

HEALTH CRISES AND THE LIMITED ROLE OF CONTRACT LAW

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I

INTRODUCTION

The COVID-19 pandemic has focused our attention on contract law's response when unanticipated circumstances make performance impractical or frustrated, or performance would harm the public. The pandemic disrupted contracts between landlord and tenant, employer and employee, universities and students, to name a few, but has contract law provided a clear path to determine who must bear the risk of loss of such events?¹ The purpose of this article is to suggest that current contract law's many and varied, sometimes even contradictory, rules and principles relevant to shaping a response to a health crisis can offer only limited guidance to courts and lawyers in challenging cases.² Further, contract law's uncertainty in these cases reinforces the perspective that judicial decisions in contract cases (and more generally) often depend not on doctrine, but on a pragmatic analysis of the facts, policies, and equities.³ Although this taste of realism is not a revelation, in fact, there may be no better example of the limits of contract law, as administered by courts, than its response to contract

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1. See Danielle Kie Hart, *If Past is Prologue, Then the Future is Bleak: Contracts, COVID-19 and the Changed Circumstances Doctrines* 1 (Sw. L. Sch. Research Paper, Paper No. 21-01, 2021) (“At the heart of most of the systemic problems currently confronting individuals and businesses is quite literally a contract. Housing. Insurance. Food. Health Care. Child Care. Employment. Manufacturing. Construction. Supply Chains. You name it.”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785621 [<https://perma.cc/SRJ2-9W5T>]; see also Robert L. Gegios & Lance Duroi, *The Legal Domino Effect: COVID-19 & Contracts*, 93 WIS. LAW. 5 (2020) (“Clients of all sizes, and across all industries, are facing a new reality of supply disruptions, cutbacks in demand for their products and services, massive governmental prohibitions, and strains on their ability to use or maintain workers. Contracts might not be performed or available as anticipated, leading to unexpected disturbances that reverberate from business to business.”).

2. For a similar observation about long-term contracts, see Robert A. Hillman, *Maybe Dick Speidel was Right About Court Adjustment*, 46 SAN DIEGO L. REV. 595, 596 (2009) [hereinafter Hillman, *Maybe*] (“as with so many policy issues, we may never identify the *best* judicial approach to disrupted long-term contracts because resolution depends on too many variables and unknowns.”).

3. See generally ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 176 (1997) [hereinafter Hillman, *RICHNESS*] (synthesizing perspectives on modern contract law). I leave for others a discussion of how other lawmaking processes can contribute to resolving enforcement issues. See, e.g., David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979 (2021) (“these cases [are] a sort of contractual anticannon: where social, and not private, ends are the focus of contract judges.”).

disputes during a public health crisis.

Part II of this article inventories the plethora of contract law issues raised when a health crisis makes performance problematic and when no federal or state regulation is in place to resolve the dispute. Part III assesses what such circumstances reveal about the nature of contract law. First, contract law's set of responses reinforce legal theorists who have long argued that, at least in hard cases, contract law is subjective and uncertain. Second, contract law's main contribution in such cases is to identify the questions that should be asked and to provide a roadmap to follow. Part IV, the Conclusion, offers a word about post-pandemic contract law.

II

CONTRACT LAW'S TOOLS FOR DECIDING DISPUTES BASED ON HEALTH RISKS

Although analysts may sometimes overlook harm to the public as a concern of contract law, it plays an important role in cases involving unanticipated health crises.⁴ Reduced to its essentials, health-risk cases create a conflict between two public policies: avoiding harm to the public, on the one hand, and supporting parties' contractual freedom, on the other.⁵ So, before a court terminates or reforms a contract based on a health risk, the court must balance the seriousness of the risk and the cost to the public of performance against the loss of party autonomy and the economic harm of unwinding a contract.⁶

A. Factors Based on Health Risks to The Public

1. The *Hanford* Case

David Hoffman and Cathy Hwang's fine article, *The Social Cost of Contract*, reinforces the importance of the public welfare in private contract law.⁷ The authors rely in part on *Hanford v. Connecticut Fair Association*,⁸ as an example.

4. See, e.g., Eyal Zamir, *Contracts in the Time of COVID-19*, JOTWELL (Nov. 10, 2020) (reviewing Hoffman and Hwang, *supra* note 3), <https://contracts.jotwell.com/contracts-in-the-time-of-covid-19/> [<https://perma.cc/A89S-W844>]; see also Aditi Bagchi, *Other People's Contracts*, 32 YALE J. REG. 211 (2015) (criticizing the exclusive focus on the parties' interests by legal theorists and economists).

