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Force Majeure and Common Law Defenses

A National Survey

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Contractual force majeure provisions allocate risk of nonperformance due to events beyond the parties' control. The occurrence of a force majeure event is akin to an affirmative defense to one's obligations.

This survey identifies issues to consider in light of controlling state law. Then we summarize the relevant law of the 50 states and the District of Columbia.

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Introduction

Contractual force majeure provisions allocate risk of nonperformance due to events beyond the parties' control. The occurrence of a force majeure event is akin to an affirmative defense to one's obligations. Generally speaking, the provisions: (A) define the events constituting force majeure; (B) describe the scope of relief available; (C) set forth duties of the party asserting force majeure to mitigate the effect of the event and allocation of performance; and (D) establish any conditions precedent to relief, such as notice requirements. Contractual force majeure provisions may operate in parallel with (E) common law and statutory doctrines such as impossibility, commercial impracticability, and frustration of purpose. Finally, we note (F) several terms that may have particular salience in the current COVID-19 pandemic.

This introduction identifies issues to consider in light of controlling state law. Then we summarize the relevant law of the 50 states and the District of Columbia.[1]

The force majeure event

A contractual force majeure provision may describe the qualifying event conceptually, specifically, and/or in catch-all terms. The following language, from a real contract, does all three:

> Neither Party will be liable for any delay in performing or any failure to perform any obligation under this Contract due to **[conceptual:]** any cause beyond its reasonable control, **[specific:]** including but without being limited to Act of God, any law, decree or regulation by governmental authority, epidemic, flood, earthquake or like natural disaster, strike, lockout or other labor dispute, **[catch-all:]** or due to any other cause, whether or not foreseeable and whether similar or dissimilar to any of the causes or categories of causes described above and which is beyond the reasonable control of the party affected (a "Force Majeure Event").

In applying these or comparable terms, courts are guided by usual canons of contract interpretation. For example, courts may look to *ejusdem generis,* which limits the scope of catch-all language to events of a nature or character similar to those listed specifically. (Note, however, that the particular contract language quoted above disclaims application of this canon by expressly including "dissimilar" events in the catch-all language.)

In addition, courts often interpret force majeure terms in light of foreseeability, limiting their application to events that the parties could not reasonably have anticipated. Force majeure events also generally must be outside the control of the party invoking the provision.

[1] This Survey includes many of the key cases from each jurisdiction, but is not necessarily exhaustive. Also, the cases make clear that whether performance may be excused in any particular case depends significantly on the specific contract language at issue and facts of each dispute. This Survey is intended only as a guide to analyzing these issues and is not legal advice or a substitute for comprehensive analysis. Please consult a Shook attorney if you have questions about the specifics of your situation.

Finally, force majeure provisions use varying terms to describe the required causal relationship between the force majeure event or condition and a party's nonperformance. The provisions may apply to nonperformance "caused by," "due to," "resulting from," "prevented by," "arising from," "hindered or delayed by," etc. the event. The precise term used may be particularly important if the causal relationship is indirect. For example, if a party failed to perform because a supplier failed to deliver component parts after a pandemic-related labor shortage made its own performance unprofitable, one might argue the party's nonperformance broadly "resulted from" the pandemic, but it might be harder to argue the pandemic "prevented" performance.

A frequent issue with respect to causation is whether financial hardship resulting from an unanticipated event will excuse performance. While the majority rule is that mere unprofitability or hardship is not an excuse, some contracts leave openings for that argument and some states have accepted this excuse in certain circumstances. Whether the scope of the hardship resulting from the COVID-19 pandemic might also allow the argument remains to be seen. In addition, as discussed below, the doctrine of commercial impracticability may apply under Uniform Commercial Code ("UCC") § 2-615 or Restatement (Second) of Contracts § 261.

Scope of relief

Force majeure provisions use varying terms to describe the excused nonperformance. The provisions may apply to "delay in performing," "failure to perform," "inability to perform," etc. While some provisions excuse performance in part or in whole, others merely allow for delay while the force majeure condition persists. Some hybrid provisions will delay performance to a point, after which they excuse it altogether.

Duty to mitigate and allocation of performance

A party invoking force majeure must take all measures reasonably within its power to mitigate the effect of the event or condition on its performance, and generally must perform to the extent possible. The UCC requires sellers of goods, and common law may require others, to allocate limited performance among counterparties in a manner that is fair and reasonable.

Notice requirements

Many force majeure provisions require notice to counterparties. Some provisions require notice within a stated time period or "as soon as [possible/practicable]." It is important to note whether a time limit runs from the occurrence of an event or condition, or from its effect on performance. States may enforce notice requirements strictly, or may consider whether delay or failure to give notice prejudiced the counterparty. Constructive notice may also be an issue.

Common law and statutory doctrines

The common law doctrines of frustration of purpose, impracticability, and impossibility may provide relief in the absence of contractual provisions. So may the UCC and other state-specific statutes.

Frustration of purpose occurs when, through no fault of any party to the contract, an unforeseen event or circumstance arises after formation of the contact that makes it physically or commercially impossible to fulfill the essential purpose of the agreement. For example, if a structure burns to the ground, a pending contract to lease that structure becomes pointless and may be terminated by the putative lessee.

Impossibility is a relatively limited doctrine, but common law and a few statutes sometimes excuse performance if an extreme "Act of God" or other fortuitous event renders performance physically impossible or even economically unfeasible.

Commercial impracticability can excuse a seller of goods' nonperformance under UCC § 2-615. UCC Comment 9 discusses excuses for a buyer in an output or requirements contract as if buyers were also covered by the section. Comment 9 states that in some circumstances "the reason of the present section may well apply and entitle the buyer to the exemption."

Similarly, Restatement (Second) of Contracts § 261 provides:

> Where, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Whether common law and/or statutory relief is available *in addition to* contractual force majeure provisions may be another matter. Some courts hold that the inclusion of force majeure terms in a contract evidences the parties' intent to rely exclusively on those terms to allocate the risk of unforeseen events. Others have at least allowed parties to argue these doctrines in the alternative.

COVID-19 pandemic considerations

The COVID-19 pandemic may implicate many of the foregoing issues.

Contractual force majeure provisions may refer specifically to "pandemics," "epidemics" or "diseases." A specific reference to such an event will make it easier to invoke force majeure, but will still require satisfaction of other terms and conditions, such as causation, mitigation, and notice.

If the force majeure provision does not include specific applicable language, however, then it will be necessary to consider whether COVID-19, or its impact on a business or a project, falls within a different concept, such as an "Act of God," "action by government," "civil commotion," "industrial disturbance" or a catch-all provision. While the pandemic itself likely falls within almost any state's interpretation of "Act of God," it is important to bear in mind that the relevant force majeure event need not be COVID-19 itself. It is the consequences of COVID-19 and its impact upon the ability of the affected party to fulfill its contractual obligations that will be relevant under the language of most contracts. The secondary and tertiary consequences that actually prevent contract performance may be Stay-at-Home Orders (*i.e.,* "government decree," etc.) or the commercial impact of customers' or suppliers' compliance with such orders and related public health guidance – which may fall within a specific or catch-all term.

Alabama

Force Majeure Clauses

Few Alabama decisions address force majeure

Alabama courts have not considered many aspects of force majeure clauses. One decision from the Fifth Circuit noted that even when a force majeure event has occurred, it is not a shield against all liability. *See Monsanto Co. v. Tenn. Valley Auth.*, 616 F.2d 887 (5th Cir. 1980) (applying Alabama law) (contract absolving power company from liability for interruption of electrical power "because of force majeure or otherwise," did not necessarily relieve company of liability for negligent interruption of power).

There is some further authority regarding "act of God" events outside the ambit of a contract term. With little in-state guidance, state and federal courts in Alabama frequently reference Florida law and Eleventh Circuit decisions when ruling on this and other contract issues. Given the dearth of case law, no Alabama decisions could be located addressing construction issues such as interpretation of which events qualify, what type of notice is required, or a party's duty to mitigate.

Allocation of inventory

Alabama federal courts have suggested that there is a duty to allocate inventory upon a force majeure event. As noted in one early decision, "[i]n order to avail itself of [force majeure defense] . . . it was incumbent upon defendant to act in good faith, and to divide the coal available for delivery ratably among its customers." *Corona Coal Co. v. Robert P. Hyams Coal Co.*, 9 F.2d 361, 362 (5th Cir. 1925) (applying Alabama law).

Common Law Defenses and UCC

The interplay between common law defenses and force majeure clauses

Alabama courts look to common law doctrines in the absence of force majeure clauses. "The authorities are abundant that when loss is proximately caused by an act of God, such as an unprecedented flood, which was not foreseeable, the defendant is not liable, and does not need a stipulation in its contract to that effect to be relieved of such liability, if defendant is not wanting in due care in that connection." *Louisville & N.R. Co. v. Finlay*, 170 So. 207, 208 (Ala. 1936) (carrier not liable for damage to shipment of sugar which was "proximate result" of unprecedented flood whose danger carrier could not foresee or avoid after occurrence).

Impracticability/frustration of purpose

Alabama applies a proximate cause analysis to extra-contractual doctrines excusing performance. For example, to be considered an "act of God" under common law rules, the force of nature causing the problem must have been the proximate cause of that problem, such that no other act could have

prevented the result. *Hill Air of Gadsden, Inc. v. Marshall*, 526 So. 2d 15, 16–17 (Ala. 1988); *Bradford v. Universal Constr. Co.*, 644 So. 2d 864, 866 (Ala. 1994).

At times, the Alabama Supreme Court has taken a stricter approach to impossibility or impracticability than the Restatement. "Where one by his contract undertakes an obligation which is absolute, he is bound to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract." *Alpine Const. Co. v. Water Works Bd. of City of Birmingham*, 377 So. 2d 954, 956 (Ala. 1979). In a subsequent decision, the state Supreme Court even stated that "this Court has not recognized the defense of impossibility or impracticability," but went on to note numerous exceptions, including the statute cited above excusing delivery of goods based on "the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made." *Silverman v. Charmac, Inc.*, 414 So. 2d 892 (Ala. 1982). No more recent Alabama decisions have resolved this inconsistent application of common law principles.

Alaska

Force Majeure Clauses

Force majeure clauses are construed narrowly

Alaska's state and federal courts have not developed any overarching rules for the construction of force majeure clauses. Generally, the state's low volume of litigation has not allowed for much development of the common law.

One decision is instructive, and shows that Alaska courts strictly construe force majeure clauses that do not contain catch-all provisions. In *Tug Blarney, LLC v. Ridge Contracting, Inc.*, the sinking of a tugboat caused a multiparty dispute over a number of issues, including whether the shipwreck qualified as a force majeure event under two parties' charter agreement. 14 F. Supp. 3d 1255, 1276 (D. Alaska 2014) (applying Alaska law to contract dispute). An equipment owner contracted with the tugboat company to transport its property by barge. The tug sank and, among other claims, the equipment owner alleged the tug operator had breached its contract by failing to transport the goods. In defense, the tug operator cited the force majeure provision in the parties' agreement, which stated, "[n]either [party] shall be responsible for any loss or damage, or delay or failure in performing hereunder arising from: act of God, act of war, act of public enemies, pirates or thieves, arrest or restraint of princes, rulers, dictators, or people, or seizure under legal process …; strikes or lockouts or stoppages or restraints of labor from whatever cause, either partial or general; or riot or civil commotion." *Id.* The court noted that "[t]his force majeure clause is limited to specific events" and dismissed the tug operator's force majeure argument because it "provided no compelling authority that the unexplained sinking of a ship qualifies as an act of God under the force majeure clause." *Id.* The tug owner also asserted commercial impracticability, but the court declined to consider it due to a number of disputed material facts.

Note that in oil and gas leases, Alaska provides a default statutory provision: "'force majeure' means war, riots, acts of God, unusually severe weather, or any other cause beyond the unit operator's reasonable ability to foresee or control and includes operational failure to existing transportation facilities and delays caused by judicial decisions or lack of them." Alaska Admin. Code tit. 11, § 83.395.

Force majeure clauses can undercut common law defenses

In a case concerning a fish processor's failure to pay commercial rent, the tenant argued it was excused from paying because fuel shortages made it commercially impracticable to operate the leased facility. *Aleut Enter., LLC v. Adak Seafood, LLC*, No. 3:10-cv-0017, 2010 WL 3522348, at *1 (D. Alaska Sept. 2, 2010) (applying Alaska law). Though the parties' agreement contained a force majeure clause, the court analyzed the tenant's common-law commercial impracticability defense, which would require a showing that "his performance under the contracts was impracticable without his fault because of a fact of which he had no reason to know and the non-existence of which was a basic assumption on which the contracts were made." *Id.* (quotation marks omitted) (citing *State Div. of Agric., Agr. Revolving Loan Fund v.*

Carpenter, 869 P.2d 1181, 1184 (Alaska 1994)). However, the force majeure clause in the parties' agreement expressly contemplated "changes in the availability of or access to fuel," meaning that "[the tenant's] impracticability defense fails because the unavailability of fuel to the Plant was foreseeable and the existence of a potential fueling problem was a basic assumption of [the parties] when the Lease agreement was executed." *Id.* at *2. Thus, it was the force majeure provision itself that defeated a commercial impracticability argument in this case.

Duty to allocate among buyers and suppliers

Alaskan courts have not addressed the duty to allocate during force majeure events.

Common Law Defenses and UCC

Alaska closely follows the Restatement (Second) approach to commercial impracticability. *See Carpenter*, 869 P.2d at 1184 (Alaska 1994) ("In order for [defendant] to be excused from performing under the loan contracts on the theory of commercial impracticability he must show that his 'performance under [the contracts was] impracticable without his fault because of a fact of which he [had] no reason to know and the non-existence of which [was] a basic assumption on which the contract[s] [were] made.'") (quoting Restatement (Second) of Contracts § 266(1) (1981)).

Alaska has also codified commercial impracticability in Alaska Statute 45.02.615, which states that a delay in delivery or non-delivery is not a breach of contract "if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made." Alaska Stat. § 45.02.615(1).

Arizona

Force Majeure Clauses

Whether a force majeure clause is enforceable depends on the foreseeability of the event

Few Arizona courts have analyzed force majeure clauses. However, federal courts interpreting contracts under Arizona law have relied upon the Restatement for guidance in construing force majeure clauses. Section 261 of the Restatement (Second) of Contracts provides:

> Where, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981); *B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513, 1517–21 (D. Ariz. 1989) (relying upon Section 261 to construe a force majeure clause given the absence of Arizona law). Accordingly, the crux of the analysis is whether the force majeure event was unforeseeable. *B.F. Goodrich*, 711 F. Supp. at 1517–21 (holding a force majeure clause that included "any other cause or causes of any kind or character reasonably beyond the control of the party failing to perform, whether similar to or dissimilar from the enumerated causes" did not apply to severe price fluctuations or changes in market conditions because those events were foreseeable).

Notice requirements are generally enforced

No Arizona courts have addressed the enforcement of Notice requirements in force majeure clauses. However, in general, Notice requirements will be strictly enforced when a party seeks to terminate a contract. *Glad Tidings Church of Am. v. Hinkley*, 226 P.2d 1016, 311 (Ariz. 1951) (holding notice was ineffective when it failed to provide a ten-day grace period because the "law does not favor forfeitures and if a party would avail himself of a contractual provision providing for such a forfeiture, he must comply strictly with all the requirements of the contract").

Arizona courts have not expressly addressed whether there is a general duty to mitigate due to force majeure

Arizona courts have not assessed whether there is a duty to mitigate with respect to a force majeure event.

Allocation of inventory

Arizona has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Arizona courts allow parties to assert a force majeure theory in addition to other common law defenses. *B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513, 1517–21 (D. Ariz. 1989). One common law defense that Arizona recognizes is the doctrine of commercial frustration. *Id.* (commercial frustration theory failed because a change in prices or market conditions is reasonably foreseeable). Commercial frustration has not been treated as a blanket remedy for parties looking to discharge a contractual obligation because of changes in price or market conditions. "[W]hile Arizona recognizes the doctrine of commercial frustration, … [it is not] a general absolution whenever performance under the contract becomes difficult or expensive." *Mohave Cty. v. Mohave-Kingman Estates,* 586 P.2d 978, 983 (Ariz. 1978) (holding frustration of purpose inapplicable because the risk of a change in the zoning ordinance was reasonably foreseeable and defendant could have contracted against it). Proper application of the doctrine requires proof from the party seeking to avoid performance that the supervening frustrating event was not reasonably foreseeable. *Garner v. Ellingson,* 501 P.2d 22, 24 (Ariz. Ct. App. 1972). *See also Next Gen Capital, L.L.C. v. Consumer Lending Assocs., LLC*, 316 P.3d 598, 600 (Ariz. Ct. App. 2013) (frustration of purpose doctrine did not apply when it was reasonably foreseeable that a payday loan operation would end and the parties could have contracted around that risk).

Another defense is impossibility of performance. The burden of proof for establishing an impossibility defense is high in Arizona. Parties are only able to assert the defense when contractual duties become impossible for all the parties to perform. *Marshick v. Marshick*, 545 P.2d 436, 439–40 (Ariz. Ct. App. 1976) (rejecting impossibility defense when it was based on a party's inability to pay); *Matheny v. Gila Cty.*, 710 P.2d 469, 471 (Ariz. Ct. App. 1985) (impossibility doctrine applied when new legislation frustrated the purpose of the contract). Impossibility may encompass "extreme or unreasonable difficulty or expense," but courts often require "proof … that the supervening frustrating event was not reasonably foreseeable." *Cortez Enters., Inc. v. Town of Chino Valley*, No. 1 CA-CV 09-0466, 2010 WL 2606260, at *5 (Ariz. Ct. App. June 29, 2010) (town could not assert an impossibility defense even though it lacked authority to condemn state land, which prevented it from performing under the terms of the agreement).

Arkansas

Force Majeure Clauses

Force majeure clauses are narrowly interpreted

Arkansas courts construe force majeure clauses narrowly. Arkansas courts have refused to enforce force majeure clauses when a party could have taken measures to avoid the triggering event. *Wilson v. Talbert*, 535 S.W.2d 807, 809–10 (Ark. 1976) (holding that a party could not invoke a force majeure clause stating "This lease shall not be terminated in whole or in part, nor lessee held liable in damages because of a temporary cessation of production or of drilling operations due to breakdown of equipment or due to the repairing of a well or wells, or because of failure to comply with any of the express or implied covenants of this lease if such failure is the result of the exercise of governmental authority, war, lack of market, act of God, strike, fire, explosion, flood or any other cause reasonably beyond the control of lessee" when the party failed to take reasonable measures to make necessary repairs and restore production). Moreover, a force majeure event will only excuse performance for a reasonable amount of time. *Cassinger v. Poinsett Cty. Rice & Grain, Inc.*, 2010 Ark. App. 308, 3–4 (Ark. Ct. App. 2010) (flooding of the Mississippi River that prevent barges from being loaded was a force majeure event that extended the delivery date for only a reasonable amount of time, which was until the merchant could cross the river and perform the duties owed under the contract).

Notice requirements are construed leniently

Arkansas courts have demonstrated a willingness to prevent parties from relying upon force majeure clauses if proper notice is not provided. However, courts appear to take a lenient approach to enforcing notice requirements. *BAE Sys. Ordnance Sys., Inc. v. El Dorado Chem. Co.,* No. 1:15-cv-01035, 2016 WL 10647120, at *2 (W.D. Ark. Sept. 27, 2016) (finding that there was a dispute of material fact as to whether proper notice was provided during a meeting even though the contract called for notice in writing).

Arkansas courts indicate there is a duty to mitigate

Arkansas courts have suggested that there that is a duty to mitigate damages related to a force majeure event. *Cassinger,* 2010 Ark. App. at 3–4 (holding excusing performance was justified for a reasonable amount of time when a party offered reimbursement for interest and storage costs during the period of delay); *Wilson*, 535 S.W.2d at 809–10 (discussed above).

Allocation of inventory

Arkansas has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Arkansas courts have not addressed the issue of whether a party may assert a force majeure theory in addition to other contractual defenses. However, courts do recognize an impossibility of performance defense. The Arkansas Supreme Court explained the standard for determining impossibility of performance:

> The burden of proving impossibility of performance, its nature and extent and causative effect rests upon the party alleging it. He must show that he took virtually every action within his power to perform his duty under the contract. It must be shown that the thing to be done cannot be effected by any means. Resolution of the question requires an examination into the conduct of the party pleading the defense in order to determine the presence or absence of fault on his part in failing to perform.

Frigillana v. Frigillana, 584 S.W.2d 30, 33 (Ark. 1979). The Supreme Court has drawn a "distinction between objective impossibility, which amounts to saying, '[t]he thing cannot be done,' and subjective impossibility[,] 'I cannot do it.'" *Christy v. Pilkinton,* 273 S.W.2d 533, 533 (Ark. 1954). *See also Courtyard Gardens Health & Rehab. v. Arnold*, 485 SW 3d 669, 676 (Ark. 2016) (impossibility of performance defense was not established when a party could comply with an arbitration provision because the selected arbitration rules were available even if in a different venue).

