

**3061 IMPOSSIBILITY: ORIGINAL**

If performance of a promise is impossible because of a state of facts existing when the contract was made and the promisor had no knowledge or reason to know of such facts, there is no duty to perform.

**COMMENT**

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 456; Estate of Zellmer, 1 Wis.2d 46, 49, 82 N.W.2d 891 (1957).

Impossibility of performance may excuse a condition, even a condition precedent, if the existence or occurrence of the condition is not a material part of the exchange for the promisor's performance, and enforcement of the condition would operate as a forfeiture. Restatement, Contracts § 301. In an action on a life and disability policy, a condition precedent requiring notice or proof of disability was excused where its performance was impossible by reason of the physical and mental incapacity of the insured during the period when proof should have been furnished. Schlitz v. Equitable Life Assurance Soc'y, 226 Wis. 255, 276 N.W. 336 (1937); Kraus v. Wisconsin Life Ins. Co., 27 Wis.2d 611, 135 N.W.2d 329 (1965).

If the contract imposes an absolute duty regardless of the existing situation, then, as a matter of law, impossibility would not be a defense.