5. See Zamir, *supra* note 4 ("According to Morris Cohen's argument, any enforcement of a contract, whether it entails externalities or not, is a public matter. If so, the state must ask itself whether to use its coercive powers and spend its limited resources to enforce contracts, even when no externalities are involved.").

6. See Hoffman & Hwang, *supra* note 3, at 991 (asking about the "boundaries of acceptable private ordering"). For an effort to define the distinction between public and private law, see John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012) ("Private law defines the rights and duties of individuals and private entities as they relate to one another. It stands in contrast to public law, which establishes the powers and responsibilities of governments, defines the rights and duties of individuals in relation to governments, and governs relations between and among nations."). Professor Zamir reinforces the point that "the public always has the last word—through interpretation and enforcement of contracts in court." Zamir, *supra* note 4.

7. See generally Hoffman & Hwang, *supra* note 3.

8. 103 A. 838 (Conn. 1918).

Hanford and the Fair Association agreed in a joint undertaking to hold a baby show, with Hanford promoting, managing, and supplying prizes for the show, and the Fair Association providing the room for the show and paying Hanford \$600. The case report does not indicate when the parties signed the contract, but likely it was before the polio epidemic of 1916 caused great danger to children, many of whom died. According to the court, the contract was “absolute and unqualified,” meaning that it did not contain any terms allocating the risk of unanticipated events such as the polio epidemic.⁹ Based on the epidemic, the Fair Association cancelled the contract and Hanford sued. The Fair Association’s answer claimed that performance of the contract would conflict with the public policy of preserving the health of the public. Hanford demurred and the trial court overruled the demurrer. Hanford appealed and the court had to decide whether, as a matter of law, public policy provided a good defense.

The majority did not hesitate to affirm the trial court and overrule the demurrer. The court set forth two arguments. First, most of the opinion focused on public policy and likened the issue to cases in which performance would be immoral or would involve an overbroad covenant not to compete.¹⁰ Second, the last paragraph of the majority opinion turned to implied-term analysis. The court wrote that an implied term of the contract relieved the Fair Association of performance because “neither party contemplated that the show would be held if the public health would be endangered thereby.”¹¹ Of course, the two arguments enjoy a close relationship: if the harm to the public by performance is sufficiently serious, it is easy to conclude that neither party contemplated performance under those conditions.

One judge dissented and argued that performance was not unlawful.¹² Further, the dissent argued that decisions on whether such promotions could be held belonged with public health officials, not courts and juries.¹³

Relying on *Hanford* and similar judicial decisions, Hoffman and Hwang in part stress the importance of public policy in resolving current pandemic contract cases. Further, they warn lawyers and their clients to be mindful of public policy concerns when they negotiate contracts or their modifications.

2. Public Policy Issues Raised by Cases Like *Hanford*

Hoffman and Hwang point out that the public policy defense raised in *Hanford* is far from settled. This should be no surprise. Suppose the case had gone to trial. The many issues that a public policy defense would raise call into question the coherence of that defense. First, a court must evaluate the

9. *Id.* at 839.

10. *Id.* (“The court will not require the performance, or award damages for a breach, of a contract in which the public have so great an interest as the preservation of health, if the health is in fact endangered any more than it would require one to be performed the tendency of which was immoral or one which interfered with the right of everyone to earn a livelihood by a lawful occupation”).

11. *Id.*

12. *Id.*

13. *Id.*

seriousness of the health risk to the public.¹⁴ A pandemic or epidemic is not necessarily lethal. On the other hand, local health problems may be deadly. *Hanford*, of course, was a relatively easy case because the scourge of polio had become apparent, at least at the time of the litigation. But in more difficult cases, a court may be a poor arbiter of, and can only speculate on, whether contract performance would be sufficiently harmful to the public. Consider for example the challenge of a winter with a particularly virulent, but not deadly, episode of the flu.

Second, a court must determine whether appropriate safeguards can be applied so that the performance under contract would not be, in today's parlance, a super-spreader event. Perhaps attendance could be limited, or, in today's world, the event could be held via Zoom.

Third, a court must evaluate the contribution of performance to the public welfare. Positive externalities may outweigh negative ones. Most obviously, today contract terminations or adjustments and the concomitant loss of commercial activity contribute to the projected \$16 trillion dollar cost of COVID-19 to the economy.¹⁵ Courts should not ignore evidence that enforcement of contracts may help restore businesses in financial distress, ensure performance of supply chains, and, in general, constitute a net benefit to the public despite health risks.¹⁶

The baby show in *Hanford* may seem trivial, at least today, but courts also should not ignore the possibility that diversions during a health crisis may contribute to the mental health of the community. For example, stay-at-home orders during the pandemic caused rates of child abuse, depression, and hunger to increase at alarming rates.¹⁷ Lawyers in litigation over disrupted contracts should be especially cognizant of such concerns in light of evidence that serious health emergencies may affect the way triers of fact evaluate the evidence.¹⁸

14. Some issues laid out in this part would be for the trier of fact; other issues would be questions of law for the judge.