Performance is excused only in cases of objective impossibility. *Christy,* 273 S.W.2d at 533. *See also Holton v. Cook,* 27 S.W.2d 1017 (Ark. 1930) (incapacitation of appellee's daughter to pursue her studies rendered performance impossible and relieved appellee from liability for tuition and board for the balance of the year); *C.G. Davis & Co. v. Bishop,* 213 S.W. 744 (Ark. 1919) (defense of impossibility of performance applied and excused the seller's liability in a contract for the sale of crops when weather conditions or matters outside the seller's control prevented him from delivering the number of crops contemplated by the contract); *Mathews v. Garner,* 751 S.W.2d 359 (Ark. Ct. App. 1988) (prevention of performance by a government order or regulation may qualify as an impossibility of performance defense); *Smith v. Decatur Sch. Dist.,* 2011 Ark. App. 126 (Ark. Ct. App. 2011) (defense of impossibility of performance was available where state or federal regulatory agency issued an order preventing performance of the contract and the contract could not be performed without violation of the governmental order; Arkansas Department of Education prevented district from paying a former superintendent pursuant to his employment contract since the agency took action that required replacement of the superintendent).

California

Force Majeure Clauses

Enforcement of force majeure clauses depends on causation and foreseeability

Early decisions in California set certain ground rules regarding "acts of God" and force majeure clauses. By the dawn of the 20th century, California courts recognized contract terms excusing performance for "acts of God", which were construed as something wholly outside human control. *See Pope v. Farmers' Union & Milling Co.*, 62 P. 384, 384 (Cal. 1900) ("it was no defense for defendant to say, or to show, that the wheat was destroyed without negligence upon its part. It was incumbent upon it to show that the wheat was in fact destroyed or damaged by [an act of God]"; human-caused warehouse fire held insufficient).

Courts soon recognized that force majeure provisions in contracts were broader than a traditional "act of God." The California Supreme Court held that "'[f]orce majeure,' or the Latin expression 'vis major,' is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence diligence and care." *Pac. Vegetable Oil Corp. v. C. S. T., Ltd.*, 174 P.2d 441, 447 (1946). This test remains the core principle governing force majeure clauses in California. *See, e.g.*, *Horsemen's Benevolent & Protective Ass'n. v. Valley Racing Assn.*, 6 Cal. Rptr. 2d 698, 713 (Cal. Ct. App. 1992), *modified* (Apr. 6, 1992) (quoting rule from *Pac. Vegetable Oil Corp.*).

Two basic rules govern the operation of force majeure clauses in California: proximate causation and foreseeability. "It is well-established that in order to constitute a force majeure, an event must be the proximate cause of nonperformance of the contract." *Hong Kong Islands Line Am. S.A. v. Distribution Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991), *aff'd*, 963 F.2d 378 (9th Cir. 1992) (applying California law) (distributor's attempt to invoke force majeure provision because strikes and riots had reduced exports from Korea was insufficient because distributor failed to show how those events rendered it "impossible or unprofitable" to ship cargo, as provision required). Foreseeability also limits the scope of force majeure clauses, particularly if the event at issue was not expressly included in the clause. If the negative event was "foreseeable at the time the contract was negotiated" and a party was "on notice of the possibility of a problem," the party cannot then rely on a force majeure provision to excuse performance, unless the provision expressly contemplates such an event. *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099 (C.D. Cal. 2001) (applying California law). Thus, "[u]nder California law, unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such. *Free Range Content, Inc. v. Google Inc.*, No. 14-cv-02329, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016) (no force majeure event because, while unauthorized activity on webpage was out of parties' control, it was foreseeable and not expressly identified in force majeure

provision). Under this standard, events that appear to be remote possibilities may, arguably, have been foreseeable.

California courts have frequently ruled that the common law doctrines of causation and foreseeability are essential to a dispute involving force majeure events, regardless of what a force majeure contract term dictates. *See Oosten v. Hay Haulers Dairy Emp. & Helpers Union,* 291 P.2d 17, 21 (Cal. 1955) ("No contractor is excused under such an express provision unless he shows affirmatively that his failure to perform was proximately caused by a contingency within its terms; that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive."); *Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511 (9th Cir. 2015) (applying California law) (citing *Oosten*).

For example, in a multifaceted dispute between a pharmaceutical company and its supplier, the supplier asserted force majeure as a defense to an alleged breach of the parties' supply agreement. The agreement included a force majeure provision, which the court described as boilerplate language, stating that the parties' obligations "shall be subject to any delays or non-performance caused by: acts of God, earthquakes, fires, floods, explosion, sabotage, riot, accidents; regulatory, governmental, or military action or inaction: strikes, lockouts or labor trouble; perils of the sea; or failure or delay in performance by third parties, including suppliers and service providers; or any other cause beyond the reasonable control of either party. *Watson Labs.*, 178 F. Supp. 2d at 1109. While the agreement was in effect, the FDA shut down the supplier's manufacturing facility, which the supplier argued qualified as regulatory or governmental action excusing its performance. The court noted that, under California law, it was unclear whether the parties "intended to apply the common law doctrine of force majeure or instead intended to supersede that doctrine with the express terms [of the contract provision]," suggesting that both are in play when courts are presented with boilerplate language. *Id.* at 1110. Regardless, the court ruled that force majeure was unavailable to the supplier because the shutdown was both foreseeable (based on earlier regulatory issues) and "not encompassed within the force majeure clause" because the supplier had a separate duty to maintain manufacturing facilities, and the "regulatory action" term was too vague. *Id.* at 1113.

Subsequent courts have interpreted the key holdings of *Watson Labs* to be that in California, force majeure clauses excuse foreseeable nonperformance only when circumstances beyond the control of the parties prevent performance and the nonperformance was specifically contemplated by the force majeure clause. *See, e.g.*, *Free Range Content*, 2016 WL 2902332, at *6 (citing *Watson* when finding no force majeure event because unauthorized webpage activity was foreseeable and provision did not specifically contemplate nonperformance caused by that activity). *See generally* C.T. Foster, Annotation, *Modern status of the rules regarding impossibility of performance as defense in action for breach of contract*, 84 A.L.R.2d 12 (1962 & Supp. 2020) ("Under California law, no contractor is excused from breach of contract under express force majeure provision in contract unless he shows affirmatively that his failure to perform was proximately caused by contingency within its terms, and that, in spite of skill, diligence, and good faith on his part, performance became impossible or unreasonably expensive").

Where a force majeure clause is validly exercised, the effect is not always termination. If provided in a particular contract, force majeure can be invoked to temporarily suspend performance while certain conditions apply. *See Distribution Servs. Ltd. v. Hong Kong Islands Line Am. S.A.*, 963 F.2d 378 (9th Cir. 1992) ("Force majeure does not cancel the contract entirely, it suspends the contract until the disability period is over.").

A party should be specific when invoking a force majeure provision and, if possible, expressly satisfy all requirements stated in the clause. In one shipping agreement, the relevant provision listed over a dozen conditions constituting force majeure if the events would "make [it] impossible or unprofitable for [defendant] to sell its services in the market." *Hong Kong Islands Line Am. S.A. v. Distribution Servs. Ltd.*, 795 F. Supp. 983, 986 (C.D. Cal. 1991), *aff'd*, 963 F.2d 378 (9th Cir. 1992) (applying California law). The court held that the defendant's citation of various riots and strikes was insufficient to invoke force majeure because it "failed to prove that the claimed events made shipments . . . 'impossible' or 'unprofitable.'" *Id.* Likewise, courts have denied motions for summary judgment addressing events not expressly included in force majeure clauses. *See, e.g.*, *Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 Fed. Appx. 519 (9th Cir. 2004) (applying California law) (finding fact issue as to whether singer's cancer diagnosis qualified as "any cause beyond such party's reasonable control").

Note that some specific types of contracts, such as oil and gas leases, are governed by unique rules. *See San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship*, 76 Cal. Rptr. 2d 287, 291 (Cal. Ct. App. 1998), *as modified* (July 1, 1998) (noting unique nature of oil and gas leases, and identifying numerous terms of art in petrochemical industry agreements).

California does not have any particular rules regarding notice requirements

California common law does not impose any general rule regarding the notice required to invoke a force majeure clause, but honors notice terms when present in a particular contract. *See, e.g.*, *Distribution Servs. Ltd.*, 963 F.2d at 398 (applying California law) (referencing notice provision in shipping contract as valid requirement to invoke force majeure clause, and ruling that distribution company could not both claim force majeure and continue receiving reduced prices in contract because force majeure provision suspended both parties' performance). In sales of goods, California's Commercial Code requires "seasonable" notice of inability to deliver in a force majeure-like event. Cal. Com. Code § 2615.

California does not impose a duty to mitigate during a force majeure event

California courts have not expressed any general duty to avoid or mitigate the negative impacts stemming from a force majeure event.

There is no common law duty to allocate among buyers and suppliers

There is no common law duty to allocate. However, in sales of goods, California's codification of the UCC states that when a force majeure event "affect[s] only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers

not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable." Cal. Com. Code § 2615(b).

Common Law Defenses and UCC

Several California statutes codify the common law doctrine of impossibility. The Civil Code provides that "[a] condition in a contract, the fulfillment of which is impossible or unlawful . . . or which is repugnant to the nature of the interest created by the contract, is void" (§1441), and that "[t]he object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed" (§1596). Additionally, performance is excused "[w]hen it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States." Cal. Civil Code §1511(2).

Like many states, California makes clear that a mere unforeseen increase in cost is insufficient to excuse performance. *See Butler v. Nepple*, 354 P.2d 239 (Cal. 1960) (holding that the fact that compliance with the contract would involve greater expense than anticipated, due to a steel strike, did not excuse performance). However, California courts consider performance "legally impossible when it is impracticable." *Emelianenko v. Affliction Clothing*, No. 09-cv-07865, 2011 WL 13176614, at *23 (C.D. Cal. June 7, 2011) (applying California law). "Impracticable" performance includes situations where it is "so difficult and expensive" to perform that it might be considered "impracticable." *Id.* Thus, contract performance can be excused by the "commercial impracticability" defense when performance becomes impracticable after an extreme and unforeseeable circumstance, even if performance remains physically possible. *Id.*

The Fifth Circuit has noted that California courts often read the common law doctrines of impossibility, impracticability, and frustration to limit the scope of force majeure provisions, particularly when the provision is boilerplate. "[T]he California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest." *Nissho-Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1530, 1540 (5th Cir. 1984). *See also Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 Fed. Appx. 519 (9th Cir. 2004) (applying California law) (holding that there was a question of fact as to whether the evidence established that Rod Stewart's performance was impossible due to his thyroid cancer diagnosis even though the relevant contract contained a clause stating, that if any party's performance became impossible because of "any cause beyond such party's reasonable control (excepting causes of which the [parties] had knowledge, or in the exercise of due diligence should have had knowledge), then there shall be no claim for damages by either party to this Agreement, and the performance shall be rescheduled to a mutually agreeable time.")

Colorado

Force Majeure Clauses

Force majeure clauses are enforced when their terms are unambiguous

The primary goal of Colorado courts in interpreting force majeure clauses is to effectuate the parties' intent. Absent an ambiguity, a court is constrained to determine the meaning intended by the parties from the four corners of the agreement. *Church Commc'n Network, Inc. v. Echostar Satellite LLC*, No. 04-cv-02206, 2006 WL 8454330, at *14–15 (D. Colo. Mar. 17, 2006) (applying Colorado law) (holding that a force majeure provision stating "Acts of God or the public enemy, acts of any local, county, state, federal or other government in its sovereign or contractual capacity, fires, floods, adverse weather conditions (including but not limited to solar flares or sun outages with respect to satellite transmission interference), epidemics, quarantines, restrictions, sabotage, acts of terrorism, acts of third parties, strikes, freight embargoes, whole or partial satellite malfunctions, uplink failure, or any other event which is beyond the reasonable control of [Defendant] ... shall constitute an excuse in performance of any obligation, condition or covenant of [Defendant] contained in this Agreement, any warranties or guarantees made herein, or any amendment thereto" was unambiguous and did not apply to an arbitration award when the defendant knew about an interim award prior to entering into the contract); (force majeure clause in another contract stating, "[i]f Lessee is rendered unable wholly or in part by force majeure to carry out the obligations of Lessee under this lease, . . . the obligations of Lessee so far as they are affected by the force majeure shall be suspended during the continuance of the force majeure . . . . The term 'force majeure' as used herein shall mean . . . action by the federal or state government regulating or interfering in any way with Lessee's Rights and obligations under this lease" unambiguously applied when a state commission refused to issue permits for geothermal wells thereby precluding the lessee from generating income to pay the lessor).

Ambiguity exists if the language of the contract is susceptible to more than one reasonable interpretation. *In re Marriage of Crowder*, 77 P.3d 858, 861 (Colo. App. 2003). Colorado courts have resolved ambiguity in force majeure clauses by examining the parties' behavior and interpretation of the contract before the dispute arises. *Smith v. Long*, 578 P.2d 232, 233–35 (Colo. App. 1978) (performance excused under a force majeure clause that included "lack of market" as a triggering event even though a small, albeit unprofitable, market still existed because a letter between the parties indicated necessity that the market be profitable). Furthermore, there is a strong preference for adopting interpretations that yield fair and reasonable results, rather than harsh or unreasonable ones. *Id. See also Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 673 (Colo. 2011), *as modified on denial of reh'g* (June 20, 2011) (rejecting force majeure theory when the effect would be to "create a poorly reasoned loophole to grandfather in unadjudicated and undecreed changes in water rights).

Notice requirements are strictly enforced

No Colorado courts have addressed the enforceability of Notice requirements within force majeure provisions. However, Colorado courts have required strict enforcement with Notice requirements in other contexts. *Hein Enters., Ltd. v. S.F. Real Estate Inv'rs*, 720 P.2d 975, 979 (Colo. App. 1985) (claimant was not entitled to indemnification due to failure to comply with notice provision); *T.W. Anderson Mortg. Co. v. Robert Land Co.,* 480 P.2d 109 (Colo. App. 1970) (to comply strictly with a provision requiring written notice, the written notice must contain all of the required information).

Colorado courts will enforce force majeure provisions that allow for cancellation without imposing a duty to mitigate

While Colorado cases have not analyzed whether there is a duty to mitigate damages due to a force majeure event, Colorado courts will enforce unambiguous contractual terms. Thus, if a contract allows a party to cancel due to a force majeure event, Colorado courts will allow cancellation without imposing any duty to mitigate. *Smith v. Long*, 578 P.2d 232, 233–35 (Colo. App. 1978) (lessee did not have a duty to conduct underground exploration in connection with mining operations since the force majeure unambiguously allowed the lessee to cancel if there is no market). However, the Colorado Supreme Court has suggested in *dicta* that a party is not obligated to mitigate damages by accepting an offer as an accord and satisfaction in the absence of common law defenses for nonperformance. *U.S. Welding, Inc. v. Advanced Circuits, Inc.*, 420 P.3d 278, 280–81 (Colo. 2018) ("In any event, in the absence of impossibility, frustration of purpose, or some other reason not involving the fault of any party, for which a contract is no longer capable of being fulfilled, the other party is never obligated to accept an offer of an accord").

Allocation of inventory

No cases in Colorado address whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Colorado has not evaluated whether a party can assert a force majeure theory in combination with other contractual defenses. However, Colorado recognizes an impossibility of performance defense. In order to establish the defense of impossibility of performance, it is necessary to demonstrate that changed circumstances have rendered "the promise vitally different from what reasonably should have been within the contemplation of both parties when they entered into the contract." *Littleton v. Emp'rs Fire Ins. Co.,* 453 P.2d 810 (Colo. 1969) (expert testimony established that the water tanks were impossible to build in accordance with the agreement and consistent with sound engineering practice).

"If governmental action is asserted to have rendered a contract impossible to perform, such action must have made the performance illegal, either by requiring an unobtainable license or in some other way; a new regulation merely rendering the performance more costly does not result in a legal impossibility." *Colo. Performance Corp. v. Mariposa Assocs.*, 754 P.2d 401, 407 (Colo. App. 1987). *See also Seago v.*

Fellet, 676 P.2d 1224, 1227 (Colo. App. 1983) (the impossibility of performance defense is not available when the intervening action, such as the enactment of new drainage requirements, merely renders performance more costly).

Furthermore, if the force majeure event is reasonably foreseeable, the courts typically take the position that the risk of impossibility or frustration was assumed by the parties and refuse to apply the defense. *Magnetic Copy Servs., Inc. v. Seismic Specialists, Inc.*, 805 P.2d 1161, 1165–66 (Colo. App. 1990) (the loss of certain customers is not sufficient to establish the defense of impossibility since it is a foreseeable event); *Ruff v. Yuma Cty. Transp. Co.*, 690 P.2d 1296, 1298–99 (Colo. App. 1984) (competition, delays in approvals, and changed economic circumstances are not situations that are so unforeseeable as to be outside the risks assumed under the contract and did not excuse performance because of impracticability); *Beals v. Tri-B Assocs.*, 644 P.2d 78, 80–81 (Colo. App. 1982) (the risk that economic conditions may change, or that government actions may impair the profitability of a real estate development, are not so unforeseeable that they are outside the risks assumed under the contract and do not frustrate the purpose of the contract); *Great Am. Ins. Co. of N.Y. v. City of Boulder*, 476 P.2d 586, 587 (Colo. App. 1970) (rejecting impossibility of performance defense when faulty plans and indecision on the part of Boulder's engineers, together with adverse weather conditions, rendered the contract, in the legal sense, impossible to perform).

Connecticut

Force Majeure Clauses

Catch-all provisions in force majeure clauses do not include foreseeable events

Connecticut has little case of law interpreting force majeure provisions. A federal court applying Connecticut law held that catch-all provisions in force majeure clauses do not encompass foreseeable events. *Rand-Whitney Containerboard L.P. v. Town of Montville*, 3:96-cv-413, 2005 WL 2481480, at *1–3 (D. Conn. Aug. 31, 2005) (applying Connecticut law) (denial of permits was foreseeable and therefore did not excuse performance under the catch-all provision of the force majeure clause, which included "any other cause beyond reasonable control of the Party"); *see also Hershman Recycling v. Am. Disposal Servs. Of Mo.*, No. 01-cv-04504069S, 2003 WL 283813, at *4 (Conn. Super. Ct. Jan. 28, 2003) (holding that a party that creates its own inability to perform by contract with inefficient suppliers cannot invoke force majeure). Connecticut courts have however enforced broadly written clauses. *See Int'l Auto. Showcase, Inc. v. SMG*, 03-cv-0477177S, 2004 WL 1833312, at *2 (Conn. Super. Ct. July 21, 2004) (closing of venue where a car show was to occur held to trigger force majeure provision that applied if "the Facility is damaged from any cause whatsoever or if any other casualty or unforeseeable cause beyond the control of [the parties], including, without limitation, acts of God, fires, epidemics, quarantine restrictions, strikes, failure of public utilities or unusually severe weather, prevents the occupancy and use").

Notice requirements in force majeure clauses may be strictly construed

Notice requirements are strictly construed and failure to comply with such provisions forecloses parties from invoking force majeure clauses. *Milford Power Co. v. Alstom Power*, No. 04-cv-000121672S, 2001 WL 822488, at *3 (Conn. Super. Ct. June 28, 2001), *vacated on other grounds*, 822 A.2d 196 (Conn. 2003) (notice provided over a month after the alleged force majeure event held inadequate because the clause required notice "promptly but in no event later than seventy two (72) hours following actual knowledge of such condition").

Allocation of inventory

Connecticut has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

A party may assert frustration of purpose in the alternative to a claim of force majeure. *Hess v. Dumouchel Paper Co.*, 225 A.2d 797 (Conn. 1966) (holding that the doctrine of frustration of purpose did not apply in a lease contract because while the building was eventually condemned for a highway, the unpaid rent sought was only for the time before the condemnation). However, the doctrine of frustration

of purpose is only applicable if the event is unforeseeable. *Wheelabrator Envtl. Sys. v. Galante*, 136 F. Supp. 2d 21, 33–35 (D. Conn. 2001) (applying Connecticut law) (finding that a party did not establish that a change in the law constituted a force majeure event and that a change in the law was foreseeable so the doctrine for frustration of purpose was inapplicable); *DDS Wireless Int'l, Inc. v. Nutmeg Leasing, Inc.*, 75 A.3d 86, 91 (Conn. App. Ct. 2013) (holding that doctrine of frustration of purpose did not apply because the parties foresaw that parties may have issues with dispatch system).

Connecticut also recognizes the defense of impracticability, which also requires the event to be unforeseeable. *Dills v. Enfield*, 557 A.2d 517, 524 (Conn. 1989) (holding that a failure to obtain financing was foreseeable, rendering defense of impracticability inapplicable).

