

A COMMENT ON HILLMAN, *HEALTH CRISES*

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In 2018, Jasmine and Robert Nicholson contracted with the Wurzak Hotel Group, a Hilton franchisee in Philadelphia, to host their wedding, which was to occur on September 9, 2020. When COVID-19 hit, the city prohibited indoor gatherings. The Hotel suggested that the Nicholsons postpone their wedding to some future date.

But the Nicholsons' love couldn't wait. They instead asked for a refund. The Hotel refused. It pointed to a clause in its contract that seemed to grant it the exclusive right to terminate, which it had no intention of exercising. The clause (typos and all) read:

Excused Non-Performance: If for any reasons beyond its control, including, but not limited to, strikes, labor disputes, accidents, government requisitions, restricts or regulations on travel, commodities or supplies, acts of war, or acts of God, Operator is unable to perform its obligations under this agreement, such non performance is excused and operator may terminate this agreement without further liability of any nature, upon return of Patron's deposit. In no event shall Operator be liable for any damages under this agreement including but not limited to consequential, actual, punitive o damages of any nature for any reason whatsoever. If for any reason the space reserved hereunder is not available for the Event, Operator may substitute therefore other space at less comparable in quality thereto, and if Patron agrees to accept such substitutions.

Unable to convince the Hotel to refund its deposit, the Nicholsons took their wedding to nearby Delaware, which had relaxed its COVID-19 restrictions. They were married more or less on schedule in September 2020. Eight months later, Philadelphia relaxed its prohibition on indoor weddings.

The Nicholsons then sued in state court, seeking to represent a class of similarly situated celebrants. Their argument rested on a provocative interpretation of the non-performance clause: that indefinite suspension should be seen as the Hotel being unable to perform under the contract, even if the venue were willing and able to perform at a later date. Claiming that some kinds of celebrations, like weddings and Bar Mitzvahs, are too time sensitive to postpone indefinitely, the plaintiffs sought restitution.¹

The deposit problem—which has produced dozens of suits in the state and federal courts— is just one part of the Contract/COVID-19 puzzle. Some have

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1. See Matthew Santoni, *Hotel Refused to Refund Events During Pandemic*, LAW360 (Sept. 28, 2021, 2:01 PM), <https://www.law360.com/articles/1425944/hotel-refused-to-refund-events-during-pandemic-suit-says> [<https://perma.cc/XN86-HZ7Y>] (including article linking to plaintiff's complaint).

already been resolved by settlement,² others by court ruling,³ and many remain pending. You can see how these cases are hard: in the Nicholsons' case, both parties have some claim to being in the right. The Hotel was arguably advancing a pro-social agenda when it suggested postponing the wedding. Terminating the contract (and refunding the deposit) would only encourage the plaintiffs to find a different location (perhaps in loose Delaware) to host a potential super-spreader event. As Cathy Hwang and I argued recently, over the decades, courts have sometimes paid attention to social risks like these in interpreting contracts to avoid remedies that create health risks.⁴ It would be odd to interpret a clause that gives one party a *right* to terminate to imply an *obligation* to do so, but only in a set of cases where the promisee decided that delay wouldn't do. Can the same contract produce different results for a wedding than a corporate holiday party (which is surely susceptible of being postponed to next year, or indeed never held at all)?

But sometimes courts have favored promisees' private interests. Again, the Nicholsons' case illustrates why. The Hotel's argument that the nonperformance clause implies an indefinite right to postpone raises similar problems to the set of cases about good faith exercises of discretion.⁵ And, under ordinary contract law principles, arguably the Hotel's actions amount to an anticipatory repudiation. Moreover, the Nicholsons relocated to a state with a different set of prudential judgments about pandemic risk: isn't that a judgment that courts shouldn't only approve of, but seek retrospectively to bless? Simply put, the health incentive effects of not giving the Nicholsons their deposit back—under Restatement (Second) 272 or otherwise—are complex.⁶ Should courts really be in this business, or should they treat COVID-19 deposit cases like all others, muddling around in, and trying to give life to, the language of the contracts before them?

2. See, e.g., Lauren Berg, *Ticket Buyers Ink \$7.5M Deal in Vivid Seats Virus Refund Suit*, LAW360 (Mar. 11, 2021, 10:10 PM), <https://www.law360.com/articles/1364046/ticket-buyers-ink-7-5m-deal-in-vivid-seats-virus-refund-suit> [<https://perma.cc/P3BR-GDTW>] (describing a \$7.5 million settlement between Vivid Seats and ticket purchasers) and Hannah Albarazi, *StubHub to Pay Over \$9.5M To End State Virus Refund Probes*, LAW 360 (Sept. 15, 2021, 9:44 PM), <https://www.law360.com/articles/1422012/stubhub-to-pay-over-9-5m-to-end-state-virus-refund-probes> [<https://perma.cc/MGX3-Y5PG>] (detailing \$9.5 million settlement between StubHub and ticket purchasers in ten states and the District of Columbia to end a multi-state investigation).