15. David M. Cutler & Lawrence H. Summers, *The COVID-19 Pandemic and the \$16 Trillion Virus*, JAMA NETWORK (Oct. 12, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2771764> [<https://perma.cc/8LWG-7AVQ>].

16. An intermediate position may reflect the use of standstill or forbearance agreements. See Jonathan C. Lipson & Norman M. Powell, *Contracting Covid: Private Order and Public Good (Standstills)*, 76 BUS. LAW. 437, 442 (2021) ("This essay looks at the . . . role that ex ante contracting can play in ameliorating the commercial costs of COVID or similar future calamities. Specifically, we focus on standstill/forbearance agreements ("SFAs").").

17. See, e.g., Steven Reinberg, *Pandemic Lockdown Increases Child Abuse Risk*, U.S. NEWS & WORLD REP. (May 12, 2020), <https://www.usnews.com/news/health-news/articles/2020-05-12/pandemic-lockdown-increases-child-abuse-risk> [<https://perma.cc/UY4T-MV3H>]; Mark É. Czeisler, *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24–30, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 14, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm> [<https://perma.cc/2RFB-BGQF>]; Lauren Bauer, *The COVID-19 Crisis has Already Left Too Many Children Hungry in America*, BROOKINGS (May 6, 2020), <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/> [<https://perma.cc/MH4C-3SQN>].

18. See, e.g., Debra Cassens Weiss, *How Will the "Anthony Fauci Effect" Influence Jurors*, ABA J. (Feb. 4, 2021), <https://www.abajournal.com/news/article/lawyers-consider-how-the-anthony-fauci-effect->

Finally, there may be good reasons to distinguish public policy concerns in health-risk situations from more established public policy defenses, such as those that involve the enforceability of exculpation clauses and covenants not to compete.¹⁹ In the latter situations, the focus is on enforcement of a particular contract term that would nullify a contracting party's otherwise established right to compensation for another's negligence or to earn a living. However, public health cases such as *Hanford* emphasize the need to protect the public at large in light of unanticipated disruptive circumstances in which judges have little expertise. Put another way, public policy cases in other contexts may offer little guidance in health-risk situations.²⁰

A court that has entertained the issue of public health also cannot ignore the nature of the obligation created by the contract. This subject follows.

B. The “Ascending Scale of Enforceability” of Contracts

Courts in cases like *Hanford* must consider the costs of upending contracts. Contracts that persuasively meet all the requirements of enforcement create the greatest challenge to a defense based on harm to the public. Some contracts do so better than others. Although the *Hanford* court focused on the interests of the public, this subpart employs the facts of that case to inventory the series of issues necessary to evaluate the contract's strength on what Lon Fuller called the “scale of enforceability.”²¹ At stake is the freedom of contracting parties to chart their own course. But whether this freedom is strongly in jeopardy depends on how the court treats the many issues that follow.

1. Express Allocation of The Risk

First, a court must determine whether the parties expressly allocated the risk of the health crisis. As noted, the court in *Hanford* wrote that the contract was “absolute and unqualified,” meaning that the contract did not include a *force majeure* clause that might have relieved the Fair Association of its obligation.²² Conversely, if the Fair Association expressly assumed the risk of the pandemic—especially if sufficient safety features were in place or the virus at issue was not so deadly or communicable—a court likely would have enforced the contract.²³ Inevitably, some contracts will be clearer than others on the risk allocation

will-influence-jurors [<https://perma.cc/36BG-BY6X>].

19. See, e.g., *Karpinski v. Ingrasci*, 268 N.E.2d 751 (N.Y. Ct. App. 1971) (enforcing in part a non-compete covenant); *McCutcheon v. United Homes Corp.*, 486 P.2d 1093 (Wash. Sup. Ct. 1971) (voiding a lease provision exculpating the landlord from liability for personal injury).

20. See also Anthony J. Casey & Anthony Niblett, *The Limits of Public Contract Law*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 51.

21. Lon L. Fuller, *Letter from Lon L. Fuller to Karl N. Llewellyn*, in *CONTRACT AND RELATED OBLIGATION* 47 (Robert S. Summers, Robert A. Hillman, & David A. Hoffman eds., 2021) (asserting the “hierarchy of contracts interests” and rejecting the “contract-no contract dichotomy”).