Delaware

Force Majeure Clauses

The language contained in the force majeure clause determines how it is interpreted

Generally "a 'catch-all' phrase, such as "or any other reason whatsoever beyond the control of the parties," must be construed within the context established by the preceding listed clauses." *Stroud v. Forest Gate Dev. Corp.*, No. Civ.A. 20063, 2004 WL 1087373, at *7–8 (Del. Ch. May 5, 2004) (holding that the force majeure clause was not triggered because the delaying event was due to the parties' own actions or lack of diligence). However, "the use of 'whatsoever' suggests that an especially narrow reading of the phrase was not intended." *Id.* at *5. Contract terms are necessary to determine if an act must be unforeseeable to trigger a force majeure provision. *See Vici Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 289–90 (3rd Cir. 2014) (interpreting Delaware law)(because foreseeability was not raised below and was not stated as a requirement in the provision court declined to rule on it). However, the case held that "[t]he law makes clear that reasonable, unextreme [sic] economic hardship cannot constitute a force majeure itself" *Id.* at 288.

Notice requirements in force majeure clauses may be strictly construed but can be waived

Few Delaware courts have addressed this issue. However, courts have held that failing to comply with a notice provision in the force majeure clause can nullify the clause. *In re Magna Entm't Corp.*, 475 B.R. 411, 416 (Bankr. D. Del. 2012) (interpreting Delaware law) (failure to provide notice precluded a party from invoking force majeure provision).

Delaware courts have not addressed whether there is a general duty to mitigate due to force majeure

Courts in Delaware have not addressed whether there is an implied or general duty to mitigate damages related to the force majeure event.

Allocation of inventory

Delaware courts have not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Delaware has not expressly addressed whether other defenses may be argued in the alternative. However, it does appear possible, from the case law, that frustration of purpose or impracticability may be argued in the alternative to a force majeure provision. *See United States v. Panhandle E. Corp.*, 693 F. Supp. 88, 97 (D. Del. 1988) (party raised a defenses under the contract's force majeure provision, frustration of

purpose, and impracticability in the lower court); *Schaefer Lincoln Mercury, Inc. v. Jump*, C. A. No. 0005-06-86, 1987 WL 642758, at *2 (Del. Com. Pl. June 8, 1987) (holding that a temporary frustration of purpose only suspends "the obligor's duty to perform while the frustration of purpose exists"; it does not cancel the contract). Further, the doctrines only apply to events that unforeseeable. *See Chase Manhattan Bank v. Iridium Afr. Corp.*, No. Civ.A. 00-564, 2004 WL 323178, at *5 (D. Del. Feb. 13, 2004) (holding that the impracticability was inapplicable because bankruptcy is foreseeable generally in a lending agreement, and the court analyzed commercial impracticability as the contract was not for the sale of goods so therefore not covered by the UCC); *Freidco of Wilmington Ltd. v. Farmers Bank of Delaware*, 529 F. Supp. 822 (D. Del. 1981) (holding that market forecast of higher utilities cost does not make performance of a lease obligation commercially impracticable, which is a common law principle not governed by the UCC since the contract was not for the sale of goods).

Florida

Force Majeure Clauses

Force majeure clauses are narrowly interpreted and lists contained in such clauses are generally found exclusive

"Force majeure clauses are typically narrowly construed, and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 18-cv-80712, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019) (force majeure clause in a lease that covered "strikes[;]lockouts; acts of God; acts of war; civil commotion; fire or any other casualty; governmental action" held inapplicable to a change in a government contract that was lessee's revenue source). Florida allows force majeure clauses that include foreseeable events and events that merely frustrate performance, but "such events must be provided for in the language of the contract and must not result in an illusory contract." *In re Flying Cow Ranch HC, LLC*, 18-br-12681, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018) (force majeure clause held inapplicable to failure to obtain zoning approvals or permits despite a catch all clause that included "any other cause not reasonably within [the parties'] control"). Florida courts recognize force majeure clauses that apply more broadly than the doctrine of impossibility. *See Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857 n.6 (11th Cir. 2009) (applying Florida law) (because force majeure clause in construction contract applied only to events beyond the control of the seller and not within its discretion, it did not render illusory seller's obligation to finish construction within two years in compliance with Interstate Land Sales Full Disclosure Act). Furthermore, force majeure clauses may adopt a lower standard for nonperformance that would not be available under alternative legal theories. *Id.* (holding that the triggering event in a force majeure clause can be broader than those under the impossibility doctrine, including events such as weather conditions and material shortages).

Notice requirements in force majeure clauses may be strictly construed but can be waived

Few Florida courts have addressed this issue. However, courts have held that failing to adhere to the notice provision in a force majeure provision can be found to be a breach of contract. *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 13-cv-20544, 2017 U.S. Dist. LEXIS 5410 (S.D. Fla. Jan. 12, 2017) (applying Florida law). The notice provision in a force majeure clause may be waived when the other party determines that continued performance is impossible and acknowledges a force majeure prevents the completion of a contract. *Harris Corp. v. National Iranian and Television*, 691 F.2d 1344, 1356 n.20 (11th Cir. 1982) (applying Florida law).

Florida courts have not expressly addressed whether there is a general duty to mitigate due to force majeure

Courts have not addressed whether there is an implied or general duty to mitigate damages related to the force majeure event. However, courts have suggested in *dicta* that force majeure provisions may impose obligations to mitigate damages. *S&B/Bibb Hines PB3 Joint Venture v. Progress Energy Fla., Inc.*, 365 Fed. Appx. 202, 204 (11th Cir. 2010).

Allocation of inventory

Florida has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Florida courts have not expressly addressed the ability to argue force majeure in the alternative to other defenses. However, there is some indication that other defenses, especially frustration of purpose, may be asserted in the alternative to force majeure. *See ARHC NVWELFL01, LLC*, 2019 WL 4694146, at *3 (citing to *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1288 (Fed. Cir. 2002) (recognizing that defendants brought defenses under force majeure, impossibility of performance, commercial impracticability, and frustration of purpose)); *In re Mona Lisa at Celebration, LLC*, 436 B.R. 179 (Bankr. M.D. Fla. 2010) (applying Florida law) ("Impossibility refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. Frustration arises when one of the parties finds that the purpose for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.") (internal quotation omitted).

Frustration of purpose/impossibility

Florida places great weight on the foreseeability of the event that caused the alleged impossibility or frustration of purpose. *Home Design Center-Joint Venture v. Cty. Appliances of Naples, Inc.*, 563 So. 2d 767, 769–770 (Fla. Dist. Ct. App. 1990). "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." *Id.*

Shifts or downturns in the market are not unanticipated circumstances sufficient for a defense of impossibility. *Ferguson v. Ferguson*, 54 So. 3d 553, 557 (Fla. Dist. Ct. App. 2011) (holding downturn in real estate market was not the sort of unanticipated circumstance that falls within the purview of the doctrine of impossibility); *Home Design Center*, 563 So. 2d at 769–771 (holding that neither the doctrine of impossibility nor frustration of purpose were applicable because failure to obtain floor plan financing did not make it impossible to run appliance store and such general business issues are foreseeable); *Hillsborough Cty. v. Star Ins. Co.*, 847 F.3d 1296, 1305 (11th Cir. 2017) (finding doctrine of frustration of

purpose inapplicable where it was foreseeable that county could be liable for damages over the sovereign immunity cap, especially when the county purchased excess insurance of $2 million).

Florida applies the UCC Doctrine of commercial impracticability

The UCC doctrine of commercial impracticability is codified at Florida Statute § 672.615. The statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (1) Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections (2) and (3) is not a breach of her or his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (2) Where the causes mentioned in subsection (1) affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among her or his customers but may at her or his option include regular customers not then under contract as well as the seller's own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.
>
> (3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection (2), of the estimated quota thus made available for the buyer.

Fla. Stat. § 672.615.

Georgia

Force Majeure Clauses

Force majeure clauses are interpreted broadly

Under Georgia law, courts interpret expansive language in force majeure clauses broadly. *Lodgenet Entm't Corp. v. Heritage Inn Assocs., L.P.*, 583 S.E.2d 225, 226–27 (Ga. Ct. App. 2003) (holding that a contract could be terminated when a business ceased to operate because the force majeure language applied "whenever operations of business by either party are discontinued, by law or otherwise, *for any reason whatsoever*") (emphasis added). Nevertheless, courts reject attenuated causation; for example, the 2008 economic downturn was not a force majeure event that excused banks' performance of their obligations under agreement with provider of credit/debit card charge processing services. *Elavon, Inc. v. Wachovia Bank, Nat. Ass'n*, 841 F. Supp. 2d 1298 N.D. Ga. 2011) (applying Georgia law) (although economic perils may have been reasonably beyond the control of banks, economic downturn and resulting merger of banks did not objectively prevent banks from continuing to refer customers to provider per contract. "[F]undamentally, the issue here is whether [the banks'] performance of their obligation under the … Agreement was excused. This is different from the question whether the banking crisis constitutes a force majeure.").

Notice requirements in force majeure clauses are strictly enforced

While Georgia courts have not decisively addressed the issue of delayed notice, total failure to comply with the notice requirement may preclude a party from relying on a force majeure provision. *Camafel Bldg. Inspections, Inc. v. BellSouth Adver. & Publ'g Corp.*, No. 1:06-cv-1501, 2008 WL 649778, at *4 (N.D. Ga. Mar. 7, 2008) (applying Georgia law) (defendant's failure to provide any notice precluded any claim under a force majeure provision, which required "immediate notice" if any force majeure condition occurred).

Georgia courts have not addressed whether there is a general duty to mitigate

Georgia courts have not determined whether there is a duty to mitigate damages in light of a force majeure event.

Allocation of inventory

Georgia has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

A contract need not include a force majeure provision in order for a party to invoke "act of God" as a defense to non-performance of a contract. Section 13-4-21 of the Georgia Code provides:

> If performance of the terms of a contract becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor.

Ga. Code. § 13-4-21. "Whether a particular casualty is an act of God is a mixed question of law and fact." *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 460 (5th Cir. 1979) (applying Georgia law)("The defining and limitation of the term, its several characteristics, its possibilities as establishing and controlling exemption from liability, are questions of law for the court; but the existence or non-existence of the facts on which it is predicated is a question for the jury." (quoting *Goble v. Louisville & Nashville R.R. Co.*, 200 S.E. 259, 264 (Ga. 1938)).

Elsewhere, the Georgia Code defines "Act of God" to mean "an accident produced by physical causes which are irresistible or inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. This expression excludes all idea of human agency." Ga. Code § 1-3-3; *see also Royal Indem. Co. v. McClatchey*, 114 S.E.2d 394, 397 (Ga. Ct. App. 1960) ("Although Code § 102-103 defines accident and 'act of God' for their statutory meaning, these definitions are persuasive as to the general meaning in Georgia law."). *See also Sampson v. Gen. Elec. Supply Corp.*, 50 S.E.2d 169, 174 (Ga. Ct. App. 1948) ("The term 'act of God' in its legal sense applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them," holding that heavy rains did not relieve defendants who contracted to keep sewer system in good repair from liability for damage resulting from their failure to do so); *Uniroyal*, 588 F.2d at 460 (an act of God must not be human caused, and it must not be reasonably predictable or avoidable).

Impossibility of performance of a contract covenant personal to the promisor does not excuse nonperformance. *Hampton Island, LLC v. HAOP, LLC*, 702 S.E.2d 770 (Ga. Ct. App. 2010) (purchaser's inability to pay contract price did not excuse performance).

Courts have allowed the defense of impracticability in the alternative to a force majeure provision. *See Elavon*, 841 F. Supp. at 1305–08 (denying summary judgment on both defenses of impracticability and force majeure).

Hawaii

Force Majeure Clauses

Force majeure clauses are narrowly interpreted

Under Hawaii law, "[t]he party who relies on a force majeure clause to excuse performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence." *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003) (applying Hawaii law). Force majeure clauses are construed narrowly by Hawaiian courts.

For example, *OWBR LLC* concerned the impacts of the 9/11 attacks on a music industry conference planned for early 2002. In 2000, the conference organizer executed a contract with Outrigger Resorts, reserving 2,200 hotel room nights to be booked by attendees for the February 2002 event. Room prices ranged from $235 to $900 per night, and if the conference was cancelled less than 30 days prior, the organizer would pay 100% of the expected room revenues. The agreement included a force majeure provision, stating that the parties' performance "is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving the Hotel's employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement." *Id.* at 1216. In January 2002, less than 30 days before the event, the organizer sent Outrigger a letter cancelling the event because "[t]he events of September 11th coupled with the fragile condition of the U.S. and international consumer economies have resulted in the withdrawal of commitments to this event from many of our sponsors and participants." *Id.* The court found that the circumstances presented did not meet the requirements for a complete excuse under the agreement's force majeure provision. "Based on the case law involving force majeure clauses and impracticability, Defendants have not presented sufficient evidence that terrorism presented travelers in February 2002 with circumstances so 'extreme and unreasonable' as to excuse performance under the Agreement." *Id.* at 1225. Going even further, the court stated that, regardless of the contract terms, "a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event." *Id.* at 1223.

Notice requirements in force majeure clauses are strictly enforced

The few cases involving notice terms in force majeure clauses show that Hawaiian courts strictly enforce such requirements. *See United States v. Pflueger*, No. 06-cv-00140, 2007 WL 1876028, at *2 (D. Haw. June 27, 2007) (applying Hawaii law). In *Pflueger*, federal, state, and local government authorities had previously entered into a consent decree with a landowner to halt unlawful grading activities and mitigate attendant environmental harms. *Id.* The consent decree required the landowner to conduct remediation programs and renovate the wastewater system in a nearby residential area. Shortly after the decree was entered, one of the landowner's reservoirs breached its dam, causing significant damage and leading local

authorities to deny permits required for the wastewater project. The regulatory authorities overseeing the consent decree sued the landowner for failure to perform under its terms, and the landowner sought shelter in the decree's force majeure clause, which excused performance for "any event beyond the control of Defendant . . . that delays the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation, and may include the failure to obtain, or delay in obtaining, a permit . . . ." *Id.* at *3. Importantly, the provision also required oral, electronic, or facsimile notice within 72 hours after the occurrence of a claimed force majeure event, "and also" written notice within a week after the occurrence. The landowner provided *written* notice of its intent to invoke the force majeure provision less than 24 hours after the denial of a permit, but admitted it failed to provide the oral, electronic, or facsimile notice described in the provision. The court found the landowner could not benefit from the decree's force majeure protections because it failed to follow the exact notice requirements contemplated, though a force majeure event had likely occurred. *Id.*

Hawaii has not addressed whether there is a general duty to mitigate

State and federal courts applying Hawaii law have not expressed any general duty to mitigate in force majeure circumstances.

Allocation of inventory

Hawaii has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Hawaii follows the Restatement (Second) approach to frustration of purpose, including the requirement that the frustration must be "substantial." *See Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1154 (D. Haw. 2007) (applying Hawaii law) (increasing costs and hardships associated with tenancy, including compliance with environmental laws in the operation of dairy farm, was not sufficiently "substantial" to excuse tenant's performance under lease; tenant's decision to terminate lease and avoid further compliance costs did not meet requirements for frustration of purpose defense).

Idaho

Force Majeure Clauses

Force majeure clauses are interpreted according to the claim language

Idaho courts interpret force majeure clauses as they would any other contract provision. *Burns Concrete, Inc. v. Teton County*, 384 P.3d 364, 367 (Idaho 2016) (construing a force majeure clause)("[i]n construing a written instrument, this Court must consider it as a whole and give meaning to all provisions of the writing to the extent possible"). Moreover, a force majeure event cannot be foreseeable. *Roost Project, LLC v. Andersen Constr. Co.*, 1:18-cv-00238, 2020 WL 560574, at *8 (D. Idaho Feb. 4, 2020)(applying Idaho law) (citing *Burns Concrete*) ("Even where, as here, a contract's force majeure clause does not expressly use the word 'foreseeability,' courts consider foreseeability when determining whether the event qualifies as force majeure").

This analysis extends to the interpretation of any "catch-all" phrases in a force majeure clause. *See id.* at 365–368. In *Burns Concrete*, the Idaho Supreme Court held that the failure of a county to give zoning approval to a developer to build a 75-foot-high permanent facility was a force majeure event under a development agreement between the developer and the county, because the agreement required the developer to construct a permanent facility that was 75 feet high. *Id.* The force majeure clause read that the permanent facility was to be constructed within 18 months, "subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment **or any other act of force majeure or action beyond developer's control**." *Id.* at 366 (emphasis added). The court held that the county's failure to give zoning approval was an action beyond the developer's control because it was unforeseeable that the county would require the developer to build a facility 75 feet in height and then prevent it from doing so. *Id.* Moreover, the court noted the catch-all phrases, "or any *other* act of force majeure" and "or action beyond developer's control" could include acts not expressly listed in the force majeure clause. *Id.* at 367.

Force majeure events only excuse obligations directly affected by the event. *Idaho Power Co. v. Cogeneration, Inc.*, 9 P.3d 1204, 1214 (Idaho 2000) ("Looking at the plain language of the contract, the district court correctly interpreted the force majeure clause as excusing only those obligations affected by an event of force majeure. Based upon the record, ample evidence exists indicating that the obligation to pay the security was not directly affected by the revocation and suspension of the required permits and certificates.").

Idaho courts will strictly enforce notice requirements

There are few cases in Idaho that expressly discuss Notice requirements in force majeure clauses. However, the Idaho Supreme Court interpreted a notice provision in *Afton Energy, Inc. v. Idaho Power Co.*, 834 P.2d 850, 855 (Idaho 1992), holding that the appellants failed to give proper notice under a clause requiring written notice "describing the particulars of the force majeure as soon as reasonably

possible after the occurrence of the force majeure" because letters sent to the appellee did not mention the alleged force majeure event.

A party may have a duty to use reasonable efforts to mitigate

Idaho courts have not addressed whether a party has an implied duty to mitigate the effects of a force majeure event through reasonable efforts or due diligence. However, a party may contractually require that a counter-party exercise due diligence to prevent or overcome an event before it can be considered a force majeure event. *See Cogeneration*, 9 P.3d at 1207 ("As defined in relevant part by the Agreement:[f]orce majeure or an event of force majeure means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome . . . .").

Allocation of inventory

Idaho courts have not addressed whether allocation of inventory is required under a force majeure provision. However, if the contract in question involves the sale of goods, Idaho's version of Article 2 of the Uniform Commercial Code ("UCC"), regarding the excuse of the delay or failure to deliver goods, requires a seller to allocate its available products among its customers in a fair and reasonable manner. Idaho Code § 28-2-615.

Common Law Defenses and UCC

Under Idaho law, defenses found in the common law and the Uniform Commercial Code ("UCC") are available to excuse a party's inability to perform. However, it is unclear if these defenses would be available notwithstanding a contract containing a force majeure clause because Idaho courts have not expressly addressed this issue.

Impossibility or frustration of purpose

According to the Idaho Supreme Court, the doctrine of impossibility operates "[w]here, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or circumstances indicate to the contrary." *Haessly v. Safeco Title Ins. Co. of Idaho*, 825 P.2d 1119, 1121 (Idaho 1992). "[I]t is the task itself which must be impossible - it is not enough that the particular promisor is unable to perform the task if it would be possible for a different promisor to perform." *State v. Chacon*, 198 P.3d 749, 752 (Idaho Ct. App. 2008). Idaho courts often use the terms impossibility and frustration of purpose interchangeably. *See id.* (discussing the impossibility doctrine and then noting "frustration of purpose must be objective, not subjective, to excuse a contractual obligation").

A party invoking impossibility must prove the following: (1) a contingency has occurred; (2) performance must be impossible, not just more difficult or more expensive; and, (3) the nonoccurrence of the contingency must be a basic assumption of the agreement. *Id.* (holding there existed a genuine issue of

material fact where appellant alleged that a contract to transfer an easement necessary for access to a highway was rendered impossible by a government entity's refusal to grant access to the highway). "Impossibility that is only temporary will not act to discharge a contractual obligation if the contract can yet be performed after the impossibility ceases." *Sutheimer v. Stoltenberg,* 896 P.2d 989, 993 (Idaho Ct. App. 1995). The doctrine of impossibility excuses performance of a contract only when performance is rendered objectively impossible. *Chacon*, 198 P.3d at 752.

UCC

For sellers, the UCC has a provision that can also be used excuse performance: "Delay in delivery or non-delivery in whole or part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . ." Idaho Code § 28-2-615. Idaho courts have recognized that § 28-2-615 can apply to buyers as well provided they satisfy the requirements of the statute. *Lawrance v. Elmore Bean Warehouse, Inc.*, 702 P.2d 930, 932 (Idaho Ct. App. 1985) (explaining that under § 28-2-615 a buyer of pinto bean seed had to show that the seed contract was based on the assumption that the price would not decline or the market would not dry up).

