[205] *See, e.g.*, Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300, 2018 WL 4719347, at *57 (Del. Ch. Oct. 1, 2018) (discussing the possibility of parties including a provision that lowers the bar of what needs to be performed for a contract if something has changed significantly); Tindula v. Bauman, 532 P.2d 785, 786-87 (Or. 1975) (stating that contracts can contain provisions that excuse a party's performance if certain circumstances occur); Estabrook v. Club Chalet of Gatlinburg, Inc., No. 133, 1988 WL 1736, at *4 (Tenn. Ct. App. Jan. 14, 1988) ("[I]t would have been a simple matter for the Defendant to have inserted an escape clause to permit cancellation of the lease in the event the contingency which both parties anticipated did not materialize.").

[206] *Akorn, Inc.*, 2018 WL 4719347, at *57.

[207] *See, e.g.*, *Tindula*, 532 P.2d at 786-87 (stating that contracts can contain provisions that excuse a party's performance if certain circumstances occur); *Estabrook*, 1988 WL 1736, at *4 ("[I]t would have been a simple matter for the Defendant to have inserted an escape clause to permit cancellation of the lease in the event the contingency which both parties anticipated did not materialize.").

[208] *See supra* note 207.

[209] *Tindula*, 532 P.2d at 786.

[210] *See id.*

[211] *Id.*

[212] *Id.*

held that the plaintiffs were entitled to specific performance.[213] In doing so, the court reasoned that the contract had not been frustrated merely because the city had decided to transfer over from a septic tank sewer system to a mass sewer system.[214] Moreover, as the court pointed out, "there was no provision in the contract excusing defendants from purchasing the lots if they were unable to secure septic tank approval."[215] The court's reasoning suggests that if such a provision had been provided for in the contract, then an event that was not otherwise sufficient to satisfy the defense of frustration would thereby have *become* sufficient.[216]

In *Estabrook v. Club Chalet of Gatlinburg, Inc.*,[217] the Court of Appeals of Tennessee made a similar observation. There, a lessor had brought action against a lessee for breach of a lease.[218] When the lessor had failed to obtain an occupancy permit for the second-floor space that was the subject of the lease, the lessee notified the lessor that it would no longer continue to honor its obligations under the lease.[219] The court ultimately rejected the lessee's argument that the contract was voidable under the doctrine of frustration, holding that it was reasonably foreseeable under the circumstances that the lessor would be unable to obtain the occupancy permit.[220] Taking it one step further, the court made the following remark: "[W]e note that it would have been a simple matter for the Defendant to have inserted an escape clause to permit cancellation of the lease in the event the contingency . . . did not materialize."[221]

These statements all serve to cast light upon the inherent power that parties possess to structure their agreements as they see fit.[222] For example, if two parties agree amongst themselves that a change in the law should not be considered a sufficient reason to justify rescission of a contract, they may include a provision in their agreement that states this explicitly. While expanding the scope of the defense of frustration as a whole would increase uncertainty, encouraging parties to take

213 *Id.* at 786-87.

214 *Id.*

215 *Id.* at 786.

216 *See id.* at 786-87.

217 *See* Estabrook v. Club Chalet of Gatlinburg, Inc., No. 133, 1988 WL 1736, at *4 (Tenn. Ct. App. Jan. 14, 1988).

218 *Id.* at *2.

219 *Id.*

220 *Id.* at *4.

221 *Id.*

222 *See supra* note 205.

advantage of their power to contract would do just the opposite. As it currently stands, the doctrine of frustration is being applied rather inconsistently.[223] Whether a particular supervening event will be considered sufficient to satisfy the defense of frustration will depend in part on where the case is adjudicated.[224] While a change in the law may be sufficient to justify rescission in one jurisdiction, it may prove insufficient in another.[225] If, on the other hand, the parties provide for the occurrence of a particular supervening event through a provision in their contract, the uncertainty is eliminated. Based on their agreed upon terms, both parties will know exactly which events will and will not trigger rescission.

1. Potential Criticisms of This Solution

There are a few arguments that may be made against abolishing the doctrine of frustration that are worth mentioning. As previously discussed, force majeure clauses are commonly included in contracts to account for the occurrence of any number of events that may render performance impossible.[226] Nevertheless, the doctrine of impossibility still exists and is adjudicated.[227] Why then, should the doctrine of frustration be abolished in its entirety?

The answer to this question may be found by comparing the relative difficulties in application of the two doctrines. The doctrine of impossibility is easier to adjudicate than the doctrine of frustration.[228] It is easier to determine whether or not performance has been rendered impossible or extremely impracticable than it is to determine whether the value of performance has been substantially frustrated.[229] While the former usually involves more of a black-and-white analysis, the latter

223 *See supra* Part II.

224 *See supra* Part II.