22. *Hanford v. Conn. Fair Ass'n*, 103 A. 838, 839 (Conn. 1918).

23. *But see Hoffman & Hwang*, *supra* note 3, at 1013 (“[P]ublic policy analysis cannot be easily defeated by showing that a party knew what it was getting into, assumed the risks by contract, or was somehow otherwise at fault.”).

issue.²⁴ In the cases that are less clear, the tools of contract interpretation will present a set of issues to determine the meaning of the language, including what evidence is admissible under the parol evidence rule.²⁵

Even if the parties have clearly allocated the risk of serious health disruptions, a court must determine whether defenses to enforcement nevertheless exist. For example, a court must consider whether the assignment of risk is unconscionable, which requires an examination of the contract's formation and the fairness of the substantive risk allocation. *Hanford* involved two businesses engaged in a joint venture in which there were no apparent disparities in bargaining power. But in other contexts in which one party may dictate terms, such as landlord-tenant, employer-employee, and retailer-supplier, the assignment of risk may "shock the conscience," rendering it unenforceable. In the garment industry, for example, a supply contract drafted by a commercial brand on a take-it-or-leave-it basis reserved for the brand the right to cancel in their sole discretion even after the supplier completed manufacture and shipped the goods.²⁶ Such a contract term tests the limits of freedom of contract.

Harm to the public, of course, is another defense even if the contract expressly allocates the risk.²⁷ A court faces the greatest challenge in this context. The court must carefully evaluate each of the factors that comprise the public health defense reviewed above against the importance of enforcing express contract terms. Analysis of this challenge helps reveal the limitations of contract law in hard cases, which is the subject of Part III of this article.

2. Implied-in-Fact Allocation of Risk

If the contract is silent on the allocation of health risks, as in *Hanford*, a court must investigate whether the parties in fact intended to assign the risk, despite failing to do so expressly. This search for the implied-in-fact risk allocation is common to both impracticability and frustration cases, and would require determining from all of the circumstances whether the parties reasonably expected one of them to bear the risk of the health crisis. Recall that the majority in *Hanford* employs just such reasoning—"neither party contemplated that the show would be held if the public health would be endangered thereby"²⁸—and

24. See, e.g., *Burt v. Bd. of Trs. of the Univ. of R.I.*, 523 F. Supp. 3d 214, 221–28 (D. R.I. 2021) (finding no express or implied contract promising on-campus learning despite advertisements, brochures, and catalogs suggesting as much).

25. See Bagchi, *supra* note 4 (interpreting ambiguous contracts to protect third parties from negative externalities).

26. See, e.g., Jeff Vogt, Miriam Saage-Maab, Ben Vanpeperstraete, & Ben Hensler, *Farce Majeure: How Global Apparel Brands Are Using the COVID-19 Pandemic to Stiff Suppliers and Abandon Workers*, EUR. CTR. FOR CONST. & HUM. RTS. (Sep. 2020), <https://www.ecchr.eu/en/publication/die-ausrede-der-hoeheren-gewalt/> [<https://perma.cc/8RZ3-9N7V>].

27. Hoffman & Hwang, *supra* note 3, at 1005 (suggesting "that in this future mass of cases, judges are likely to at least consider how private contract performance affects public health risk. COVID-19, an unanticipated event that vastly increased the public harm of some contract performances, may spur courts to refuse to enforce, or reinterpret, contracts in ways the parties have not contemplated.").

28. *Hanford v. Conn. Fair Ass'n*, 103 A. 838, 839 (Conn. 1918).

the court therefore assigned the risk to Hanford. However, the court failed to substantiate this assertion, so the implied-in-fact analysis is not very persuasive. At a trial, probative, but not definitive, evidence would be a showing of what the parties knew about the polio epidemic when they made the contract. The traditional, but somewhat archaic, reasoning of contract law is that foreseeability of the disrupting event plays an important role; if the Fair Association knew or should have known of the dangers of polio at the time of contracting, and did not protect itself in the contract, it must have intended to bear the risk of the epidemic.²⁹

Cases in which the court finds an alleged promise unenforceable because of health risks should be less controversial if the promise at issue is not express, especially if the risks to the public are compelling. Such implied-in-fact risk allocation cases present less autonomy concerns because the parties' intentions are not as firmly established or at least as objectively determinable. For example, consider *Burt v. Board of Trustees of the University of Rhode Island*,³⁰ where students sought tuition reductions against four Rhode Island universities that moved to remote learning in the face of the COVID-19 pandemic. Plaintiffs argued that "university publications, including websites, marketing materials, course catalogs, and other resources" constituted contract promises of on-campus learning.³¹