Illinois

Force Majeure Clauses

Force majeure clauses are interpreted as any other contract provision

Illinois courts interpret force majeure clauses according to the words of the clause and the surrounding contract terms. *See Fried, Mendelson & Co. v. Mayer Shirt Co.,* 225 Ill. App. 464, 465 (Ill. App. Ct. 1922) (holding that a force majeure clause stating "fire, war, strikes, . . . or any cause not within the seller's control, . . ., shall absolve the seller from any liability hereunder" could not apply to the buyer); *U.S. v. Krilich*, 126 F.3d 1035, 1037 (7th Cir. 1997) (interpreting Illinois law) (noting "[t]he doctrine of impossibility and frustration is akin to the force majeure provisions in the decree"). A force majeure event must be one envisioned by the force majeure clause and must have proximately caused the non-performance. *N. Ill. Gas Co. v. Energy Co-op., Inc.,* 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984) (holding that a natural gas utility's termination of a naphtha supply contract based on a government order denying a rate increase for its natural gas was not a force majeure event[1] because voluntarily reducing production (and thereby reducing its need for naphtha) in response to the inability to increase its rates was not compelled by the order and, therefore, was not relevant or material to its performance of the contract). No Illinois courts have analyzed Notice requirements in force majeure clauses

Illinois courts have not addressed the issue of whether Notice requirements in a force majeure clause are enforceable.

Illinois courts also have not addressed whether there is a duty to mitigate

Courts in Illinois have not expressly addressed whether there is an implied or general duty to mitigate damages related to the force majeure event. Contract terms, however, may govern a seller's duty to cover in the event of a force majeure event. *See Allen v. W.J. Quann & Co.*, 80 Ill. App. 547, 547–49 (Ill. App. Ct. 1899) (holding that a cannery was excused from delivering canned corn and did not have to purchase corn from others to fulfill the contract where a clause provided, "[i]n case of destruction of cannery by the elements, the seller is not to be held liable for non-delivery," indicating the parties contemplated that the corn had to be delivered only from the cannery that was destroyed).

Allocation of inventory

Illinois courts have not directly addressed whether resources or inventory must be allocated when invoking a force majeure provision. However, if the contract in question involves the sale of goods,

[1] The force majeure clause in *Northern Illinois Gas* read in relevant part: ". . . In no event shall any liability result to either party for . . . non-performance caused by circumstances beyond the control of the party affected, including but not limited to . . . compliance with any law, regulation, requisition, request or direction made by any governmental authority . . . or by reason of any similar or dissimilar causes . . . ." 461 N.E.2d at 1057.

Illinois's version of Article 2 of the Uniform Commercial Code ("UCC"), codified in Chapter 810 of the Illinois Commercial Code, regarding the excuse of the delay or failure to deliver goods, requires a seller to allocate its available products among its customers in a fair and reasonable manner. 810 Ill. Comp. Stat. 5/2-615.

Common Law Defenses and UCC

Under Illinois law, defenses found in the common law and the Uniform Commercial Code ("UCC") are available to excuse a party's inability to perform. Even if a force majeure clause is present, a party should also be able to argue the common law defenses of frustration of purpose or commercial frustration. *See N. Ill. Gas Co.*, 461 N.E.2d at 1059–61 (court considered, but subsequently rejected, a utility's arguments it was justified in failing to purchase naphtha under a supply contract under: (a) a force majeure clause based on a government order denying a rate increase for its natural gas; and (b) the frustration of purpose doctrine and UCC § 2-615 because increased natural gas supplies, increased naphtha prices, and the government order destroyed the value of the contract and were unforeseeable events.).[2]

Impossibility, frustration of purpose, commercial frustration

The doctrine of impossibility, frustration of purpose, or commercial frustration[3] is a viable defense but is not to be applied liberally. *Smith v. Roberts*, 370 N.E.2d 271, 273 (Ill. App. Ct. 1977); *Downs v. Rosenthal Collins Group, LLC*, 963 N.E.2d 282 (Ill. App. Ct. 2011) (doctrine of impossibility of performance is applied only in narrow circumstances due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances).

A defendant invoking commercial frustration must satisfy a two-prong test: "(1) the frustrating event was not reasonably foreseeable; and (2) the value of counter-performance by the lessee had been totally or nearly totally destroyed by the frustrating cause." *Smith v. Roberts*, 370 N.E.2d at 273 (holding a store's destruction by fire terminated lease for adjacent building that tenant intended to use to expand store; commercial frustration doctrine applied because store's destruction was not reasonability foreseeable). The doctrine of impossibility excuses performance of a contract only when performance is rendered objectively impossible either because the subject matter is destroyed or by operation of law. *Innovative Modular Sols. v. Hazel Crest Sch. Dist.* 152.5, 965 N.E.2d 414, 421 (Ill. 2012), *as modified on denial of reh'g* (Mar. 26, 2012) (holding the impossibility doctrine inapplicable when an entity created by an Act enacted to administer the finances of a troubled school district sought to terminate a contract (without paying cancellation fees required by the contract) for modular school buildings because the subject matter

[2] But *see U.S. v. Krilich*, 126 F.3d 1035, 1037 (7th Cir. 1997) (holding that the defendant could not sidestep the force majeure provision and invoke the doctrine of impossibility because it had failed to petition the court for resolution of the dispute between the parties as to whether a force majeure event had occurred as required under the force majeure provision.)

[3] Illinois courts tend to use these terms interchangeably.

– modular buildings – had not been destroyed, nor did the Act render performance of the contracts objectively responsible by operation of law as the Act required the contracts to be cancelled according to the contract terms); *Leonard v. Autocar Sales & Serv. Co.*, 64 N.E.2d 477 (Ill. 1945) (holding lessee could not terminate lease under the impossibility doctrine where government took temporary possession of premises for the war effort because the landlord's estate was not extinguished by the temporary takeover or condemnation).

In order to assert that its performance was impossible or impractical, a party must show that it made reasonable efforts to overcome the obstacle to performance. *N. Ill. Gas Co.*, 461 N.E.2d at 1058; *see also* Restatement (Second) of Contracts, §§ 261(d) (1981) ("[A] party is expected to use reasonable efforts to surmount obstacles to performance . . . , and a performance is impracticable only if it is so in spite of such efforts."). "A party seeking to excuse his performance must show that he can operate only at a loss and that the loss will be so severe and unreasonable that failure to excuse performance would result in grave injustice." *N. Ill. Gas Co.*, 461 N.E.2d at 1058.

UCC

For sellers, the UCC has a provision that can also be used excuse performance: "Delay in delivery or non-delivery in whole or part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . ." 810 Ill. Comp. Stat. 5/2-615(a). At least one Illinois court has recognized that § 2-615 can apply to buyers as well as seller provided they satisfy the requirements of the statute. *N. Ill. Gas Co.*, 461 N.E.2d at 1063 (approved of trial court permitting natural gas utility, as a buyer, seeking declaratory judgment that it properly ceased performance under naphtha supply contract, to invoke §2-615 impracticability as a defense).

Indiana

Force Majeure Clauses

Indiana courts enforce force majeure clauses according to their terms

Under Indiana law, a force majeure clause "is defined as a contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." *Specialty Foods of Ind., Inc. v. City of S. Bend*, 997 N.E.2d 23, 26 (Ind. Ct. App. 2013) (noting that "Indiana has very few cases interpreting force majeure clauses"). Courts in Indiana hold:

> The scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term. In other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended. The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense.

Id. at 27 (upholding force majeure as excuse for non-performance where triggering event was not in the reasonable control of defendant; recognizing that "catchall" phrases limit force majeure provisions and require that triggering events must be similar to the those expressly listed in the provision itself).[1] Finally, "a force majeure clause is not intended to buffer a party against the normal risks of a contract." *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986) (applying Indiana law).

Notice requirements are strictly enforced

Notice requirements are strictly enforced under Indiana law. See e.g., State v. Int'l Bus. Machs. Corp., 51 N.E.3d 150, 165 (Ind. 2016) (holding that defendant could not avail itself of force majeure clause because it failed to provide notice of flood to affected party); cf. IPF/Ultra Ltd. P'ship v. UP Improvements, LLC, No. 2:08-cv-21, 2008 WL 3896746, at *6 (N.D. Ind. Aug. 19, 2008) (applying Indiana law) (holding that

[1] The force majeure clause in *Specialty Foods* provided:

> In the event Century Center or [Specialty Foods] shall be delayed or hindered or prevented from the performance of any obligation required under this Agreement by reason of strikes[,] lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war or any other reason not within the reasonable control of Century Center or [Specialty Foods], as the case may be, then the performance of such obligation shall be excused for the period of such delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

997 N.E.2d at 27.

notice was not required because force majeure provision in Purchase Agreement was silent as to notice requirement).

Indiana has not addressed whether there is a general duty to mitigate

Indiana courts have not addressed whether there is a duty to mitigate damages in light of a force majeure event.

Allocation of inventory

Indiana courts also have not analyzed how inventory should be allocated when a force majeure event occurs.

Common Law Defenses and UCC

Indiana courts have not addressed whether litigants are permitted to assert both force majeure and impracticability/frustration of purpose as affirmative defenses to breach of contract. *See Carbon Cty. Coal*, 799 F.2d at 277 (applying Indiana law) (Expressly refusing to decide "whether a *force majeure* clause should be deemed a relinquishment of a party's right to argue impracticability or frustration, on the theory that such a clause represents the integrated expression of the parties' desires with respect to excuses based on supervening events").

Impracticability is available as a statutory defense to non-performance in sale of goods contracts. Ind. Code § 26-1-2-615. Specifically:

> Except so far as a seller may have assumed a greater obligation and subject to IC 26-1-2-614 on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Id.

Iowa

Force Majeure Clauses

Force majeure events must be unforeseeable

Notably, "it does not appear that the Iowa courts, or, indeed, federal courts applying Iowa law, have engaged in any substantial discussion of the scope of force majeure clauses." *Rexing Quality Eggs v. Rembrandt Enters., Inc.*, 360 F. Supp. 3d 817, 840 (S.D. Ind. 2018) (applying Iowa law) (rejecting force majeure clause defense where foreseeable economic triggering event, i.e. drop in consumer demand, fell outside force majeure clause as articulated by the parties, which provided that "[a]ny delay or failure of either party to perform its obligations under this Agreement shall be excused if, and to the extent that the delay or failure is caused or materially contributed to by force majeure or other acts or events beyond the reasonable control of a party hereto").

Iowa courts define force majeure as "an event that can neither be anticipated nor controlled." *Pillsbury Co. v. Wells Diary, Inc.*, 752 N.W.2d 430, 440 (Iowa 2008). Iowa courts characterize force majeure provisions as clauses "allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled." *Id.* (rejecting force majeure as a defense where defendant failed to show that explosion at facility was beyond his reasonable control when force majeure provision provided that "Neither party will be liable for delays or suspension of performance (other than the obligation to pay for services and goods sold and delivered) caused by acts of God or … explosions …or any other cause that is beyond the reasonable control of that party ("Force Majeure") so long as that party has used its best efforts to perform despite such Force Majeure.) "A force majeure clause is not intended to shield a party from the normal risks associated with an agreement." *Id.*

Notice requirements in force majeure clauses may be strictly construed but can be waived

No Iowa courts have analyzed Notice requirements with respect to force majeure clauses.

Iowa courts have not addressed whether there is a general duty to mitigate due to force majeure

Courts in Iowa have not addressed whether there is an implied or general duty to mitigate damages related to the force majeure event.

Allocation of inventory

Iowa has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Although not expressly stated, parties are typically permitted to assert other defenses in addition to force majeure under Iowa law. *See, e.g.*, *Rexing*, 360 F. Supp. 3d at 842 (allowing defendant to assert force majeure, impracticability and frustration of purpose as defenses to breach)*; see also Am. Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.*, 586 N.W. 2d 325, 331 (allowing force majeure defense as well as impracticability defense under UCC).

Even without the existence of a force majeure clause, Iowa courts permit impracticability as a valid defense excusing performance. *See id.* at 330 (recognizing adoption of Restatement (Second) of Contracts §261) ("Where, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary").

Kansas

Force Majeure Clauses

Force majeure clauses are narrowly construed

Little case law exists in Kansas regarding force majeure provisions. However, force majeure provisions are narrowly construed under Kansas law. *See e.g.*, *Hutton Contracting Co. v. City of Coffeyville*, 487 F.3d 772, 778 (10th Cir. 2007) (applying Kansas law) (rejecting force majeure defense where non-performance was caused by subcontractor delay)[1]; *Benson Mineral Grp., Inc. v. N. Nat. Gas Co., Div. of Enron Corp.*, No. 86-cv-1903, 1988 WL 404348, at *7 (D. Kan. Apr. 29, 1988) (applying Kansas law) (rejecting force majeure defense where triggering event was market collapse because "[w]hen several specific contingencies which will excuse nonperformance are named in a contract, only the named contingencies will excuse nonperformance.") (citing *City of Topeka v. Indus. Gas Co.*, 11 P.2d 1034).

Notice requirements are upheld in Kansas

Failure to comply with notice requirements can preclude a party from relying on a force majeure provision in order to excuse performance. *See K.C. Power & Light Co. v. Pittsburg & Midway Coal Min. Co.*, No. 88-cv-2224, 1989 WL 151919, at *4 (D. Kan. Nov. 17, 1989) (applying Kansas law) (denying summary judgment where defendant strictly complied with notice provision of force majeure clause). In *Kansas City Power & Light*, the plaintiff sought excuse from performance and rescission of its contract to buy coal from defendant. *Id.* at *1. Plaintiff gave notice to defendant that it was unable to comply with fuel emission standards while burning coal. *Id.* at *4. As a result, plaintiff invoked the force majeure clause and gave notice of same. The court found that prompt notice had been given and denied defendant's motion for summary judgment. *Id.*

Kansas courts have not addressed whether there is a duty to mitigate damages

Kansas courts have not addressed mitigation or allocation in the context of force majeure provisions.

Allocation of inventory

Kansas has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

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[1] The force majeure clause in *Hutton Contracting* provided:

The time for Completion of Construction shall be extended for the period of any reasonable delay which is due exclusively to causes beyond the control and without the fault of [contractor], including Acts of God, fires, floods, and acts or omissions of [the City] with respect to matters for which [the City] is solely responsible.

487 F.3d at 775.

Common Law Defenses and UCC

Kansas courts have not explicitly addressed whether litigants can assert force majeure and impracticability defenses at the same time. A federal court applying Kansas law permitted parallel defenses, however. *K.C. Power & Light*, 1989 WL 151919, at *5 (permitting defendant to assert defenses based on force majeure, impracticability and frustration of purpose).

"Under Kansas law, a party asserting commercial impracticability to excuse performance must establish that the performance, as agreed to in the contract, has become objectively impractical as a result of a particular event or condition, which the parties assumed would not occur." *Id.* at *5. "Performance that has become merely more difficult or unprofitable is not enough to establish objective impracticability." *Id.* (citing *Sunflower Elec.,* 638 P.2d 963, 969 (Kan. Ct. App. 1981)).

Additionally, "the doctrine of commercial frustration excuses a breach of contract only if the purpose of the contract is frustrated or its enjoyment is prevented by law." *K.C. Power & Light*, 1989 WL 151919, at *6.

Kentucky

Force Majeure Clauses

Force majeure clauses are interpreted narrowly in Kentucky

"A force majeure event is commonly considered to be caused by overpowering, superior, or irresistible force, such as an act of God, which is beyond the reasonable control of the parties and cannot be avoided by the exercise of due care." *Ky. Utils. Co. v. S.E. Coal Co.*, 836 S.W.2d 392, 400 (Ky. 1992). To invoke a force majeure provision, a party needs to show: "(1) that an event occurred meeting the contract's definition of 'force majeure,' and (2) that event caused the party's failure to perform." *Emerald Int'l Corp. v. WWMV, LLC*, No. 15-cv-0179, 2016 WL 4433357, at *3 (E.D. Ky. Aug. 15, 2016). Even if a force majeure event causes a delay in performance, a party must nevertheless fulfill its contractual obligations if the delay does not prevent completion of the contract in a timely manner. *See Gulf States Protective Coatings, Inc. v. Caldwell Tanks*, Inc., No. 3:15-cv-00649, 2019 WL 7403970, at *18 (W.D. Ky. June 18, 2019).

The party asserting force majeure has the burden of proving the event was beyond its control and not due to its fault or negligence. *Kentucky Utils. Co.*, 836 S.W.2d at 400 (Although scheduled power outages for maintenance are not normally legitimate force majeure events, their inclusion in the force majeure clause was valid because the terms of the contract were the result of a lawful arm's length transaction. Thus, the question for the court was "whether any or all of force majeure events were valid events and whether any or all of same were reasonably beyond the control of [the purchaser]"); *In re Clearwater Nat. Res., LP*, 421 B.R. 392, 397 (Bankr. E.D. Ky. 2009) (force majeure clause in a contract mining agreement excused performance in the event coal customers refused, failed, or were unable to buy coal. The court held that the coal company could not avail itself of the force majeure clause because the events claimed by the company were not force majeure events but, rather, normal market risks. The company's agreement to a fixed-priced contract evidenced an express assumption of normal market risks, such as a downturn in the coal market).

The force majeure event also must be unforeseeable. For instance, in *Emerald International*, a coal mining company invoked force majeure clause in agreement with coal broker, which excused the "failure or delay of performance … caused by events or conditions beyond its reasonable control including, without limitation, failure or shortage of materials, supplies, or shipping facilities, acts of God, and acts, regulations, directives, or priorities of any governmental authority." 2016 WL 4433357, at *5. In support, the coal mining company noted that the government issued an order prohibiting cutting down trees from the mining area, which prohibited the company from using its preferred mining method. *Id.* The company also claimed that a decline in the coal market has caused its inability to perform. *Id.* The court rejected both events as insufficient to constitute force majeure. The parties agreed to price terms that assumed market risks and a market decline did not change the quantity of coal available to mine. The agreement also permitted the coal to be provided from any source and by any method.

Notice requirements are also strictly construed

Failure to provide timely notice of force majeure event as required by contract precludes invocation of force majeure defense of nonperformance. *Gulf States Protective Coatings*, 2019 WL 7403970, at *13–15.

Kentucky has not addressed whether there is a general duty to mitigate

Courts in Kentucky have not addressed whether there is an implied or general duty to mitigate damages related to the force majeure event.

Allocation of inventory

Kentucky has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Parties are free to define force majeure terms in a contract as they desire, including by defining force majeure much more broadly than the typical scope of a force majeure event under common law. *Kentucky Utils. Co.*, 836 S.W.2d at 400. *See also Home Ins. Co. v. Wood*, 11 S.W. 15, 16 (Ky. 1903) (the doctrine of impossibility "has no application to a case where a person has created a charge or obligation upon himself by an express contract.")

The general rule is that a party to a contract will not be relieved of the obligations undertaken by him merely because supervening events have rendered the contract unprofitable, even though the supervening event be a law, regulation or other governmental act. "It is only where the governmental act makes unlawful the obligation assumed under a contract, prohibits its performance or otherwise renders performance impossible that the obligor will be excused from further performance." *See Frazier v. Collins*, 187 S.W.2d 816, 817–18 (Ky. 1945). Therefore, Kentucky courts uniformly agree that performance is not excused merely because it becomes onerous or unprofitable. *See Mid-Continent Petroleum Corp. v. Barrett*, 181 S.W.2d 60, 62 (Ky. 1944). Proving that an intervening event completely precluded performance "is a difficult standard to meet." *Republic/NFR & C Parking of Louisville v. Reg'l Airport Auth. of Louisville & Jefferson Cty.*, 410 F.3d 888, 892 (6th Cir. 2005).

A party may rely on the impossibility of performance doctrine in defense of a breach of contract when he "rendered himself incapable of performing a contract" by his own action. *Lovejoy v. Reed*, 193 S.W.2d 1013, 1016 (Ky. 1946). *See also Ross Seed Co. v. Sturgis Implement & Hardware Co.*, 181 S.W.2d 426 (Ky. 1944) (despite seller's inability to harvest its farm seed due to flooding, it could have satisfied purchase order by buying seed on open market. Seller was not excused from contract merely because they would it would have incurred a loss in purchasing seed at higher price than on date of contract); *Wickliffe Farms, Inc. v. Owensboro Grain Co.*, 684 S.W.2d 17 (Ky. Ct. App. 1984) (defense of "impossibility" was not available to seller who contracted for future delivery of white corn, despite drought which struck seller's farm, because contract merely called for delivery of 35,000 bushels of white corn, without specifying where such corn was to be grown); *Green v. McGrath*, 662 F. Supp. 337 (E.D. Ky. 1986), *aff'd*, 818 F.2d

866 (6th Cir. 1987) (performance of original contract for breeding of thoroughbred horses became impossible due to disappearance of stallion).

Louisiana

Force Majeure Clauses

Situated as it is along the Gulf Coast, Louisiana courts have had multiple occasions to interpret force majeure provisions in cases involving oil and gas contracts and performance failures due to hurricanes. The decisions discussed below suggest—but do not explicitly hold—that courts interpret force majeure provisions narrowly.

If a contract does not contain a force majeure provision, a party may nonetheless seek relief under the Louisiana Civil Code. Originating in Canon law, the Louisiana Code offers a force majeure doctrine, which provides that "[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." Civil Code art. 1873. The doctrine is strict. Performance must be impossible for a party to obtain relief. *See Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, 109 So. 844, 844 (La. 1926) (holding that force majeure applies only when performance is impossible rather than merely burdensome).

Contractual force majeure provisions supersede the statutory concept of force majeure. *See Exxon Corp. v. Columbia Gas Transmission Corp.*, 624 F. Supp. 610, 612 (W.D. La. 1985) (applying Louisiana law) (looking to contractual force majeure provision that was "considerably broader" than force majeure under Civil Code).