225 *Compare* Harford Cnty. v. Town of Bel Air, 704 A.2d 421, 432 (Md. 1998) (finding the change in state and federal environmental regulations to be foreseeable and concluding that the requirements under the frustration doctrine were not met), *with* Matheny v. Gila Cnty., 710 P.2d 469, 472 (Ariz. Ct. App. 1985) ("These facts compel our conclusion that it was impossible to foresee in July 1980 that legislation would become law causing the contract to be commercially frustrated and useless to the county.").

226 *Force-Majeure Clause*, BLACK'S L. DICTIONARY (11th ed. 2019).

227 *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981) and accompanying case citations.

228 *Compare id.* cmt. d (describing various situations in which performance may be rendered impracticable), *with id.* § 265 cmt. a (merely stating that frustration must be "substantial").

229 *See supra* note 228.

will often involve a larger gray area. Whether or not performance has been rendered impracticable is an objective determination.[230] Conversely, determining whether or not the value of one party's performance to the other has been substantially destroyed involves both objective and subjective considerations.[231] This is due in part to the fact that parties sometimes place idiosyncratic value on a performance.[232] Seeing as how the doctrine of impossibility is easier to adjudicate, the risk that courts will apply it incorrectly is presumably lower.

Another argument against abolishing the doctrine concerns the possibility of unintended consequences resulting from the proliferation of force majeure clauses. Through the use of individualized force majeure clauses, parties with stronger bargaining power may be able to bully their less powerful counterparts into entering into contracts with suboptimal terms. For example, a party known to be the largest player in a particular industry could easily pressure a smaller party into agreeing to less-than desirable terms, knowing that the smaller party is desperate to do business with them.

This argument, while certainly valid from a normative perspective, is not the kind that contract law is typically concerned with. As previously discussed, courts are quick to note that parties to a contract possess the freedom to structure their agreements as they so please.[233] This is further evidenced by several courts' discussions regarding bargaining power. In general, courts tend to assume that both parties to a contract are sophisticated parties with relatively equal bargaining power.[234] In some instances, they have even gone so far as to suggest that a party that appears to have greater bargaining power use that power "to shift [the]

---

[230] *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. e (AM. L. INST. 1981) ("This Section recognizes that if the performance remains practicable and it is merely beyond the party's capacity to render it, he is ordinarily not discharged . . . .").

[231] *See id.* § 265 cmt. a ("The object must be so completely the basis of the contract that, *as both parties understand*, without it the transaction would make little sense." (emphasis added)).

[232] *See id.* (stating that the purpose that has been frustrated must have been understood *by the parties* to have been the basis of the contract).

[233] *See supra* notes 206–21 and accompanying text.

[234] *See, e.g.*, Stanley Works v. Halstead New Eng. Corp., No. CV010506367S, 2001 WL 651208, at *4 (Conn. Super. Ct. May 18, 2001) ("It is noteworthy that, in the majority of the cases . . . the disputed agreement was a commercial contract between sophisticated commercial parties with relatively equal bargaining power."); Prudential Res. Corp. v. Plunkett, 583 S.W.2d 97, 100 (Ky. Ct. App. 1979) ("Plunkett dealt with Prudential at arms length . . . and they entered into a sophisticated drilling contract. We see no disparity of bargaining power.").

risk to the purchaser . . . by contracting for a 'force majeure' clause."[235] This lends further support to abolishing the doctrine altogether.

CONCLUSION

The doctrine of frustration, as codified in section 265 of the *Restatement (Second) of Contracts*,[236] has had a tumultuous history.[237] The earliest studies conducted on the doctrine revealed that its success rate was dismal.[238] Today, the doctrine has been successfully asserted as a defense to the enforceability of a contract in eighteen states.[239] Despite this, a survey of the current caselaw reveals that many courts are incorrectly applying the doctrine.[240] Some are incorrectly applying it,[241] while others are treating the doctrine as being synonymous with the doctrine of impossibility.[242] Both approaches increase the risk that the defense will fail in some situations in which it otherwise should have succeeded.[243] This, in turn, furthers the doctrine's unreliability.[244]

In light of the inconsistencies surrounding the doctrine's application, this Note argues that the best solution is to abolish the doctrine entirely.[245] In place of the doctrine, contracting parties should be encouraged to include a clause within their agreement, similar to a force-majeure clause, which provides for rescission of the contract given the occurrence of certain agreed upon supervening events.[246] Such a solution would not only reinforce the power of parties to contract, but also decrease any uncertainty surrounding the contract's enforceability.[247]

---

235 United Techs. Corp. v. Citibank, N.A., 469 F. Supp. 473, 480 (S.D.N.Y. 1979).
236 RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. L. INST. 1981).
237 *See* discussion *supra* Part I.B.
238 *See* Anderson, *supra* note 3, at 1; Chapman, *supra* note 3, at 106.
239 *See supra* notes 38–55.
240 *See supra* Part II.
241 *See supra* Part II.A.
242 *See supra* Part II.B.
243 *See* discussion *supra* Part II.
244 *See* discussion *supra* Part II.
245 *See supra* Part III.
246 *See supra* Part III.
247 *See supra* Part III.