Despite the dramatic change in student experiences when the universities moved to remote learning, the court dismissed the breach of contract allegations, stating that: "Plaintiffs' complaints fail to identify any contractual terms that obligate the universities to provide in-person, on-campus instruction. Simply, no plausible reading of the university materials cited by Plaintiffs gives rise to enforceable contractual promises."³² The court reasoned that the materials, including advertisements, brochures, and catalogs, were too vague and amounted to no more than puffery. Further, more specific course descriptions and registration materials did not constitute actionable promises because the universities reserved the right to change them.³³

The plaintiffs fared no better by arguing that the universities breached implied-in-fact contracts based on "usual and customary practices."³⁴ The court noted that, "nothing in the universities' conduct suggests an intent to promise access to in-person education."³⁵ Instead, the court surmised that "the universities reserved their rights for situations just like what occurred in 2020—unexpected events, in this case a global pandemic."³⁶

29. See Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 625 (1983) [hereinafter Hillman, *Cessation*].

30. 523 F. Supp. 3d at 214.

31. *Id.* at 221.

32. *Id.*

33. *Id.* at 222.

34. *Id.* at 222–223.

35. *Id.* at 223.

36. *Id.*

The reference to the pandemic strongly suggests that the primary motivation for the court's conclusion was not contract law, but was the COVID-19 pandemic:

[T]his Court cannot possibly read an obligation for in-person education, let alone during a global pandemic, into the universities' contracts with students . . . [T]he unique nature of this moment warrants emphasis . . . Defendants were responding to the remarkable circumstances of this pandemic—which has upended countless aspects of our society's usual and customary practices.³⁷

Burt v. Board of Trustees thus was a relatively easy case because of the absence of express promises and, according to the court, a very serious pandemic.

3. Gap-Filling

If there are no identifiable express or implied-in-fact allocations of health risks, the court's next step would be to fill the gap. In this context, the seriousness of harm to the public should play an enhanced role because the public policy argument does not have to contend with a strong competing policy of freedom of contract. So, in a case like *Hanford*, the court could have acknowledged that the parties left a gap and that the court was going to fill it based on the health dangers to the public of performance.

If health risks are not sufficiently serious to end the debate, a court may fill the gap in cases like *Hanford* by seeking to determine what the parties would have wanted had they dealt with the exigency.³⁸ Some courts, favoring an economic analysis, would reason that had *Hanford* and the Fair Association anticipated the epidemic they would have allocated the risk to the party best able to bear it. This approach to gap-filling appeals to some courts both on freedom of contract and efficiency grounds, the former because it simulates most closely the parties' intentions and the latter because it reduces future transaction costs.³⁹ As one take on efficiency theory goes, by assigning the risk to the "superior risk bearer or avoider," contract law reduces the overall cost of contracting because similarly situated future parties would favor this approach and avoid the costs of bargaining to replace a different gap-filler.⁴⁰

A more sophisticated gap-filling approach with economic overtones requires attention to the incentives created by the particular gap-filler.⁴¹ A decision in

37. *Id.* at 222–223. Plaintiffs were more successful on a related breach of contract claim for the universities' failure to provide promised fee-based on-campus services: "Plaintiffs make plausible claims that they reasonably expected certain services—ranging from recreational programs to room and board—in exchange for the fees they paid." *Id.* at 224.

38. Hillman, *Cessation*, *supra* note 29, at 628.

39. The strategy has met some resistance. *See, e.g., Dalton v. Robert Jahn Corp.*, 146 P.3d 399, 410 (Or. Ct. App. 2006) ("While a court may allow exceptions for 'subordinate details of performance,' it cannot 'under the guise of "filling gaps" make the contract which it thinks the parties would have agreed to.'") (quoting *Booras v. Uyeda*, 666 P.2d 791 (Or. 1983)); *but see Great Am. Ins. Co. v. Honeywell Int'l Inc.*, No. 05-857, 2009 WL 5064478 (W.D. Pa. 2009).

40. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 93 (4th ed. 1992); *see also United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1137 (E.D. Cal. 2001) ("[I]f no other method can adequately interpret the contractual provision in question, the court allocates the risk of the unforeseeable loss to the more efficient risk bearer.")

41. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default*

favor of the Fair Association, the argument might go, would encourage future parties in Hanford's position to take special precautions against the possibility of health issues when organizing the event so that the contract could be performed.