Level of proof necessary to establish delay in, or prevention of, performance

The earliest known interpretation of a contractual force majeure clause under Louisiana law was in *Logan v. Blaxton*, 71 So. 2d 675 (La. Ct. App. 1954). The parties in *Logan* entered into a three-year oil, gas and mineral lease covering 40 acres of land. The applicable force majeure clause allowed the lessor to cancel the contract if "prevented" from producing and transporting oil due to "Acts of God; insurrection; flood; strike." *Id.* at 676. The lessor invoked the force majeure clause, claiming that heavy rains prevented its trucks from accessing the site. The court did not agree that the rains constituted a "flood" sufficient to prevent performance. *Id.* at 677. It noted that the lessor failed to provide evidence suggesting it was "impossible to improve [the road to the well] or to obtain ways over other property, or to obtain smaller transport trucks, if needed, to transport this oil to market." *Id.* It also believed the rains were seasonal and to be expected. *Id.*

In *Woods v. Ratliff*, also involving an oil and gas lease contract, the lessee terminated the agreement after the lessor failed to engage in production operations for a period of more than 90 days. 407 So. 2d 1375 (La. Ct. App. 1981). The lessee claimed the lease was suspended under its force majeure provision because a high-speed gear in the pumping unit broke and delivery of a replacement part was delayed for months. *Id.* at 1378. The agreement defined a force majeure event as, *inter alia*, "any cause whatsoever beyond the control of the Lessee" that "delayed or interrupted" production. *Id.* The appellate court agreed with the

trial court that the delay did not constitute a force majeure event. As the trial court commented, other machine shops in Texas were capable of manufacturing a new part within only four to six weeks. *Id.* at 1379.

Changes based on governmental policy or economic conditions

For fixed price supply contracts, unless specifically addressed in the force majeure clause, Louisiana courts have declined to suspend contractual obligations based on changed governmental policy or regulation or unforeseen adverse economic conditions. In *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So. 2d 1234, 1237 (La. Ct. App.), a gas purchaser argued that modifications in government regulations and various adverse economic conditions, including a recession, constituted force majeure events excusing its failure to fully perform. The court concluded that the force majeure catch-all provision for "any other causes, whether of the kind herein enumerated or otherwise" did not extend to these adverse events: "Although the circumstances relied upon by [the purchaser] are forces or events beyond its control, adverse economic conditions and modifications in governmental regulations and policy which tend to render performance burdensome and unprofitable do not constitute force majeure." *Id.* at 1240. *See also Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 602 (3d Cir. 1977) (applying Louisiana law) (holding that force majeure clause was clearly inapplicable to oil company's failure deliver gas due to insufficient gas reserves where company chose to warrant delivery of the full contract quantity, rather than conditioning that delivery on the availability of sufficient gas reserves); *but see Webb v. Hardage Corp.*, 471 So. 2d 889, 893–94 (La. Ct. App. 1985) (suggesting that bankruptcy proceedings "beyond the control of the lessee" could trigger a force majeure clause but finding the defendant did not present any such evidence).

Notice of provisions

Failing to invoke a force majeure claim timely and properly may bar the assertion of a force majeure defense, even if the events did constitute a force majeure. *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98, 108–09 (W.D. La. 1985) (applying Louisiana law) (denying force majeure defense where company failed to "give notice and full particulars of the [force majeure claim] in writing or by telegraph to the other party as soon as possible after the occurrence relied on"). *See also Carrollton Cent. Plaza Assocs. v. Piccadilly Rests., LLC*, 952 So. 2d 756, 758 (La. Ct. App. 2007) (recognizing that Hurricane Katrina was a force majeure but affirming trial court ruling that force majeure provision in lease agreement did not excuse landlord's delay in repairing restaurant because landlord failed to give required notice within 10 days of event).

Force Majeure Doctrine in Louisiana Code

As mentioned above, if a contract subject to Louisiana law does not contain a force majeure provision, a party may nonetheless seek relief under the Louisiana Civil Code. The doctrine of force majeure, also sometimes referred to as "impossibility of performance," is found in Louisiana Code of Civil Procedure article 1933. The general rule stated in Article 1933 is that if a "fortuitous event" or an "irresistible force" prevents a party from doing what he has contracted to do, the party is not liable for a failure to perform under the contract. *Louisiana Farms Co. v Yazoo & M. V. R. Co.*, 154 So 445 (La. 1934); *Yor-Wic*, 329 F.

Supp. 3d 331 (noting that the rule "is essentially synonymous with the common law concept of act of God"). *See also Yor-Wic Constr. Co., Inc. v. Eng'g Design Techs., Inc.*, 329 F. Supp. 3d 320 (W.D. La. 2018) (applying Louisiana law) ("[i]n considering the defense of impossibility of performance, Louisiana jurisprudence uses the terms fortuitous event and force majeure, or irresistible force, interchangeably").

Louisiana courts limit the application of force majeure to excuse only events that are impossible to perform. *Payne v. Hurwitz*, 978 So. 2d 1000, 1005–06 (La. Ct. App. 2008) (to relieve an obligor of liability, a fortuitous event must post an "insurmountable obstacle" to performance); *see also* Saúl Litvinoff, *Louisiana Civil Law Treatise: The Law of Obligations*, § 16.17, at 476 (2d ed. 2001). If performance is possible, a party should fully satisfy its contractual obligations, "regardless of any difficulty he might experience in performing it." *Associated Acquisitions, LLC. v. Carbone Props. of Audubon, LLC*, 962 So. 2d 1102, 1107 (La. Ct. App. 2007). *See also* Saul Litvinoff, Force Majeure, *Failure of Cause and Théorie de L'imprévision: Louisiana Law and Beyond*, 46 La. L. Rev. 1 (1985) (commenting that performance, if possible, "must be absolute and perfect, regardless of the magnitude of the increase in physical or financial effort" caused by an unforeseen event). Nor is the nonperformance of a contract excused even when a fortuitous event alters the manner of performance, so long as performance is nevertheless still possible. In *Dallas Cooperage v. Creston Hoop*, although excessive rainfall prevented the defendant from providing coiled elm hoops to the plaintiff, the court found that it would still be possible to perform through a third party. 109 So. 844 (La. 1926).

Recent court decisions have relied on the strict force majeure jurisprudence of *Dallas Cooperage* to reject force majeure defenses where performance was literally possible. In *Associated Acquisitions v. Carbone Properties*, the plaintiff owned an interest in a construction company building a Hilton Inn in New Orleans. Hurricane Katrina forced construction to stop, the bank to rescind its construction loan, and Hilton to terminate the hotel franchise agreement. 962 So. 2d 1102 (La. Ct. App. 2007). The investor attempted to rescind a promissory note, claiming that the hurricane was a force majeure event that prevented it from continuing to make interest payments. The court ruled that the investor had to pay full interest on the promissory note because payment was possible despite the means becoming more difficult. *Id.* at 1107.

Even if an event renders performance truly impossible, there are three exceptions to the force majeure rule: "first, when the party in default has by his contract expressly or impliedly undertaken the risk of the fortuitous event, or of the irresistible force; secondly, if the fortuitous event, or case of force, was preceded by some fault of the debtor, without which the loss would not have happened." *Trinidad Petroleum Corp. v. Pioneer Nat. Gas Co.*, 416 So. 2d 290, 298 (La. Ct. App. 1982). Third, an obligor is liable "when the fortuitous event occurred after [the obligor] has been put in default." La. Civ. Code art. 1873; *see also Guillard v. Copeland's of New Orleans, Inc.*, 971 So. 2d 451 (La. Ct. App. 2007) (destruction of restaurant by Hurricane Rita did not excuse obligation to pay janitor because restaurant had been put in default over one month before the hurricane struck).

If none of the exceptions apply, Article 1933 provides Louisiana courts the power to dissolve a contract or reduce the other party's obligations proportionately. When a contract is so dissolved, a party who has partially performed its obligations may recover for any performance that it has already rendered.

Additional impossibility of performance interpretation and case rulings

- "Danger to the health or life of the obligor, rather than his actual illness, may be of such a nature as to incline a court to regard that danger as an insurmountable obstacle that makes performance practically impossible." 5 La. Civ. L. Treatise, Law of Obligations, § 16.36 (2d ed.) (noting conclusion by French courts that epidemic of typhoid fever in a particular city was force majeure that prevented an actor from giving performance in that city).
- *Nat'l Wholesale Grocery Co. v. Simon Rice Milling Co.*, 92 So. 713 (La. 1922) – Embargo on ocean transport did not justify failure to deliver rice where the contract did not specify the mode of transportation. Prompt shipment by rail could have been made, even if it was more expensive to do so.
- *Wurst v. Pruyn*, 202 So.2d 268 (La. 1967) – Force majeure did not relieve the builder of a home where the foundation gave way due to shrinkage of the soil underneath by large trees in close proximity because the builder should have foreseen the hazard.
- *Bank of La. in New Orleans v. Campbell*, 329 So. 2d 235 (La. Ct. App. 1976) – The fact that defendant incurred increased expenses in obtaining printed sales forms from its supplier, after defendant entered into contract to provide plaintiff bank with such forms at certain price, did not release defendant from duty to perform under such contract.
- *Morris N. Palmer Ranch Co. v. Campesi*, 487 F. Supp. 1062, 1068 (M.D. La. 1980) – Stating in dictum that a seller is excused from damages where the intervention of the government prevents delivery.
- *La. Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981) – Cost increase of 38% over original contract price of $1.1 million, producing loss on contract of $428,000, held insufficient to constitute impracticability.
- *Esplanade Oil & Gas Inc. v. Templeton Energy Income Corp.*, 889 F.2d 621, 625 (5th Cir. 1989) (interpreting Louisiana code) – Unforeseen plunge in the market price of oil did not qualify under the doctrine of force majeure as a "fortuitous event." The price decline merely made performance unprofitable.
- *St. Charles Ventures, LLC v. Albertsons, Inc.*, 265 F. Supp. 2d 682, 695 (E.D. La. 2003) (applying Louisiana law) – Imminent development of a Wal-Mart Supercenter in the market area did constitute a force majeure event permitting Albertson's to rescind construction contract.
- *Payne v. Hurwitz*, 978 So. 2d 1000 (La. Ct. App. 2008) – Conceding that Hurricane Katrina undoubtedly was a force majeure but rejecting the force majeure defense because seller failed to prove it was impossible to make necessary repairs by the agreed-upon closing date.

UCC Doctrine of Commercial Impracticability

Louisiana has not adopted the Uniform Commercial Code and, thus, has not adopted the concept of "commercial impracticability" set forth at Section 2-615.

Maine

Force Majeure Clauses

There are no known judicial decisions interpreting an explicit force majeure clause under Maine law. A 1922 decision by the Maine Supreme Court, however, considered a contract "contingent upon strikes, embargoes, unavoidable accidents, and weather conditions beyond [the seller's] control." *Hoyt v. Tapley*, 116 A. 559 (Me. 1922). The seller-defendant in *Hoyt* contracted with the buyer-plaintiff to deliver potatoes by rail in multiple shipments between January 1919 and February 1920. The seller failed to deliver any potatoes and requested to be relieved from damages for breach of contract because of "excessive weather" in February. *Id.* at 562. The court rejected this defense, noting that the defendant did not attempt to deliver potatoes to plaintiff in January either, thereby "dispos[ing] of any claim that the weather conditions excused performance." *Id.* Plaintiff also managed to deliver 20 carloads of potatoes to other parties notwithstanding the weather. *Id.*

Common Law Defenses and UCC

Impossibility

Contractual performance is excused if it "becomes physically impossible by the act of God." *Id.* at 562. This rule does not "prevail when the essential purpose of the contract may be accomplished." *White v. Mann*, 26 Me. 361, 361 (Me. 1846). "If the intention of the parties can be substantially, though not literally, executed, performance is not excused." *Id.*

"But a contract may of course be so expressly qualified that impossibility of performance resulting from some unforeseen accident will constitute a complete defense; or it may be impliedly so qualified. It depends on the intention of the parties as disclosed by the contract." *Cohen v. Morneault*, 114 A. 307, 308 (Me. 1921). The *Cohen* court rejected the defendant's reliance on the impossibility of performance doctrine to excuse delivery of potatoes after the railcar containing the potatoes burned. The agreement did not except performance in the event of a fire. It also did not require that defendant deliver a particular car of potatoes, but rather a car of any potatoes of a certain kind and quality.

Potentially important for today's circumstances, the Maine Supreme Court held in 1942 that a school closure due to infectious disease outbreak did not relieve a school board of its contractual obligations to a teacher. *Elsemore v. Inhabitants of Town of Hancock*, 18 A.2d 692 (Me. 1941) (school board could not deny full payment under a teaching contract after school closed because of a contagious disease outbreak because the school board could "have stipulated [in the contract] that the plaintiff should have no compensation during the time the school should be closed").

UCC Doctrine of commercial impracticality

Maine has adopted the Uniform Commercial Code, including §2-615. Maine Statute title 11, § 2-615. The statute states:

> Except so far as a seller may have assumed a greater obligation and subject to section 2-614 on substituted performance
>
> (1) Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections (2) and (3) is not a breach of his duty under a contract for sale, if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (2) Where the causes mentioned in subsection (1) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection (2), of the estimated quota thus made available for the buyer.

No court has yet analyzed this statute under Maine law.

Maryland

Force Majeure Clauses

Force majeure clauses are narrowly interpreted

In Maryland, an "'Act of God' will excuse mortal man from responsibility only if God is the sole cause." *Mark Downs, Inc. v. McCormick Prop., Inc.*, 441 A.2d 1119, 1128 (Md. Ct. Spec. App. 1982) (reversing a lower court decision and barring an "Act of God" defense where an unexpected flood was not the immediate proximate cause of the destruction and negligent acts of the defendants added to the damage). Thus, "unwarranted hardship" created by a party's own "negligent omission" defeats a force majeure defense. *White v. North*, 708 A.2d 1093, 1113 (Md. Ct. Spec. App. 1998), *vacated on other grounds*, 736 A.2d 1072 (Md. 1999) (finding that a defendant's negligent omission rather than evolving zoning ordinance created the defendant's unwarranted hardship and thus a force majeure defense was not proper). *See also Fergusson v. Brent*, 12 Md. 9, 10 (Md. 1858) ("[t]o relieve the carrier, the act of God must be the direct and immediate cause of the loss, and without which it would not have occurred; all circumstances produced by human agency must be excluded, so that if diverse causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier").

In addition, a "boiler plate" force majeure clause will not void a contract that a party simply found to be unprofitable. *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F. 2d 1327 (4th Cir. 1987) (applying Maryland law). Furthermore, a party found to be attempting to misuse the force majeure clause to its advantage could face sanctions. *Id.* In *Langham-Hill*, the defendant contended that Saudi Arabia caused a dramatic drop in world oil prices that excused its refusal to honor its obligations. *Id.* at 1330. The clause read in part:

> The term "force majeure" shall include, without limitation by the following enumeration, acts of God, and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil or public disturbance, or any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority, civil or military.

Id. at 1329 n.1. The Fourth Circuit ruled that foreign governmental action was insufficient to nullify a contract under its force majeure clause. *Id.* at 1330. The Court also affirmed the ruling that the defendant violated Federal Rules of Civil Procedure 11 by attempting, without support in existing law, to use the force majeure clause to extricate itself from an unprofitable contract. *Id.*

By contrast, more specific language in a force majeure clause could relieve a party from liability where the party's financial stress is directly due to a specified event in the clause such as the "inability to obtain labor and/or materials beyond the control of the Contractor." *In re Reg'l Bldg. Sys., Inc.*, 320 F. 3d 482, 485 n.5 (4th Cir. 2003) (applying Maryland law) (contractor was not liable for debt to a creditor under

bankruptcy debt plan because its subcontractor's financial difficulties and inability to complete its obligations to contractor fell within the force majeure clause as "beyond [contractor's] control").

Maryland courts have not expressly addressed whether there is a general duty to mitigate due to force majeure

Maryland has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Allocation of inventory

Maryland has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Frustration of purpose and impossibility of performance

Even when there is no applicable force majeure clause, the doctrines of frustration of purpose or impossibility of performance may still apply to void a contract. *Montauk Corp. v. Seeds*, 138 A.2d 907 (Md. 1958) (if purpose of contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance, contract is discharged); *Acme Moving & Storage Corp. v. Bower*, 306 A.2d 545, 547–48 (Md. 1973).

A party invoking these doctrines has the burden to present evidence that the contract's principal purpose has been substantially frustrated or its performance is made impracticable, without the party's fault, by the occurrence of an event the non-occurrence of which was the basic assumption on which the contract was made.

If a contract becomes impossible to perform due to "the inability to obtain a necessary governmental permit to carry out a contract" and by no fault of the alleged breaching party, that party is excused from performing its contractual obligations." *Green v. Jenkins Servs., LLC*, No. 16-cv-2572, 2018 WL 1761960, at *3 (D. Md. Apr. 11, 2018) (applying Maryland law) (*quoting Acme Moving*, 306 A.2d at 547–48) (local planning board's zoning decision to deny occupancy permit to the landlord defendant made it impossible for the landlord to carry out the contract because the requirements of the board would have frustrated the purpose of the use of the premises). The contract will be excused provided that "such interference was not foreseeable at the time of the execution of the contract and the risk was not assumed by the promisor." *Id.*

However, where evolving regulations could have been foreseen, the defense of impossibility may not be available. *See Levine v. Rendler*, 320 A.2d 258, 264 (Md. 1974) (a change in local governmental permitting requirement to use lower cost materials was foreseeable and thus insufficient to void a contract).

The defense of impossibility is a steep hill to climb

The general rule of the common law in Maryland is that when the impossibility of performance arises after the formation of the contract, the failure of the promisor to perform is not excused." *Green,* 2018 WL 1761960, at *3. This rule is premised on the theory that "if the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control." *Id.*

The impossibility defense will only apply when a party's hands are tied

Under the impossibility exception, "a contractual duty is discharged where performance is subsequently prevented or prohibited by a judicial, executive, or administrative order, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty." *Green*, 2018 WL 1761960, at *3.

But, as noted, "if the circumstances surrounding the formation of the contract are such as to indicate that the possibility of such interference was recognized and the risk of its [sic] was assumed by the promisor," then "an order which interferes with the performance of the contract is not an excuse." *Id.*

For example, if because of an unanticipated and unforeseeable pandemic, people are unable to attend an event such that it is impracticable to go forward with it (since no one or very few people will participate), the principal purpose of a contract with the host venue may be rendered so frustrated as to make it null and void. *See, e.g.*, *Harford Cty. v. Town of Bel Air*, 704 A.2d 421, 431 (Md. 1998).

Maryland courts have limited the use of the doctrine of frustration to cases of extreme hardship in which the intervening act was not reasonably foreseeable and the value of the contract is greatly or totally destroyed. *Md. Trust Co. v. Tulip Realty*, 153 A. 2d 275, 285–86 (Md. 1959) (citations omitted) (ruling the intervening act was foreseeable and thus the contract was not voided). In *Md. Trust*, a commercial lessee-defendant was precluded from using frustration as an excuse for nonperformance after the value of a lease was diminished when a fence that blocked customer parking was built. The Court ruled the erection of the fence was foreseeable within a pre-existing land use covenant of the adjacent shopping parcels. *Id.*

UCC Doctrine of commercial impracticability

Maryland has adopted the UCC doctrine of commercial impracticability. The statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option

include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Md. Code Com. Law § 2-615.

Massachusetts

Force Majeure Clauses

Force majeure clauses are to be interpreted in relation to the other clauses of the contract. *Goldman Envtl. Consultants, Inc. v. Kids Replica Ballpark, Inc.*, No. 11-P-322, 2012 WL 1069345, at *1 (Mass. App. Ct. Apr. 2, 2012). In *Goldman,* the defendant argued that its inability to secure necessary permits for a replica ballpark was "an action of a government agency" under the force majeure clause. *Id.* The court disagreed, finding "[t]he contract unambiguously requires [defendant] to pay [plaintiff] regardless of any permits; an unambiguous contract must be enforced according to its terms." *Id.* "[W]here sophisticated parties choose to embody their agreement in a carefully crafted document, they are entitled to and should be held to the language they choose." *Id.* at *2. The fact that the defendant was unable to obtain the permits from the government did not constitute "action of a government agency" under the force majeure clause. *Id.*

Where a circumstance was foreseeable at the time of contracting, but the parties did not provide for it, the fact that the circumstance later occurs and prevents a party from performing will not be considered a force majeure event. *Harper v. N. Lancaster LLC*, 18-P-1490, 2019 WL 2869577, at *1 (Mass. App. Ct. July 3, 2019). In *Harper,* the defendant agreed to make two payments to the plaintiff that both parties understood were contingent on the sale of a property. *Id.* The contract did not include any provisions regarding the prospective sale. *Id.* It was known at the time of the contract that the occupant of the property did not want to vacate and might cause a problem with the sale. *Id.* When the sale did not occur, the defendant sought to be excused from performance based on the force majeure clause which applied in part to "Act of God, Force Majeure or similar." *Id.* The court rejected the argument, holding that the existing tenant's refusal to vacate the property was not "unforeseeable, unanticipated or uncontrollable." *Id.*

Business and residential customers of Fitchburg Gas & Electric Light Company were left without power for up to two weeks following an ice storm. *Bellerman v. Fitchburg Gas & Elec. Light Co.*, No. WOCV0923B, 2009 WL 3086005, at *1 (Mass. Super. Ct. Sept. 9, 2009). The customers sued alleging that the defendant was inadequately prepared for the ice storm in a number of ways. *Id.* The customer contracts contained a force majeure clause stating: "The Company shall be excused from performing . . . and shall not be liable in damages or otherwise if and to the extent that it shall be unable to do so or prevented from doing so . . . by reason of storm . . ." *Id.* at *2. The court found the force majeure clause did not protect the defendants as the claims in the lawsuit were independent of the force majeure event and were not limited to damages incurred due to the storm. *Id.* The plaintiffs alleged that they were harmed by other failures (*i.e.*, failure to put in place tree cutting and adequate emergency response programs). *Id.*

Massachusetts courts strictly enforce notice requirements

Where the force majeure provision has a notice requirement, that requirement must be satisfied for the clause to excuse performance. *Goldman Envtl.*, 2012 WL 1069345, at 1 (finding that even if force majeure clause applied, the failure to give notice would prevent it being used to excuse performance).

