

A producer contracted to pay an inexperienced performer a specified salary to act in a small role in a play the producer was taking on a six-week road tour. The contract was for the duration of the tour.

On the third day of the tour, the performer was hospitalized with a stomach disorder. The producer replaced her in the cast with an experienced actor. One week later, the performer recovered, but the producer refused to allow her to resume her original role for the remainder of the tour.

In an action by the performer against the producer for breach of contract, which of the following, if proved, would be the producer's best defense?

- A. Both the producer and the performer knew that a year earlier the performer had been incapacitated for a short period of time by the same kind of stomach disorder.
- B. The actor, by general acclaim, was much better in the role than the performer had been.
- C. The actor was the only replacement the producer could find, and the actor would accept nothing less than a contract for the remainder of the six-week tour.
- D. The producer offered to employ the performer as the actor's understudy for the remainder of the six-week tour at the performer's original salary, but the performer declined.

## Explanation:

### Ways to discharge contractual obligations

Full performance of contractual obligations

Impossibility, impracticability, or frustration of purpose

Release (in writing only)

Mutual rescission

Substituted contract

Contract or covenant not to sue

Accord & satisfaction

Novation

Mnemonic: **FIRM SCAN**

A party's duty to perform under a contract can be dismissed by **impracticability**. The defense of impracticability is available when:

an **unanticipated or extraordinary event** makes it impracticable for the party to perform the contract was formed under a **basic assumption** that the **event would *not* occur** *and* the **party seeking discharge** was **not at fault**.

However, **temporary impracticability** merely **suspends** the party's duty to perform until the circumstances giving rise to the impracticability cease to exist—with one exception. If the delay makes **performance materially more burdensome**, the party's duty to perform is **dismissed**.

Here, the performer's illness *suspended* the producer's duty to employ the performer during the period that her illness prevented her from acting. The producer then replaced her with an experienced actor. If the actor was the only replacement the producer could find and would not take a contract for less than the remainder of the six-week tour, the producer's obligation to the performer would be *dismissed*. The reason is that it would be materially more burdensome for the producer to employ them both. Therefore, if proved, that is the producer's best defense.

**(Choice A)** If both the producer and the performer knew that a year earlier the performer had been incapacitated by the same kind of stomach disorder, the performer's illness would have been foreseeable. As a result, this fact would *undermine* the producer's impracticability defense.

**(Choice B)** The relative quality of the actor's performance is not a circumstance that would suspend or discharge the producer's contractual duty to the performer.

**(Choice D)** The producer's action in offering the performer a job as an understudy is irrelevant to the critical issue of whether the producer had the right to cancel the contract.

**Educational objective:**

A period of temporary impracticability suspends a party's duty to perform until the circumstances giving rise to the impracticability pass. But if the delay caused by the impracticability makes performance materially more burdensome, then the party's duty to perform is discharged.

**References**

Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (discharge by supervening impracticability).

Restatement (Second) of Contracts § 269 (Am. Law Inst. 1981) (temporary impracticability).

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