3. See, e.g., Linda Chiem, *United Can't Ditch Passengers' Covid-19 Refund Suit*, LAW 360 (Feb. 12, 2021, 9:44 PM), <https://www.law360.com/articles/1355145/united-can-t-ditch-passengers-covid-19-refund-suit> [<https://perma.cc/PC6J-4YWH>] (reporting that U.S. District Judge Thomas Durkin partially denied United Airlines' motion to dismiss arguing that a force majeure clause precluded a consolidated passenger action).

4. David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 978 (2021).

5. See, e.g., *Fortune v. Nat'l Cash Reg.*, 364 N.E.2d 1251 (1977) (holding that an implied covenant of good faith and fair dealing modifies performance even where a challenged action doesn't breach the bare language of a contract).

6. See RESTATEMENT (SECOND) OF CONTRACTS § 272(2) (1981) (noting that if the rules provide for an unjust result, courts may grant relief to protect the parties' reliance interests and promote justice).

Bob Hillman, inarguably the academy's clearest and most reasonable expositor of contract doctrine, is pro-muddle. Or at least that is one way to read his estimable essay, *Health Crises and the Limited Role of Contract Law*.⁷ Bob's basic point is that contract courts' responses to epidemiological arguments will be all over the map. As he puts it, this "taste of realism is no revelation."⁸ But his point is deeper than the law professor's old standby, "it depends." Rather, Bob makes three original analytical contributions.

First, Bob sharpens how courts weighing diffuse public health interests might conflict with contractual arrangements. He describes express risk allocations, implied-in-fact risk allocations, and gap fillers. In descending order, each pressures courts to decide whether public or private interests should determine litigation outcomes. What is particularly interesting in this discussion is Bob's analysis of gap fillers: what happens if the parties haven't effectively allocated pandemic risk? Should courts use their "conception of what is fair," or, even more adventurously, incorporate motive into their analysis?⁹

Second, Bob points out that the reason that contract law will fail to provide simple answers to hard COVID-19 problems is not merely because (as Cathy and I earlier argued) the modern dispute resolution system is set up to produce compromise outcomes. Rather, Bob argues, because contract law is inherently pluralistic, tradition limits courts' abilities to strike in bold new directions, and the resulting doctrine is irreducibly at tension with itself.

Third, Bob raises a very interesting problem, though since it ends his essay, in true Socratic fashion, he doesn't answer it. Because COVID-19 has been such a shock to the contracting ecosystem, Bob posits that firms will increasingly draft "ironclad *force majeure* clauses that expressly assign the risk of health disruptions."¹⁰ This will lead to a "clash of public policies": courts' desire to enact the parties' will, on the one hand, and their fear for public harm, on the other.¹¹ This will lead to more scrutiny of the "efficacy of the public policy defense."¹²

As Bob gently suggests, the question then becomes which is "least bad": courts occasionally enlarging the scope of the public policy defense *ex post*, ideally tailored to particularly egregious fact patterns, or regulators providing *ex ante* rules which are over and under inclusive, but have the virtues of legitimacy and perceived expertise? Cathy and I left this precise question unanswered in our work as well, so I can't fault Bob for laying out the problem without answering it.

My own view, perhaps darker than either Cathy's or Bob's, is that the pandemic has exposed as hollow some of the claims of expertise and accountability previously enjoyed by health regulators. Courts have filled that

7. Robert A. Hillman, *Health Crises and the Limited Role of Contract Law*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 19.

8. *Id.*

9. *Id.* at 27.

10. *Id.* at 31.

11. *Id.*

12. *Id.*

gap, whether by discounting those regulators' expertise (as we saw at the Supreme Court last term),¹³ or by being more willing to modify existing contract doctrine in response to COVID-19 fact patterns. That leads me to suspect that parties will be unable to successfully externalize contract harms with ironclad terms, at least for the foreseeable future. However, I agree with Bob that this won't be true for all courts at all times. Rather, we will see a heterogeneous set of outcomes, lacking a single goal or set of methodological commitments. Bob sees that as both contract law's bug and feature. I tend to agree with him.

13. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (granting in part an injunction against enforcement of the Governor of California's executive order aimed at combatting COVID-19 through restrictions on gathering in different indoor and outdoor spaces) (Kagan, J., dissenting) ("Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic.").