Massachusetts has not addressed allocation of goods in force majeure

Common Law Defenses and UCC

Impossibility and frustration of purpose

Impossibility and frustration of purpose are considered "companion rules" and both concern the effect of supervening circumstances upon the rights and duties of the parties. *Chase Precast Corp. v. John J. Paonessa Co.*, 566 N.E.2d 603, 605 (Mass. 1991) (defendant had agreed to purchase concrete barriers for highway project only to have the Commonwealth remove the barriers from the plan following citizen complaints). "The difference lies in the effect of the supervening event. Under frustration of purpose, performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by the fortuitous event." *Id.* at 606. "The principal question in both kinds of cases remains whether an unanticipated circumstance, the risk of which should not fairly be thrown on the promisor, has made performance vitally different from what was reasonably to be expected." *Id.*

Impossibility

Massachusetts courts have "long recognized and applied" the doctrine of impossibility as a defense to an action for breach of contract. *Chase*, 566 N.E.2d at 605. Under the impossibility doctrine, "where from the nature of the contract it appears that the parties must from the beginning have contemplated the continued existence of some particular specified thing as the foundation of what was to be done, then in the absence of any warranty that the thing shall exist … the parties shall be excused … [when] performance becomes impossible from the accidental perishing of the thing without the fault of either party." *Id.*

In *Fargo Mmgt. LLC v. City of Worcester*, Fargo sued for the City's failure to develop a steel skywalk in Worcester. No. 2012-1028C, 2014 WL 7466746, at * 1 (Mass. Super. Ct. Nov. 21, 2014). When steel prices increased by 40% during the development period, Worcester decided not to build the skywalk. *Id.* at *7. The court held "[f]luctuation in the market price of construction materials over the course of two years is a risk inherent in any development contract, and even large cost increases of this nature do not rise to the level of substantial, unanticipated circumstances such as will excuse contract performance." *Id.* "Although the increased cost of constructing the Skywalk was certainly unexpected and Worcester obviously felt the money could be better spent on other development projects, the Skywalk's construction was by no means impossible." *Id.* The *Fargo* court rejected the impossibility argument. *Id.*

Frustration of purpose

Massachusetts first defined the doctrine of frustration of purpose in the *Chase* case discussed above. The Supreme Judicial Court used the Restatement (Second) of Contracts § 265 definition:

> 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.

Chase, 566 N.E.2d at 606 (quoting Restatement (Second) of Contracts § 265 (1981)). This definition is nearly identical to the defense of "commercial impracticability," found in the Uniform Commercial Code and adopted by Massachusetts. Mass. Gen. Laws ch. 106, § 2-615 (1988 ed.). Courts may look to case law interpreting the UCC doctrine when analyzing common law frustration of purpose. In *Chase*, defendant had contracted to purchase concrete median barriers for a highway project. 566 N.E.2d at 372. Following citizen protests and a lawsuit, the Commonwealth entered into a settlement, which provided there would be no additional concrete median barriers. *Id.* at 373. The Commonwealth then deleted the concrete median barriers from its contract with the defendant. *Id.* Defendant had paid Chase for all the concrete barriers it had supplied, but refused to purchase the remaining barriers governed by the contract. *Id.* "[Defendant] bore no responsibility for the department's elimination of the median barriers from the projects. Therefore, whether it can rely on the defense of frustration turns on whether elimination of the barriers was a risk allocated by the contracts to [defendant]." *Id.* at 375–76. The relevant test:

> The question is, given the commercial circumstances in which the parties dealt: Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance? Was it one of that variety of risks which the parties were tacitly assigning to the promisor by their failure to provide for it explicitly? If it was, performance will be required. If it could not be so considered, performance is excused.

Id. at 375 (quoting *Mishara Const. Co. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 367 (Mass. 1974). The *Chase* court concluded that both Chase and the defendant were aware the Commonwealth could decrease its order for concrete median barriers and accordingly the risk was not to be borne by the defendant. *Id.* at 376. The Chase court affirmed the finding that frustration of purpose excused defendant's performance under the contract. *Id.*

"[A] contracting party cannot be excused where the only 'frustration' consists in the fact that known risks assumed by [her] have turned out to [her] disadvantage." *Baetjer* v. *New England Alcohol Co.*, 66 N.E.2d 798, 803–04 (Mass. 1946). The question is one of reasonable foreseeability. In *Fargo Mmgt*, the court rejected defendant's frustration of purpose argument holding, "[u]nchanging prices and other cost-impacting conditions cannot realistically be considered implied assumptions of contracts at the time of execution, and, therefore, performance of a contract will not be excused under the doctrine of frustration of purpose." 2014 WL 7466746, at *8. "The rise in the cost of raw materials needed by one party for its performance simply cannot be deemed to be so unusual, nor the economic consequences of the same so severe, as to lie beyond the parties' contemplation at the time they struck their bargain." *Id.* at *9.

Similarly, at least one Massachusetts court has held that "economic downturns and market shifts are not the type of risks that are so unusual and have such severe consequences that they must have been beyond the assignment of risks inherent in the contract." *Wagner & Wagner Auto Sales, Inc. v. Land Rover N. Am., Inc.*, 539 F. Supp. 2d 461, 472 (D. Mass. 2008) (applying Massachusetts law).

Massachusetts applies the UCC doctrine of commercial impracticability

The doctrine is codified at Massachusetts General Laws chapter 106 § 2-615. The section states that performance is excused when it has been made "impracticable by the occurrence of a contingency, the non-occurrence of which was a basis assumption on which the contract was made." *Id.*

Michigan

Force Majeure Clauses

Michigan courts have noted that "force majeure is a term that is virtually unknown in Michigan common law." *Cordoba v. City of Detroit*, No. 221391, 2001 WL 1009308, at *3 (Mich. Ct. App. Sept. 4, 2001). Accordingly, Michigan courts have turned to other jurisdictions for guidance. *Id.*

Force majeure is not a contract defense under Michigan law, but it can be a bargained-for contract provision. *Hemlock Semiconductor Corp. v. Kyocera Corp.*, No. 15-cv-11236, 2016 WL 67596, at *7 (E.D. Mich. Jan. 6, 2016) (applying Michigan law). The purpose of a force majeure clause is to relieve a party from termination of the agreement "due to circumstances beyond its control that would make performance untenable or impossible." *Erickson v. Dart Oil,* 474 N.W.2d 150, 154 (Mich. Ct. App. 1992). The effect of a force majeure clause is to excuse performance in the event an unforeseen circumstance occurs. *Hemlock*, 2016 WL 67596, at *6. "The performance to be excused is determined by the language of the clause." *Id.*[1]

Michigan courts decline to enforce force majeure clauses in specific instances

Michigan courts refused to enforce force majeure clauses in the following circumstances:

[1] The *Hemlock* clause stated:

"[Hemlock] shall not be liable for delays or failures in performance of an order or default in the delivery arising out of or resulting from causes beyond its control. Such causes include, but are not limited to, acts of God, acts of Buyer, acts of the Government or the public enemy, fire, flood, epidemics, quarantine restrictions, strikes, freight embargoes, severe weather, equipment breakage or default of suppliers due to any of such causes. In the event of any such delay of HSC's performance, Buyer shall honor its obligations hereunder as soon as HSC is able to perform. If [Hemlock] fails to deliver or Buyer fails to Purchase Product … and such failure occurs as the result of a Force Majeure Event, [Hemlock] may deliver and Buyer may purchase the deficient Product, (at the prevailing contract price that was in effect during the Force Majeure Event), within a reasonable time after resolution of the Force Majeure Event (determined by mutual agreement of the parties). … [Hemlock] will provide Buyer notice of the deficient Product delivery schedule for the deficient Product prior to delivery as well as notice of its request to extent the Terms of the Agreement. In addition, if due to force majeure or any other cause, [Hemlock] is unable to produce sufficient goods to meet all demands from customers and internal uses, [Hemlock] shall have the right to allocate production among its customers and plants in any manner which [Hemlock] may determine to be equitable."

2016 WL 67596, at *6.

- When governmental action caused unfavorable market conditions affecting the profitability of a contract but did not preclude a party's performance. *Hemlock*, 2016 WL 67596, at *7.
- When the 2008 financial crisis caused financial hardship. *Flathead-Michigan I, LLC v. Penninsula Dev., LLC*, No. 09-14043, 2011 WL 940048, at *4 (E.D. Mich. Mar. 16, 2011) (applying Michigan law).
- When the party invoking the clause caused or could have been prevented by exercise of prudence, diligence and care. A party's failure to explore or utilize available options to overcome the delaying condition can constitute lack of due diligence. Cordoba, 2001 WL 1009308, at *3.

Michigan courts interpret force majeure clauses narrowly

The court rejected a defendant's claim that the 2008 financial crisis and subsequent collapse of the market for steel should excuse its performance under a contract to purchase natural gas transportation services. *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC,* 871 F. Supp. 2d 843, 848 (D. Minn. 2012) (applying Michigan law). Defendant argued that the financial crisis resulted in it being unable to secure funding to build a steel factory where the contracted for natural gas was to be transported. *Id.* The court held that "while the force majeure clause includes a laundry list of hardships that may suspend a party's obligations under the Contract, it does not include financial crises or changes in financial conditions." *Id.* at 855.[2] The court also noted that, immediately following the force majeure clause, the remedies section provided explicitly that neither party was excused from its obligation to make payments of amounts due under the contract. *Id.* The court found that reading the contract as a whole it would make "little sense" for the force majeure clause to excuse the obligation to make payments explicitly affirmed in the remedies section. *Id.* The court found "what is most determinative is the plain language of the Contract. The Contract is for the transportation of natural gas. [Plaintiff's] obligation under the contract is to provide the transportation, and [defendant's] obligation is to pay for that service.

[2] The clause in Great Lakes Gas Transmission stated:

"Neither Shipper nor Transporter shall be liable in damages to the other for any act, omission or circumstances occasioned by or in consequence of: any acts of God, strikes, lockouts, acts of the public enemy, wars, blockages, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, line freezeups, decline in the Btu level of Gas received by Transporter at any point below the level at which the MDQs of Service Agreements are based, as specifically stated in Section 8.1 of the General Terms and Conditions, to the effect that Transporter cannot Transport Shippers Scheduled Daily Delivery, or the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other cause, whether the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such a party is unable to prevent or overcome."

871 F. Supp. 2d at 855.

The parties' obligations were not conditioned on [defendant's] ability to obtain financing, the status of the Nashwauk facility, or the status of the construction on any lateral pipelines necessary to transport natural gas to that facility." Id. The court went on to note that defendant's inability to obtain financing to construct the steel facility was a foreseeable event, even absent a financial crisis. Id.

Michigan enforces notice requirements in force majeure clauses

Where the contract required a party seeking a time extension based on a force majeure event to provide notice to the other party within ten days of the event's occurrence, failure to provide notice and a request for an extension rendered the force majeure clause inapplicable and the contract breached. *Cordoba*, 2001 WL 1009308, at *4.

Common Law Defenses and UCC

Frustration of purpose

The doctrines of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles. *Liggett Rest. Group, Inc. v. City of Pontiac,* 676 N.W.2d 633, 637 (Mich. Ct. App. 2003).

Under Michigan law, frustration of purpose is "generally asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *Id.* at 637. Under the frustration of purpose doctrine, nothing is actually impeding either party's ability to perform the contract. *Id.* The following conditions must be present for a party to avail itself of the doctrine of frustration of purpose:

a) the contract must be at least partially executory;

b) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made;

c) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

Id. The frustration must be "so severe that it is not fairly to be regarded as within the risks that he assumed under the contract" and "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." *Id.*

In *Liggett*, the court denied plaintiff's request for a rescission of a concession agreement for the Pontiac Silverdome under the doctrine of frustration of purpose after the Lions departed the Silverdome prematurely, because the agreement explicitly contemplated the possible scenario where the Detroit Lions did not play games at the Silverdome. *Id.* at 638. When the contract terms contemplated the scenario that ultimately occurred, a party cannot claim relief under the frustration of purpose doctrine. *Id.*

Without regard to changes in the market at issue, when a supplier is still willing to supply the contracted for goods at the contracted for price, the doctrine of frustration will not excuse performance based on "a party's claim that it is unable to conduct business profitably …" *Hemlock*, 2016 WL 67596, at *5 (E.D. Mich. Jan. 6, 2016). In *Hemlock*, the price of solar panels had dropped precipitously due to Chinese large scale "dumping" of panels into the global market to increase Chinese market share and United States tariffs on Chinese-made solar components. *Id.* at *4. Kyocera sought to modify the contracted-for price and, when those negotiations failed, stopped purchasing product from Hemlock under the contract. *Id.* Kyocera argued that the Chinese government's actions were unforeseeable; the court held that the Chinese government's actions did not impact the primary purpose of the contract – Hemlock providing Kyocera with a stable supply of polysilicon for solar panels at a foreseeable price. *Id.* at *6. "Under the doctrine of frustration of purpose, foreseeability is only relevant to the extent that it relates to an action that frustrates the primary purpose of a contract." *Id.* at *6. The court rejected Kyocera's frustration of purpose argument. *Id.*

The 2008 financial crisis did not satisfy the frustration of purpose doctrine to excuse a defendant's default on its loan obligations. *Flathead-Michigan*, 2011 WL 940048, at *4. "A lack of profit is generally insufficient to frustrate the purpose of a contract." *Id.*

Impossibility and impracticability

Under Michigan law, "economic unprofitableness [sic] is not the equivalent to impossibility of performance. Subsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive will not operate to relieve [a party of its contractual obligations]." *Hemlock*, 2016 WL 67596, at *3. In *Hemlock*, the facts of which are described above, the court held "[r]egardless of the cause of the market shift, Kyocera's allegations amount only to claims of 'economic unprofitableness' which are insufficient to give rise of claims of impossibility or impracticability." *Id.* at *4.

Rejecting impossibility, the *Flathead-Michigan* court held in the case described above, that "unexpected financial difficulty, expense or hardship does not excuse a contractual promisor from performing on his undertaking when the contract does not provide otherwise." *Flathead-Michigan*, 2011 WL 940048, at *4.

UCC Doctrine of commercial impracticability

Michigan adopted the UCC doctrine of commercial impracticability at Michigan Complied Laws Service § 440.2615. The statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic

assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Mich. Comp. Laws § 440.2615.

Minnesota

Force Majeure Clauses

A party relying on force majeure to excuse performance bears the burden of proving by a preponderance of the evidence that the clause[1] applies. *Toll Bros., Inc. v. Sienna Corp*, No. 06-cv-4378, 2009 WL 961379, at *6 (D. Minn. Apr. 7, 2009) (applying Minnesota law). "The effect of a force majeure clause is to excuse performance in the event an unforeseen circumstance occurs. The performance to be excused is determined by the language of the clause." *United Sugars Corp. v. U.S. Sugar Co.*, No. 13-cv-1485, 2015 WL 1529861, at *3 (D. Minn. Apr. 2, 2015) (applying Minnesota law) (holding that force majeure clause did not excuse performance where the contract did not expressly include market fluctuations in the list of events that would trigger the clause).[2]

Minnesota rejects force majeure based on market fluctuations

Minnesota courts reject application of a force majeure clause due to changed economic conditions in a variety of circumstances:

[1] The clause at issue in *Toll Brothers* stated:

"[The deadline] may be delayed by conditions beyond [defendant's] control, including, but not limited to Acts of God, casualty (not attributable to [defendant], terrorism, wars, insurrections, labor disturbances (when substitute labor is not available on commercially reasonable terms), shortages or delays in deliveries of materials (when substitute materials or delivery methods are not available on commercially reasonable terms)."

2009 WL 961379, at *2.

[2] The clause at issue in *United Sugars* stated:

"Such causes shall include, without limitation, storms, flood, adverse weather or other acts of nature negatively affecting sugar beet or sugar cane crops or sugar processing facilities … governmental actions or regulations including sugar allotments, quotas, or allocations and any adverse declaration or act by government agencies regarding the labeling, use or safety of sugar that would prevent or prohibit a party from, in whole or in part, ordering or furnishing sugar products or performing any other aspects of the obligations hereunder."

2015 WL 1529861, at *3.

- The parties had a fixed price contract for sugar from 2010 to 2013. Over 2012 and 2013, the prices of bulk sugar declined by 50% and U.S. Sugar's survival was in jeopardy. U.S. Sugar did not make any of its contracted for purchases in the fourth quarter of 2012 or at any point in 2013. The court rejected U.S. Sugar's argument that the force majeure clause excused its performance finding the clause did not "expressly include market fluctuations as a basis for avoiding performance." United Sugars, 2015 WL 1529861, at *4.
- Rembrandt contracted to purchase an $8.5 million industrial egg dryer to be installed at a constructed large-scale egg processing plant. Before the egg dryer was installed, an epidemic of Avian Flu hit the Midwest. Ultimately, Rembrandt was forced to eliminate over one million birds which cut its egg production capacity by over 50%.3 Rembrandt later informed its contractors that it was scuttling plans for its large-scale egg processing plant. The court rejected Rembrandt's argument that its force majeure4 clause excused performance of the contract to purchase the egg dryer. The court held that the force majeure clause contemplated a failure of the "work" to be done under the contract and the "work" was defined to mean the contractor's building and installation of the industrial egg dryer. The language in the force majeure clause was not "written to apply if one party to the contract makes a unilateral decision to terminate performance of the contract for market-based reasons." *Rembrandt Enters. v. Dahmes Stainless, Inc.*, No. C15-4248, 2017 WL 3929308 (N.D. Iowa, Sept. 7, 2017) (applying Minnesota law).

A force majeure clause will not excuse performance when the events and circumstances at issue were within the control of the party seeking to excuse performance. *Toll Bros, Inc.,* 2009 WL 961379, at *6. In *Toll Bros.,* the defendant real estate developer failed meet material deadline due to its own failure to timely (a) pay for required feasibility study; (b) provide a complete environmental study; and (c) apply for required permits. *Id.* The court rejected the developer's argument that force majeure excused its breach of contract. *Id.* at *2–3.

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[3] *Rembrandt* declared a force majeure to its egg buyers and began distributing eggs and egg products on a pro rata basis. There are no reported cases regarding Rembrandt's invocation of its force majeure clause in response to the Avian Flu epidemic.

[4] The force majeure clause in *Rembrandt* stated:

"Neither party shall be liable to the other for failure or delay in performance of the Work caused by war, riots, insurrections, proclamations, floods, fires, explosions, acts of any governmental body, terrorism, or other similar events beyond the reasonable control and without the fault of such party ("Force Majeure Event"). Nevertheless, such party shall use its best efforts to mitigate the effect and to perform in spite of the difficulties causing such failure or delay and shall resume performance with the utmost dispatch as soon as the cessation of the Force Majeure Event permits. Any party claiming force majeure shall give prompt written notice thereof to the other party."

2017 WL 3929308, at *11.

Notice or general duty to mitigate

Minnesota courts have not addressed the notice provision required to invoke a force majeure clause or whether there is a general duty to mitigate due to force majeure.

Allocation of inventory

Minnesota has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Common law defenses

Minnesota recognizes the common law doctrines and that "[t]hese doctrines have at their core a requirement that some event must occur, the nonoccurrence of which was a basic assumption of the contract at the time it was made." *J.J. Brooksbank Co. v. Budget Rent-A-Car Corp,* 737 N.W.2d 372, 377 (Minn. 1983) (holding the doctrines did not apply to excuse defendant from discounts agreed to in franchise agreement because the agreement was not limited to the reservation system in place when the agreement was made, therefore technological advances that made discounts less attractive to defendant did not make the agreement impracticable). The defenses are not available where the "event which renders performance impossible, impracticable or frustrates the purpose of the contract could have been anticipated and provided for in the contract." *Powers v. Siats*, 70 N.W.2d 344, 348 (Minn. 1955); *see also Winthrop Res. Corp. v. Anastasi Constr. Co*., 01-cv-787, 2002 WL 523877, at *5 (D. Minn. Mar. 18, 2002) (applying Minnesota law to hold that none of the common law doctrines excused performance because bankruptcy in a commercial context was reasonably foreseeable).