Courts sometimes fill gaps based on their conception of what is fair under the circumstances. For example, a court may consider how a decision in *Hanford* one way or the other affects the potential gains and losses of each party.⁴² The goal would be for each party to realize as closely as possible the benefit of the bargain.⁴³ This would not be possible in *Hanford*, of course, but the court would not want to reach a decision that is catastrophic to one of the parties and a windfall to the other. For example, under the rubric of impracticability, the greater the potential losses to the Fair Association by performance, the greater the likelihood that the court would excuse performance. But a court would also consider what Hanford expected out of the contract and whether it had already incurred significant reliance expenses. Although the court in *Hanford* did not pursue this balancing-of-interests inquiry, we can gather that Hanford likely incurred substantial reliance expenses and expected a sizable profit from the event or Hanford would not have litigated the matter. If Hanford's reliance losses and expected gains outweighed the Fair Association's potential losses by performing, excusing performance might be inappropriate under this gap-filling approach.⁴⁴

A fairness inquiry may also encompass the reasons for breach. For example, why did the Fair Association breach? Hoffman and Hwang surmise that it did so "to reduce external harms."⁴⁵ But perhaps the Fair Association had only its own interests in mind and was using the health risk as an excuse. The possibility of such bad faith of a party is relevant in deciding health disruption cases. In order to promote exchange transactions, contract law must support a party's expectations that its counterpart will cooperate in times of hardship and not take advantage of an unforeseen calamity.⁴⁶

4. Remedies

Courts also must be mindful of the remedial ramifications of a decision to enforce or excuse contract performance. Hoffman and Hwang appear sympathetic towards a risk-splitting solution but, as they point out, thus far courts

Rules, 99 YALE L.J. 87, 104 (1989).

42. See Hillman, *Cessation*, *supra* note 29, at 629–34 (explaining that in comparing parties engaged in cessation disputes, courts balance the potential gains and losses of each party); see also *Dato v. Mascarello*, 557 N.E.2d 181, 184 (Ill. App. Ct. 1989) ("[I]t was proper for the trial court to supply terms which it determined to be reasonable, either by construing the expressed terms together with the circumstances surrounding and occurring subsequent to the formation of the contract, or on the basis of fundamental principles of fairness, or both.").

43. Hillman, *Cessation*, *supra* note 29, at 638–39.

44. See Hoffman and Hwang, *supra* note 3, at 1004, ("If there is a common thread that runs through these cases, it is the court's interest in finding equitable solutions.").

45. *Id.* at 979.

46. Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 17 [hereinafter Hillman, *Court Adjustment*].

and analysts have not favored such a response.⁴⁷ The court in *Hanford*, for example, did not pursue such an inquiry. The principal objection to a court-mandated sharing of the costs of disruptions are that courts lack the competence and authority to reformulate the parties' exchange.⁴⁸

This argument is rebuttable. Sufficient evidence of the parties' goals derived from a thorough examination of the language and circumstances of the contract may offer guidance on how to fashion remedies to reflect what the parties were trying to achieve.⁴⁹ Further, as to the power of courts, the parties may expect flexibility and cooperation from their counterpart during disruptions and even a willingness to share losses. If evidence supports such a "relational" contract, then court adjustment is just a form of specific performance of the contract.⁵⁰

Suffice it to say, however, that a loss splitting approach in cases like *Hanford* remains unlikely. Still, a court inclined to cancel the contract must consider each party's reliance expenses and any benefit conferred on the other party. For example, should the Fair Association recover the \$600 as restitution, if already paid to Hanford under the contract? Courts have not been consistent in treating such issues.⁵¹

III

HARD CASES AND CONTRACT LAW'S LIMITED GUIDANCE

The survey in Part II reviews the challenges a court faces when a party defends a breach of contract action based on unanticipated health risks. This part raises the more general question, does contract law offer a clear path to a decision in hard contract cases of *any kind*, or are courts mainly on their own to "reason [their] way to a result"?⁵² What lessons can we learn from the health-risk cases?

47. Hoffman and Hwang, *supra* note 3, at 995; *see also* Hillman, *Court Adjustment*, *supra* note 46, and sources cited therein.

48. Courts lack the ability to "invent viable new designs for disrupted enterprises, now gone awry, that the persons most concerned had tried to construct but without success." John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1, 37 (1984).

49. Hillman, *Court Adjustment*, *supra* note 46, at 20–21.

50. *See* Hillman, *Maybe*, *supra* note 2, at 595; *see also* Aluminum Co. of Am. v. Essex Group, Inc. 499 F. Supp. 53, 79 (W.D. Pa. 1980) (a leading, but highly criticized, case on court adjustment of contracts, stated that reformation of the formula for determining the price of ALCOA's conversion of alumina to aluminum would "preserve the purposes and expectations of the parties" and was "essential to avoid injustice."). "[M]uch of the criticism has focused on the court's determination that ALCOA did not assume the risk of the rise in costs of the magnitude it had experienced, not on the court's decision to adjust the contract assuming some relief was in order." Hillman, *Maybe*, *supra* note 2 at 598.