Common law of impracticability or impossibility

Minnesota recognizes the common law doctrine of impracticability or impossibility of performance as set out in the Restatement (Second) of Contracts §261 (1981) which provides: Where, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary. *See J.J. Brooksbank Co.,* 737 N.W.2d at 377 (rejecting doctrine of impracticability/impossibility where contract could still be performed despite the change in reservation system used by defendant). Minnesota uses the terms impracticability and impossibility interchangeably. *Powers,* 70 N.W.2d at 348.

The doctrine of impossibility/impracticability provides an excuse for a party failing to perform its contractual obligations:

> when, due to the existence of a fact or circumstances of which the promisor at the time of the making of the contract neither knew nor had reason to know, performance becomes impossible, or becomes impracticable in the sense that performance would cast upon the promisor an

> excessive or unreasonably burdensome hardship, loss, expense or injury . . . A mere difficulty of performance [, however,] does not ordinarily excuse the promisor.

Id. at 348 (assuming without deciding that plaintiff delivering overheated eggs to the defendant was a circumstance the parties did not anticipate, the court nonetheless found that defendants were not excused from performance because they subsequently learned of the excessive heat yet took no steps to alleviate the situation). "A mere difficulty of performance does not ordinarily excuse the promisor, but where a great increase in expense or difficulty is caused by a circumstance not only unanticipated but inconsistent with the facts which the parties obviously assumed as likely to continue, the basic reason for excusing the promisor from liability may be present." *Id.* at 349. The term "impossibility is not limited to a scientific or actual impossibly of performance." *Id.* at 348.

"The impossibility defense is not available to a party that learns that performance is impossible in time to avoid the impossibility but fails to do so, and the defense does not apply when the 'impossibility or impracticability of performance is wholly attributable to the subjective inability of the promisor.'" *Meier v. First Commercial Bank,* No. A12–146, 2012 WL 3101290, at *3 (Minn. Ct. App. July 30, 2012) (quoting *Powers*, 70 N.W.2d at 348–49).

"The unforeseen exercise of governmental authority rendering performance [of a promisor's contractual obligation] impossible will excuse the promisor's obligation." *Meier*, 2012 WL 3101290, at * 3 (Minn. Ct. App. July 30, 2012) (quoting *Automatic Alarm Corp. v. Ellis*, 99 N.W.2d 54, 56 (Minn. 1959)).

The defendant has the burden of providing impossibility. *Meier*, 2012 WL 3101290, at *3.

Common law frustration of purpose

The doctrine of frustration of purpose as adopted by the Minnesota courts is based upon the Restatement (Second) of Contracts §265, which provides: "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 to the contrary." *United* Sugars, 2015 WL 1529861, at *4 (quoting Restatement (Second) of Contracts §265 (1981)). For the doctrine to apply, the principal purpose "must be so completely the basis of the contract as both parties understand, without it the transaction would make little sense." *Id.* at *12. In *United Sugars Corp.,* the court held the principal purpose of the contract was to buy sugar. *Id.* The fact that the bulk sugar market collapsed and it would be more expensive for the defendant to make the purchases did not excuse performance based on the frustration of purpose doctrine. *Id.* Only the purpose of the party seeking to be excused from the contract must be frustrated for the doctrine to apply. *Rembrandt Enters.*, 2017 WL 3929308, at *4.

Courts applying Minnesota law have held that a force majeure clause and a common law frustration of purpose defense can be complementary. *Id.* at *13. "While the contract contains a force majeure clause, no authority suggests that the existence of such a clause precludes the doctrine of frustration of purpose." *Id.* at *14.

UCC-based commercial impracticability

The Minnesota Supreme Court recognized the "Uniform Commercial Code provision governing excuse of performance has replaced the common-law requirement of impossibility of performance by a less stringent standard of commercial impracticability." *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn. 1978) Minnesota law provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among the seller's customers but may include regular customers not then under contract as well as the seller's own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Minn. Stat. § 336.2-615.

Under this doctrine, commercial impracticability excuses performance of both parties to the contract. *See Melford Olsen Honey, Inc. v. Adee,* 452 F.3d 956, 963–964 (8th Cir. 2006) (applying Minnesota law) (jury had rejected application of force majeure clause and also rejected alternative defense of commercial impracticability). As with common law frustration of purpose, Minnesota law would not reject a commercial impracticability argument based on the existence of a force majeure clause.

Mississippi

Force Majeure Clauses

Force majeure clauses will be narrowly interpreted

In ruling whether or not a force majeure clause applies, a Mississippi Court will interpret the language of the contract narrowly. *Chapel Hill, LLC v. SoilTech Consultants, Inc.*, 112 So. 3d 1097 (Miss. Ct. App. 2013). In *Chapel Hill*, the court relied on the plain language of the contract to hold that the force majeure clause was inapplicable when a government contractor failed to pay a subcontractor for soil testing. *Id.* at 1100. The contractor claimed that since the governmental agency canceled its parent contract, the force majeure clause excused its obligation to pay the subcontractor. *Id.* The clause stated:

> Force Majeure. Neither [contractor] nor [subcontractor] shall be liable for any fault or delay caused by any contingency beyond their control, including, but not limited to, acts of God, wars, strikes, walkouts, fires, natural calamities, or *demands or requirements of governmental agencies*.

Id. at 1100 (emphasis added). Nevertheless, the court sided with the subcontractor because no actual "fault or delay" occurred in the performance of the work. *Id.* Because the subcontractor completed the work, the court ruled, the contractor's payment obligation stood. *Id.*

In *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652, 658 (Miss. 1975), a soybean buyer sued a farmer to recover damages for alleged breach of soybean delivery contract. The Mississippi Supreme Court held that the farmer had not bound himself to deliver no less than the 4,000 bushels called for in the written agreement, but instead had only agreed to deliver his entire crop up to such amount, and drought conditions that reduced his yield fell within the 'force majeure' clause. *Id.*

A decrease in oil and gas prices and changes in regulation did not fall within "force majeure" clauses of take-or-pay gas purchase agreements or Mississippi "force majeure" statute and, thus, take-or-pay clauses were enforceable. *Day v. Tenneco, Inc.*, 696 F. Supp. 233, 235–36 (S.D. Miss. 1988) (applying Mississippi law).

Notice requirements

Mississippi has not addressed a party's notice requirements when invoking a force majeure provision

Duty to mitigate

A party to a contract has a duty to mitigate or attempt to find alternative means of fulfilling the contract. *Hendrick v. Green*, 618 So. 2d 76, 78 (Miss. 1993) (holding that the mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance). Seller of shares in bank brought suit against buyer for specific performance, or alternatively, damages for breach of

contract. *Id*. The Mississippi Supreme Court held that failure of buyer to obtain governmental approval to become majority shareholder did not excuse buyer from performing under contract). The court explained:

> Where the law casts a duty on a party, the performance shall be excused, if it be rendered impossible by the act of God. But where a party, by his own contract, engages to do an act, it is deemed to be his own fault and folly, that he did not thereby expressly provide against contingencies, and exempt himself from liability in certain events; and in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by, or within the control of the party'.
>
> ...
>
> Three exceptions are recognized: 1. A subsequent change in the law, whereby performance becomes unlawful. 2. The destruction, from no fault of either party, of the specified thing, the continued existence of which is essential to the performance of the contract. 3. The death or incapacitating illness of the promisor in a contract which has for its objective the rendering of personal services.

Id at 78–79.

Allocation of inventory

Mississippi has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Frustration of purpose and impossibility

Frustration of purpose

Mississippi has not (yet) recognized the doctrine of frustration of purpose. *City of Starkville v. 4-Cty. Elec. Power Ass'n,* 819 So. 2d 1216, 1225 (Miss. 2002) ("This Court has not recognized frustration of purpose as a defense to a breach of contract action").

Common law impossibility

"[W]here the law casts a duty on a party, the performance shall be excused[] if it be rendered impossible by the act of God.'" *Hendrick*, 618 So. 2d at 78 (quoting *Browne & Bryan Lumber Co. v. Toney*, 194 So. 296, 298 (Miss. 1940)). But "[t]he mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance." *Hendrick*, 618 So. 2d at 78. So "'when a party by his own contract creates a duty or charge upon himself he is bound to discharge it, although to do so should subsequently become unexpectedly burdensome or even impossible; the answer to the objection of hardship in all cases such being that it might have been guarded against by proper stipulation.'" *Id.* Mississippi courts have noted three cases in which impossibility may excuse performance:

1. A subsequent change in the law, whereby performance becomes unlawful.
2. The destruction, from no fault of either party, of the specified thing, the continued existence of which is essential to the performance of the contract.
3. The death or incapacitating illness of the promisor in a contract which has for its objective the rendering of personal services.

Watkins Dev., LLC v. Jackson Redevelopment Auth., 283 So. 3d 170, 179 (Miss. 2019). The *Watkins* court rejected the defendant's argument that a construction flaw costing $1.5 million to remedy rendered performance impossible. *Id.* The court similarly rejected the argument that funding difficulty and the economic realities of development in downtown Jackson should excuse performance. *Id.* "That one of the buildings might have structural faults was surely within the realm of foreseeability and could have been (and indeed was) dealt with by the contract: it expressly provided that the expense and the *risk* of the construction would be borne by [defendant]. [Defendant] knew about the state of the economy when it agreed to the amended lease in 2010. And, regardless, the general state of the economy cannot be a basis to excuse performance of a contract under Mississippi law." *Id.*

UCC Doctrine of commercial impracticability

Mississippi has adopted the UCC doctrine of commercial impracticability. Miss. Code § 75-2-615. The statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c), or failure to take delivery as provided for under the contract on the part of a buyer who complies with paragraph (d), is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.
>
> (d) The buyer must notify the seller seasonably that there will be a delay or total inability to take delivery, and where practicable, state the contingency which has occurred causing such delay or inability.

Missouri

Force Majeure Clauses

Lists of triggering events contained in force majeure clauses are generally found to be exclusive

Missouri case law is very thin regarding force majeure provisions. However, courts have made clear how they interpret lists of triggering events, especially those containing catch-all clauses. "The purpose of a general, catch-all phrase, such as cause beyond [the parties'] control,' in a force majeure or escape clause is to relieve a party of liability when the parties' expectations are frustrated due to an 'unforeseeable occurrence' beyond the parties' control." *Clean the Unif. Co. v. Magic Touch Cleaning, Inc.*¸ 300 S.W.3d 602, 610 (Mo. Ct. App. 2009) (holding that a force majeure provision was inapplicable because the non-renewal of the VA Hospital contract was not expressly listed in the force majeure provision, which applied to only express situations such as strikes and lockouts, and the non-renewable was foreseeable). "When the event that prevents performance is not enumerated in the *force majeure* or escape clause, but the clause lists specific events followed by a general catch-all phrase, it is appropriate to apply the precept of *ejusdem generis*." *Id.* "The precept holds that generally when words of general description are used in connection with a specific enumeration of articles, the general description will include only articles similar to those specifically mentioned." *Id.* (internal quotation omitted).

Notice requirements

Missouri courts have not addressed Notice requirements in force majeure clauses. Missouri courts have also not addressed the necessity to mitigate damages.

Allocation of inventory

Missouri has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Common law defenses

Commercial impracticability

Missouri recognizes the doctrine of commercial impracticability as set out in the Restatement (Second) of Contracts. The Restatement defines commercial impracticability as:

> Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.

Clayton X-Ray Co. v. Evenson, 826 S.W.2d 45, 48 (Mo. Ct. App. 1992) (quoting Restatement (Second) of Contracts § 266(1) (1981)) (holding that the circuit court correctly refused to give the instruction on the doctrine of impracticability because the contract contemplated the issue claimed to create impracticability). Where the event was foreseeable at the time of contracting, the doctrine will not excuse performance. *Mo. Pub. Serv. Co. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. Ct. App. 1979) (holding that the doctrine of impracticability did not apply because divergence in cost indexes and the Arab oil embargo were foreseeable).

Frustration of purpose

This doctrine provides that "if the happening of an event not foreseen by the parties and not caused by or under the control of either party has destroyed or nearly destroyed either the value of the performance or the object or purpose of the contract, then the parties are excused from further performance." *Liquidation of Prof'l Med. Ins. v. Lakin*, 88 S.W.3d 471, 479–80 (Mo. Ct. App. 2002) (holding that the doctrine of frustration of purpose was not applicable because the performance under the contract had essentially been performed). "[I]n cases of commercial frustration, performance remains possible but the expected value of performance in the party seeking to be excused has been destroyed by the fortuitous event" that supervenes. *Id.* However, if the supervening event was reasonably foreseeable, "the parties should have provided for its occurrence in the contract and the absence of such provision indicates an assumption of risk by the promisor." *Id.*

UCC Doctrine of commercial impracticability

Missouri has adopted the UCC doctrine of commercial impracticability. Missouri statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to section 400.2-614 on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Mo. Rev. Stat. § 400.2-615.

Montana

Force Majeure Clauses

Montana has held that a force majeure clause did not excuse performance when Oil and Gas Commission stopped production because of salt water seepage from salt water deposit pit at the well site where Commission would have allowed further production of the well if lessee had sealed the salt water pit, lessee could have corrected problem of leakage with truckload of mud which was available, lessee did not request Commission to grant variance to allow salt water to seep, and thus solving problem was reasonably possible and within control of lessee**.** *Edington v. Creek Oil Co.*, 213 Mont. 112 (1984). "The force majeure clause is not an escape way for those interruptions of production that could be prevented by the exercise of prudence, diligence, care, and the use of those appliances that the situation or party renders it reasonable that he should employ." *Id.* at 120 (finding that the force majeure clause in oil and gas lease did not apply when a governmental agency ordered the lessee to stop work because solving the salt water leakage problem, which led to the order, was within the control of the lessee).

A force majeure clause will not excuse a party's performance where a party could have addressed the event now claimed to be the force majeure. *Cont'l Res., Inc. v. Montana Oil Properties, Inc.*, No. 05-cv-74, 2006 WL 8435788, at *2 (D. Mont. May 30, 2006) (applying Montana law) (denying summary judgment because the party seeking to use the force majeure clause may been able to acquire drilling permits needed to perform the contract before its lease expired despite governmental board delaying their approval).

Allocation of inventory

Montana has not addressed whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Impossibility and impracticability

The Montana Supreme Court has observed that, "impossibility of performance is a strict standard that can only be maintained where the circumstances truly dictate impossibility. *Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 17, 305 Mont. 513, 516 (2001) (applying doctrine of impossibility to allow rescission of real property buy-sell agreement, where purchasers sought land to build a motel or hotel, land needed to be subdivided and rezoned in order for sale to be completed, but groundwater contamination was unexpectedly discovered and vendor was unwilling to assume large risks to remedy contamination, and purchasers were unwilling to enter into an indemnity agreement and bond). The general rule is that, where a party to a contract obligates himself to a legal and possible performance, he must perform in accordance with the contract terms. *Id.* However, "[i]mpossibility encompasses not only

strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Id.*

The Montana Code allows for rescission of a contract based on impossibility:

> Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

Mont. Code Ann. § 28-2-603. Rescission of a contract under the doctrine of impossibility or impracticability, while a strict standard, is not limited to literal impossibility, but also encompasses impracticability. *Cape-France Enterprises*, 2001 MT 139 at ¶ 19.

"[M]odern authorities [have] abandoned any absolute definition of impossibility and, following the example of the Uniform Commercial Code, have adopted impracticability or commercial impracticability as synonymous with impossibility in the application of the doctrine of impossibility of performance as an excuse for breach of contract." *Cape-France Enterprises*, 2001 MT 139 at ¶ 19 (internal citations omitted).

UCC Doctrine of commercial impracticability

Montana has adopted the UCC provision regarding commercial impracticability. The statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (1) Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections (2) and (3) is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (2) Where the causes mentioned in subsection (1) affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among its customers but may at its option include regular customers not then under contract as well as its own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.
>
> (3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection (2), of the estimated quota thus made available for the buyer.

Mont. Code Ann. § 30-2-615.

Nebraska

Force Majeure Clauses

Nebraska courts enforce broadly-worded force majeure clauses

Force Majeure events are not "necessarily limited to the equivalent of an act of God; the test is whether under the particular circumstances there was such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence, and care." *First Data Res., Inc. v. Int'l. Gateway Exch., LLC*, 2004 WL 2187566, at *7 (D. Neb. Sept. 28, 2004) (applying Nebraska law) (upholding a broadly-worded force majeure clause where the defendant "did not assume the allocation of any risk" and the clause "excuse[d] performance for reasons similar or dissimilar to acts of God").

A third party's failure to complete its contractual obligation meets the above test. In *First Data Resources, Inc.*, defendant International Gateway Exchange, LLC ("IGE") entered into two main contracts for its cash card business. Defendant first contracted with plaintiff FDR to process IGE's cash card transactions. *Id.* at *2. This contract included a force majeure clause that stated the following:

> If performance by either party of any service or obligation under this Agreement, including Conversion or Deconversion, is prevented, restricted, delayed or interfered with by reason of labor disputes, strikes, acts of God, floods, lightning, severe weather, shortages of materials, rationing, utility or communication failures, failure of a Network, failure or delay in receiving electronic data, earthquakes, war, acts of terrorist, revolution, civil commotion, acts of public enemies, blockade, embargo, or any law, order, proclamation, regulation, ordinance, demand or requirement having legal effect of any government or any judicial authority or representative of any such government, or any other act, omission or cause whatsoever, whether similar or dissimilar to those referred to in this clause, which are beyond the reasonable control of said party, then said party shall be excused from the performance to the extent of the prevention, restriction, delay or interference.

Id. at *3. Next, defendant contracted with Western Union, a company under the same corporate umbrella as FDR, to allow IGE customers to load their cash cards using Western Union's locations and services. *First Data Res., Inc.*, 2004 WL 2187566, at *3. Much of the FDR/IGE contract depended on Western Union completing their contractual obligations to the IGE. *Id.* When Western Union failed to complete its obligations, IGE could not generate enough cash flow to pay FDR, and FDR subsequently sued IGE. IGE invoked the force majeure clause in the FDR/IGE contract. The court upheld the force majeure clause for the following reasons:

- The force majeure clause was "very broad" in that it "excuse[d] performance for reasons similar or dissimilar to acts of God." *Id.* at *8
- The force majeure clause was "clear and unambiguous." *Id.*
- FDR was familiar with IGE's business plan and that IGE's business was dependent on Western Union completing its contractual obligations. *Id.*
- Because FDR was aware of IGE's business difficulties with Western Union, FDR "should have acted to mitigate its damages by terminating the contract . . ." *Id.* at *9.
- Western Union's failure "frustrated the essential purpose of IGE's business, and consequently [the contract with FDR]." *Id.* at *8.
- IGE could not "contemplate . . . control . . . counteract . . . or . . . remedy" Western Union's actions. *Id.*

Notice requirements

Nebraska courts have not analyzed Notice requirements in force majeure clauses. Notably, the force majeure clause upheld in *First Data Resources, Inc.* did not include a notice provision. *Id.* at *3.

Duty to mitigate damages

We did not locate reported Nebraska case law analyzing the duty to mitigate damages in light of force majeure events.

Duty to allocate inventory

We did not locate reported Nebraska case law analyzing allocation of inventory in the event of a force majeure.

Common Law Defenses and UCC

Common law defenses

Nebraska courts allow other defenses such as business necessity, frustration of purpose, impossibility, or extreme impracticability even where the contract includes a force majeure provision. *First Data Res., Inc.*, 2004 WL 2187566, at *7.

Nebraska courts recognize impracticability as a valid defense to contractual claims. *Id.* at *7. "Where, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Id.* (citing Restatement (Second) of Contracts, § 261). The defense of impracticability does not "[relieve a party] of his contractual duties simply because he is no longer able to pay them. *In re Sears*, 536 B.R. 286, 308 (D. Neb. 2015), *aff'd*, 863 F.3d 973 (8th Cir. 2017) (applying Nebraska law) (debtor's bankruptcy filing does not preclude payments to claimant for amounts owed).

Frustration of purpose is also a recognized defense under Nebraska law. "[W]here, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence 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." *First Data Res., Inc.*, 2004 WL 2187566, at *7 (citing Restatement (Second) of Contracts, § 265); *In re Sears*, 536 B.R. at 308 (applying Nebraska law) (the possibility of filing for debtor filing for bankruptcy was addressed in the Stock Sale Agreement, therefore making the event "a basic assumption on which the contract was made").

UCC Doctrine of commercial impracticability

Nebraska has adopted the UCC doctrine of commercial impracticability. Its statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Neb. Rev. Stat. Ann. § UCC § 2-615.