51. Some courts have awarded reliance expenses to the losing party, others have limited the recovery to benefit conferred. Still others "leave the parties where they find them." *See* ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 370–371 (4th ed. 2019).

52. Clay Risen, *Ralph K. Winter Jr., a Top Conservative Judicial Mind, Dies at 85*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/18/us/ralph-k-winter-jr-dead.html> [<https://perma.cc/R4B7-UGEB>]. In the context of health disruption cases, *see also* Hoffman and Hwang, *supra* note 3, at 1005 ("Our prediction is far from bankable: many factors, including the proximity of the pandemic's spread to the court decision, the parties' relative fault, the actions and signaling by public health authorities, and the specificity of contract terms about risk, will influence courts' dispositions of COVID-19 cases.").

Some cases are easy and contract doctrine leads the way.⁵³ Consider, for example, an express assignment of the risk of minor health disruptions, such as an outbreak of the common flu. Conversely, consider a contract silent on the risk of a serious epidemic, as in *Hanford*. Courts should have no trouble enforcing the contract and excusing performance respectively. However, think about a more difficult case in which performance would lead to serious adverse consequences for the public, but the contract expressly and clearly assigns the risk to the party seeking to avoid the contract. Consider also a case where the health risk's seriousness and the contract's risk allocation are both debatable. Courts will be hard-pressed to resolve the clash of interests between the public and freedom of contract based on the set of rules, qualifications, exceptions, and contradictions of contract law.⁵⁴ Such cases are an excellent example of contract law's general uncertainty in difficult cases.⁵⁵

The lack of a clear path is not difficult to explain. Contract doctrine seeks to promote autonomy, but at the same time to support collective interests.⁵⁶ However, contract law does not provide a coherent formula for harmonizing these norms. Precisely when are the dangers to the public in health disruption cases or, for that matter, the costs of dismantling a contract in other contexts, serious enough to defeat society's interest in contract performance?⁵⁷ Ultimately, in hard cases, such as health-disruption cases, judges must resort to their own views of the seriousness of the disruption and how to balance contrary public policies.

Although contract law is far from conclusive in difficult cases, judges do not have unlimited discretion.⁵⁸ As Part II describes, contract law offers a set of instructions, a roadmap, for deciding cases, by identifying the questions to be asked and the facts to ascertain: “[I]legal doctrines . . . represent . . . time-tested approaches for determining what facts are relevant, why they are relevant, and

53. Alvin B. Rubin, *Judges and the Critical Legal Studies Movement*, SYLLABUS: ABA SECTION OF LEGAL EDU. & ADMISSION TO BAR, June–Sept. 1987 at 6. The Critical Legal Studies (“CLS”) movement referred to a “fundamental contradiction” between freedom of the individual and the importance of relations with others. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 205, 211–213 (1979); see also Jay M. Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. REV.* 829, 844–47 (1983).

54. For an early case assessing the COVID-19 defense, where the court followed the contract allocation of risk, see *Martorella v. Rapp*, 17 *MISC* 00634, 2020 WL 2844693 (Mass. Land Ct. 2020) (purchaser, husband, could not get back his deposit for a land sale even though he could not get financing due to COVID-19 and his wife contracted the disease).

55. This problem is not limited to health disruption cases, of course—cases involving application of principles such as good faith and unconscionability, cases analyzing whether a party has materially breached, and cases seeking to determine whether a promise was supported by consideration, are only the tip of the iceberg.

56. “For each individualist rule designed to ensure freedom of contract, contract law provides, and judges may select, a counter rule designed to further collective interests . . .” Hillman, *RICHNESS*, *supra* note 3, at 193 (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1700 (1976)).

57. See *id.* at 192 (citing Feinman, *supra* note 53, at 844–47 (1983)).

58. *Id.* at 173 (citing Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199, 208–09 (1984)).

the degree of strength of the relevance.”⁵⁹

By tradition, courts also look for “complementary strands” in their reasoning as they move towards decisions guided by their overall “judgment.”⁶⁰ Further, judicial norms, such as the obligation to consider carefully legal arguments and to pursue fairness and justice, place limits on possible results.⁶¹ In *Hanford*, for example, a court could release the Fair Association because of health risks, but the court would not forgive the Fair Association simply because it paid local taxes or contributed to the judge’s campaign chest.

For some readers, this brief discussion will bring to mind the important 1980s and 1990s exchanges between the Critical Legal Studies (CLS) movement and mainstream legal scholars. Although CLS scholars did not all speak with one voice, many took their cue from the legal realists who described the limitations of doctrine.⁶² These CLS writers argued that contract law was mainly indeterminate because of contradictory rules and principles and competing policies.⁶³ The writers explained that rule indeterminacy was inevitable because of countervailing, but ingrained, American values, namely individualism and communitarianism.⁶⁴ Mainstream scholars thought that CLS exaggerated contract law’s lack of direction, and the mainstream distinguished between easy and hard cases.⁶⁵ The mainstream also emphasized the guidance of the roadmap revealed by doctrine.⁶⁶ The discussion in this article reinforces an earlier conclusion of this author that “contract law is probably not as indeterminate as CLS wants to claim and not as objective as the mainstream would like.”⁶⁷

IV

CONCLUSION: WHAT DOES THE FUTURE HOLD?

Professors Hoffman and Hwang forecast that arbitrators will decide many COVID-19 contract cases, leading to more compromise and adjustment of obligations.⁶⁸ Another possibility is that parties will be less likely to turn to formal dispute resolution, but instead will negotiate a compromise themselves.⁶⁹ The

59. Walter Oberer, *On Law, Lawyering and Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203, 205 (1989).

60. Stephen Waddams, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO AMERICAN LEGAL REASONING 191 (2003).

61. Hillman, RICHNESS, *supra* note 3, at 181.

62. *Id.* at 191.

63. *Id.*

64. Feinman, *supra* note 53, at 844–47.

65. Hillman, RICHNESS, *supra* note 3, at 178–79.

66. *Id.* at 209.

67. *Id.* Further, “the various norms of contract law reflect the major social, economic, and institutional forces of a pluralistic society. Not only do these norms often clash, but they are themselves frequently internally inconsistent.” *Id.* at 268.

68. “COVID-19 and contract performance’s potential to amplify health risk only further tilts courts and arbitral tribunals toward compromise and reformation.” Hoffman & Hwang, *supra* note 3, at 1012–13.

69. Courts and arbitrators already may be moving toward compromise solutions: “COVID-19 and

complexity of the law around disrupted events, spelled out in this article, may create incentives for such an outcome, at least in relational contract settings, where the parties frequently interact and expect flexibility and compromise in the face of unexpected events.⁷⁰

In the post-pandemic future, lawyers will draft more ironclad *force majeure* clauses that expressly assign the risk of health disruptions.⁷¹ If the contract clearly does so, and in the absence of a persuasive unconscionability defense, interpretation and gap-filling issues recede in importance. But good drafting will bring to a head the clash of public policies: courts will be required to balance the benefits of protecting the public against the costs of intruding into private affairs. The result inevitably will be greater scrutiny of the efficacy of the public policy defense. In light of the limits of contract law in this regard, perhaps such issues should be in the hands of federal and state regulators, with greater resources and expertise to balance the seriousness of the crisis against the value of freedom of contract.⁷² On the other hand, politics may intrude and render such an approach unsatisfactory as well, a subject beyond the scope of this paper and ably handled by others.⁷³ Solutions to the challenge of health crises and contract law ultimately may depend on what is the “least bad” approach.⁷⁴

contract performance’s potential to amplify health risk only further tilts courts and arbitral tribunals toward compromise and reformation.” Hoffman & Hwang, *supra* note 3, at 1012–13.

70. Hillman, RICHNESS, *supra* note 3, at 244.

71. See Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020), <https://www.stanfordlawreview.org/online/contracts-and-COVID-19/> [https://perma.cc/LV35-J4XD] (predicting revision of *Force Majeure* clauses that may lead to lower prices or abandonment of deals).

72. See, e.g., Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–9141 (2020) (halting foreclosures and evictions); Martorella, 17 MISC 00634, 2020 WL 2844693 at *10 (“Perhaps recognizing the sometimes harsh consequences of Massachusetts contract law, the Massachusetts legislature has passed at least one statute during the COVID-19 emergency that arguably has the effect of modifying certain private agreements”); see CARES Act, c. 65 (limiting rights of lessors, creditors and mortgagees during the state of emergency); but see Hoffman & Hwang, *supra* note 3, at 997 (“When risks increase sharply post-formation, policing through court decisions—in a sense the least appealing and effective constraint on risk-taking—is the least bad option available.”); Lipson & Powell, *supra* note 16 (controversial political issues may impede effective regulation).

73. See, e.g., Lipson & Powell, *supra* note 16, at 438 (“too often the responses have been politically controversial, poorly executed, or excessively costly”).

74. Hoffman & Hwang, *supra* note 3, at 997.