Nevada

Force Majeure Clauses

Force majeure clauses are narrowly construed

Although the case law regarding force majeure in Nevada is scant, courts that have analyzed the issue seem to strictly construe force majeure clauses. *Baroi v. Platinum Condo. Dev., LLC*, 874 F. Supp. 2d 980, 986 (D. Nev. 2012) (applying Nevada law) (because force majeure clause in construction contract applied only to those events explicitly listed in the clause, which constituted events beyond the seller's control, it did not render illusory seller's obligation to finish construction within two years in compliance with Interstate Land Sales Full Disclosure Act). The force majeure clause in *Baroi* stated the following:

> SECTION 18–CONSTRUCTION DELAYS: The parties acknowledge that the Unit will be part of a newly-constructed condominium project. If Seller is delayed in the construction of the Unit for reasons beyond the control of Seller, then the time for performance of Seller's obligations shall be extended for the period of such delay. Reasons beyond the control of Seller shall include, by way of illustration, acts of God, fire, earthquake, flood, explosion, acts of governmental agencies or delays in construction resulting from labor disputes, shortages of construction materials, weather or unexpected adverse soil or other site conditions.

Id. at 985.

Notice requirements

Notice requirements relating to force majeure events are strictly construed in Nevada. *Land Am. Lawyers Title v. Metro. Land Dev. LLC*, 2007 WL 9728765, at *7 (D. Nev. July 26, 2007) (applying Nevada law) (the "plain language" included in the notice provision of the parties' purchase agreement did not apply to force majeure events, in this case, a hurricane). In *Land America Lawyers Title*, the notice provision indicated "default notice must be given in all cases of default, before action is taken, except for the mere failure of [p]urchaser to pay the [c]ash to [c]lose." *Id.* Although the court's analysis does not provide the notice provision in its entirety, the court stated "such [force majeure] events do not, according to the plain language of the Purchase agreement, trigger the notice requirement . . ." *Land Am. Lawyers Title*, 2007 WL 9728765, at *7.

Duty to mitigate damages

We did not locate reported Nevada case law addressing damage mitigation due to force majeure events.

Allocation of inventory

We did not locate reported Nevada case law addressing inventory allocation due to force majeure events.

Common Law Defenses and UCC

Common law defenses

Nevada courts permit force majeure clauses to be much broader than other defenses such as the common law defense of impossibility. *Baroi*, 874 F. Supp. 2d at 984 ("[t]he contractual force majeure clause may be broader than the state's law regarding the defense of impossibility, so long as the state would enforce such a force majeure clause as a matter of contract law.") *Baroi* also illustrates the right to use "all applicable legal and equitable remedies, including, without limitation, specific performance . . . to compel . . . performance" even where a force majeure provision exists within a contract. *Id.* at 986.

Frustration of purpose

Generally, Nevada courts do not provide much analysis on frustration of purpose. *Max Baer Productions, Ltd. v. Riverwood Partners, LLC*, 2010 WL 3743926, at *4 (D. Nev. Sept. 20, 2010) (applying Nevada law) (frustration of purpose is a defense, not a cause of action). The courts instead look to Restatement (Second) of Contracts section 265, which provides two lists—one with examples that warrant application of the defense, and one with examples that do not. *Id.* Although Nevada courts "recognize frustration of purpose as a valid defense to breach of contract claims," Nevada differs from the UCC in that it "requires the event giving rise to frustration of purpose to be unforeseeable." *Towbin v. Empire Suzuki*, 2009 WL 10693409, at *2 (D. Nev. Aug. 5, 2009) (applying Nevada law) (refusing to grant summary judgment because "whether or not cancellation of [a television show] was foreseeable is a factual question that cannot be resolved on a motion for summary judgment.").

Common law impracticability

The common law doctrine of impracticability is applicable only if "if the promisor's performance is made impossible or highly impractical by the occurrence of unforeseen contingencies . . . [such as] acts of God or acts of third parties." *Max Baer Productions, Ltd.*, 2010 WL 3743926, at *3 (defendant's failure to perform its contractual obligation of obtaining $27 million construction loan or fulfill development obligations do not constitute unforeseen contingencies giving rise to the defense of impracticability; such a failure is simply breach of contract). Unforeseen contingencies are those that "giv[e] rise to an unforeseen cost increase that is "more than merely onerous or expensive," but is so great that "it [is] positively unjust to hold the parties bound. *Id.* at *3.

UCC Doctrine of commercial impracticability

Nevada has adopted the UCC doctrine of commercial impracticability. Its statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> 1. Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections 2 and 3 is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a

basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

2. Where the causes mentioned in subsection 1 affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among his or her customers but may at his or her option include regular customers not then under contract as well as his or her own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.

3. The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection 2, of the estimated quota thus made available for the buyer.

Nev. Rev. Stat. Ann. § 104.2615.

New Hampshire

Force Majeure Clauses

Force majeure provisions are narrowly construed in New Hampshire

New Hampshire case law is scarce on the issue of force majeure. Where a New Hampshire court analyzed a force majeure provision, however, the court strictly construed the language of that provision. *Tommy Hilfiger Retail, Inc. v. N. Conway Outlets LLC*, 2000 WL 1480450, at *6 (D.N.H. Feb. 14, 2000) (applying New Hampshire law) (because "'governmental restrictions' is specifically listed 'among the parade of horribles triggering' [the force majeure provision of the commercial lease]," defendant's inability to begin construction of a retail outlet shopping center due to a third party's challenge of land use approvals constituted a force majeure event.) In *Tommy Hilfiger Retail, Inc.*, the force majeure clause stated the following:

> [C]onstruction of the demised premises to the extent required of [NCO] shall be substantially completed by not later than twelve (12) months following October 1, 1997 unless [NCO's] failure so to complete is caused by governmental restrictions, strikes, walkouts, shortages of material or labor, act of God, enemy actions, civil commotion, fire or casualty, or any other causes beyond the reasonable control of [NCO], in which event the aforesaid date shall be extended for such period as [NCO] is so prevented from completing such construction. If such substantial completion has not been achieved by the aforesaid date, as extended as aforesaid, [Hilfiger] and [NCO] shall have the right to terminate this lease by giving written notice of such termination to the other within thirty (30) days thereafter.

Id. at *1.

Notice requirements

We did not locate reported New Hampshire case law addressing Notice requirements in force majeure clauses.

Duty to mitigate damages

We did not locate reported New Hampshire case law addressing damage mitigation due to force majeure events.

Allocation of inventory

We did not locate reported New Hampshire case law addressing inventory allocation due to force majeure events.

Common Law Defenses and UCC

Commercial frustration

The commercial frustration defense "assumes the possibility of literal performance but excuses performance because supervening events have essentially destroyed the purpose for which the contract was made." *Gen. Linen Services, Inc. v. Smirnioudis*, 897 A.2d 963, 966 (N.H. 2006) (citing *Perry v. Champlain Oil Co.*, 134 A.2d 65 (1957)) (plaintiff could not claim benefit of commercial frustration defense because a fire destroyed the defendant's restaurant to which plaintiff was contractually obligated to deliver linens such as table cloths and napkins because plaintiff was already in breach of contract by supplying substandard linens prior to the fire).

UCC Doctrine of commercial impracticability

New Hampshire has adopted the UCC doctrine of commercial impracticability. Its statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

N.H. Rev. Stat. Ann. § 382-A:2-615.

New Jersey

Force Majeure Clauses

Force majeure clauses are narrowly construed

Under New Jersey case law, an agreement between parties that contains a force majeure clause, that clause "must be construed like any other contractual provision, in light of the contractual terms, the surrounding circumstances, and the purpose of the contract." *Norfolk S. Ry. Co. v. New York Terminals, LLC*, 2017 WL 4005158, at *4 (D.N.J. Sept. 12, 2017) (applying New Jersey law); *see also Facto v. Pantagis*, 390 N.J. Super. 227, 232 (App. Div. 2007) ("[w]hen an unforeseen event affecting performance of a contract occurs, such a clause will be given a reasonable construction in light of the circumstances.").

New Jersey courts also construe catch-all language of a force majeure clause narrowly and as contemplating only events or things of the same general nature or class as those specifically listed. *See Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 210 N.J. Super. 646, 650 (Law. Div. 1986) (finding that a party's disability (diabetes) did not fall into the same class as that of labor strikes, fires, floods, earthquakes or war). When listing specific events like natural disasters (i.e. floods, fire, earthquakes), a party must establish 1) the cause of the event and 2) prove that the event was beyond the party's reasonable control. *See, e.g.*, *CSX Transp., Inc. v. Ports Am., Inc.*, 2017 WL 5515908, at *6 (D.N.J. Feb. 10, 2017) (applying New Jersey law) (finding the party's breach was not excused by a storm where it was on notice that the storm surge could eclipse its bulkhead and it had no contingency to protect against flooding).

New Jersey courts have construed "acts of God" to refer to natural events and storms as well as "all misfortunes and accidents arising from inevitable necessity that human prudence could not foresee or prevent." *Facto*, 390 N.J. Super. at 232; *see also Seitz*, 210 N.J. Super. at 650 (where one of the party's disability (personal condition) left him incapacitated, but the court determined that his disability was a reasonably foreseeable consequence of a preexisting condition). Where a party successfully establishes the force majeure event constitutes an act of God and that event's occurrence, the party must still prove the event proximately caused its failure to perform the contract. *See, e.g.*, *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 453–54 (3d Cir. 1983) (applying New Jersey Law) (a hurricane occurred and impacted party had to establish that pipe damage and mechanical breakdowns would not have otherwise happened because of normal wear and tear).

Notice requirements

New Jersey cases strictly apply notice requirements in force majeure clauses. *Norfolk S. Ry. Co. v. New York Terminals, LLC*, 2017 WL 4005158, at *5 (D.N.J. Sept. 12, 2017) (applying New Jersey law) (failure to provide written notice as required by force majeure clause prevented relief); *United States v. Sunoco, Inc. (R & M)*, 2007 WL 1652266, at *3 (D.N.J. June 7, 2007) (applying New Jersey law) (failure to

properly invoke the force majeure clause barred party from asserting that clause to excuse its noncompliance with the deadline).

Duty to mitigate

It is common that force majeure clauses require the impacted party to 1) use diligent efforts to end (prevent) the failure or delay allegedly caused by the force majeure event and 2) ensure the effects of the force majeure event are minimized. *See, e.g.*, *Gulf Oil Corp.*, 706 F.2d at 454 (requiring a party to show that it tried to overcome the results of a force majeure event by doing everything within its control to prevent or to minimize the event's occurrence and its effects).

Courts consider parties' mitigation requirements to help determine whether to excuse performance obligations under the agreement or delay them for a period of time equal to the delay caused by the force majeure event. *Id.* at 451.

Foreseeability of force majeure event

Where a force majeure provision includes open-ended or catch-all language, courts typically inquire into the foreseeability of the claimed event. *See, e.g. Seitz*, 210 N.J. Super. at 65 (party to the action tried to claim his disability was an "act of God," and the court disagreed; concluding that his disability was a reasonably foreseeable consequence of his underlying condition of diabetes); s*ee also Corestar Int'l Pte. Ltd. v. LPB Commc'ns, Inc.*, 513 F. Supp. 2d 107, 122 (D.N.J. 2007) (applying New Jersey law) (party seeking performance excuse claimed that delay in delivering supplies to impacted party was caused by unavailability of materials).

Common Law Defenses and UCC

Impracticability and impossibility

When confronted with a question concerning the impracticability or impossibility of performance, New Jersey state and federal courts turn to the Restatement (Second) of Contracts for guidance. *Dworman v. Mayor & Bd. of Aldermen, Governing Body of Twp. of Morristown*, 370 F. Supp. 1056, 1070 (D.N.J. 1974) (applying New Jersey law); *Directions, Inc. v. New Prince Concrete Constr. Co., Inc.*, 200 N.J. Super. 639, 643 (App. Div. 1985).

Even if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises, making performance impracticable, "a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event." *Petrozzi v. City of Ocean City*, 433 N.J. Super. 290, 302 (App. Div. 2013) (citing *Facto*, 390 N.J. Super. at 231); *see also M.J. Paquet, Inc. v. New Jersey Dep't of Transp.*, 171 N.J. 378, 390 (2002) (relying on Restatement (Second) of Contracts and finding that "[t]he promulgation of the revised OSHA regulations rendered the parties' respective performances under the contract impracticable because the parties could not agree on a price for the bridge painting as modified."). The Restatement provides: Even if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises,

making performance impracticable, "a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event." Restatement (Second) of Contracts § 261. Note, however, that impossibility is no defense where one party undertakes risk allocated to him under the parties' agreement and "[does] not condition his performance on" the existence of the fact. *Connell v. Parlavecchio*, 255 N.J. Super. 45, 50 (App. Div.1992), *cert. denied*, 130 N.J. 16 (1992).

Frustration of purpose

This doctrine, sometimes referred to collectively with impracticability, as the doctrine of changed circumstances is recognized as an affirmative defense under New Jersey law. *Edwards v. Leopoldi*, 20 N.J. Super. 43, 49 (App. Div. 1952) (noting that principles of impossibility of performance appear to be subsumed within the concept of frustration of purpose). The primary inquiry involved in a frustration of purpose analysis centers on foreseeability. "[T]he parties must not have reasonably foreseen the change that rendered the contract performance impossible or impracticable" and whether the condition giving rise to that change "is of such a character that it can reasonably be implied to have been in the contemplation of the parties at the date when the contract was made." *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n., Inc.*, 431 N.J. Super. 233, 245–46 (App. Div. 2013) (citing Second Restatement at § 261 (regarding impossibility or "impracticability" of performance) and § 265 (regarding frustration of purpose)); *Petrozzi*, 433 N.J. Super. at 302 (App. Div. 2013).

New Jersey courts will only grant relief from a contractual obligation based on frustration of purpose if the party seeking performance be excused presents clear, convincing and adequate evidence of the essential condition (as enumerated by the terms of the contract). *See A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384, 397 (App. Div. 1977) (reversing trial court finding that purpose of contract frustrated).

Based on New Jersey case law, the purpose that is frustrated must be common to both parties, not merely the individual advantage, which one party might have achieved from the contract. It does not appear to be sufficient to disclose that the purpose or desired object of only one of the contracting parties have been frustrated. *Edwards*, 20 N.J. Super. at 49 (reversing trial court on grounds that evidence did not support frustration defense).

New Jersey also relies on the Restatement (Second) of Contracts section 265 (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.

The *Edwards* court stated the "pivotal question [in a frustration of purpose defense] is in reality a compound of law and fact." 20 N.J. Super. at 57. The legal issue appears to be whether the contract includes an implied term. "[C]ourts under a more modern philosophy may and do exercise the power to infer from the nature and substance of the contract and the surrounding circumstances that a critical and vital condition which is not expressed constituted a foundation on which the parties contracted." *Id.* The

fact issue pertains to whether the condition identified by the court is "essential." *Id.* "Factually the inquiry relates to the degree of dependency of the attainment of the essential object and purpose of the parties upon the continued existence of the condition. Was the continued existence of the situation that constitutes the condition of the essence of the agreement?" *Id.*; s*ee generally* 3B N.J. Prac., Civil Practice Forms § 22:82.50 (6th ed.).

UCC Doctrine of commercial impracticability

New Jersey has adopted the UCC doctrine of commercial impracticability. Its statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

N.J. Stat. Ann. § 12A:2-615.

New Mexico

Force Majeure Clauses

Until 2003, "New Mexico [had] no cases interpreting a force majeure clause. What types of events constitute force majeure depends on the specific language included in the clause." *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003). The court in *Maralex* relied on a Texas appellate case in reaching a conclusion on the facts presented. *Id.* (citing *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 282 (Tex. Ct. App. 1998)). The New Mexico Supreme Court ruled in favor of Maralex in concluding that, although a claim of force majeure is equivalent to an affirmative defense, it was inapplicable under these facts because the party seeking to excuse performance under the agreement failed to provide evidence establishing the alleged force majeure event was beyond their control. *Id.* at 637.

This dispute involved Maralex Resources, Inc., an oil and gas development company seeking to acquire new leaseholds in the San Juan County area, and Norman and Loretta Gilbreath, who were successors in interest to the original lessee on the lease in question, which covered two sections of land in San Juan County, including a shut-in gas well that was drilled on the property. Maralex was the lessor, seeking to enforce payment and the Gilbreaths were the lessees, seeking to excuse performance under the parties' lease agreement. *Id.* at 628–29.

Pursuant to the lease agreement, the Gilbreaths agreed to produce gas from the shut-in well. The Gilbreaths relied upon (gas purchaser) El Paso Natural Gas's line as a means of transporting well production to intended destinations. *Id.* Upon discovery that the line contained an abnormally high line of pressure, the Gilbreaths decided to cease production and instead, opted to pay Maralex "shut-in royalties"[1] in order to prevent termination of the parties' agreement.[2] *Maralex*, 76 P.3d at 628–29. The insufficient well line pressure prevented gas production for nearly three months, which the Gilbreaths contended constituted a force majeure.[3] *Id.* at 636. Maralex argued that the parties' lease terminated because the Gilbreaths failed to pay shut-in royalties during the period of non-production. *Id.*

At issue in this case was whether the cessation of gas production was caused by something beyond the Gilbreath's control. The Gilbreaths argued that the line pressure problem constituted either a "failure of transportation" or fit into the lease agreement's catch-all phrase "other cause beyond the control of the

[1] A "shut-in royalty clause" in an oil and gas lease allows the lessee (Gilbreaths) to keep a non-producing lease in force by paying a pre-determined amount to the lessor as a substitute for royalty payments from production—essentially "holding the lease" open while waiting for the market to improve. *Maralex*, 76 P.3d at 632.

[2] To satisfy the parties' gas lease, well production was required to be "in paying quantities," such that income generated from the gas production exceeded the operating costs. *Maralex*, 76 P.3d at 630.

[3] Court did not require the Gilbreaths show by preponderance of the evidence that the well was capable of producing in paying quantities. There was no question that the Gilbreaths' well was incapable of producing gas during the relevant time period.

Lessee as enumerated in the force majeure clause."[4] *Id.* at 636. On one hand, if the cessation was caused by the El Paso pipeline, that would be an external cause, and appropriately considered beyond their control. However, if it was caused by insufficient pressure *within the well*, this would not be considered beyond the Gilbreath's control because it is not an external cause.[5] The *Maralex* court construed the language of the parties' agreement narrowly. *Id.* at 637.

"Where general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." *State v. Foulenfont*, 895 P.2d 1329, 1332 (N.M. Ct. App. 1995). Thus, where a force majeure clause specifically lists certain events, but also includes a catch-all phrase, a New Mexico court will "look to the specific terms employed and seek the common characteristics among them, excluding anything that does not share those characteristics." *Maralex*, 76 P.3d at 637; *see also United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 709 P.2d 649, 653 (1985) (applying doctrine of *ejusdem generis*[6] when interpreting terms of a contract).

The Court affirmed summary judgment in favor of Maralex holding that as a matter of first impression, the Gilbreaths did not have the option of paying "shut-in royalties" on the gas well in order to prevent the termination of their lease with Maralex. *Maralex*, 76 P. 3d at 637. The court also held that, absent any evidence establishing that the cessation of gas production was caused by abnormally high line pressure within the gas purchaser's line, rather than too little pressure within the well, the Gilbreaths could not avoid termination of their gas lease under the force majeure clause. *Id.*

Interpretation/clause construction

The New Mexico appellate court acffirmed the trial court's conclusion that monsoonal rains and increased sediment accumulation *did not* constitute a force majeure that excused. Appellant's duty to perform under the permanent injunction. *Allred v. New Mexico Dep't of Transp.*, 388 P.3d 998, 1011 (N.M. Ct. App. 2016). In construing the injunction's language, the court noted "we apply similar principles in construing contracts and judgments . . . [t]he rules to be followed in arriving at the meaning of judgments and

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[4] The force majeure clause, in its entirety, stated: "All express or implied covenants of this lease shall be subject to all Federal and State laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or in part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or if such failure is the result of any such Law, Order, Rule or Regulations or if prevented by an act of God, of the public enemy, labor disputes, inability to obtain material, failure of transportation, or other cause beyond the control of the Lessee." *Id.* at 636.

[5] The parties' force majeure clause listed various forces that can cause a cessation of production. But none of the forces listed in the clause "involve[d] the internal mechanical operations of the well itself. Instead, the list describe[d] the external forces beyond the control of a lessee, such as natural disasters or governmental decisions." *Id.* at 636.

6 *See, e.g., United Nuclear Corp.* 709 P.2d at 652 (Discussing the scope of an insurance contract with a "subsidence" exception, which excluded coverage for loss resulting from "any other earth movement." The New Mexico Supreme court applied the doctrine of *ejusdem generis* and construed "the term 'earth movement' to cover only naturally occurring phenomenon"); *Id.* (string citing persuasive case law from other circuits that similarly applied the doctrine).

decrees are not dissimilar to those relating to other written documents. Where the decree is clear and unambiguous, neither pleadings, findings nor matters [outside] the record may be used to change or even to construe its meaning." *Id.*

The *Allred* court was also asked to opine on a catch-all phrase in the injunction (separate from the force majeure question). In analyzing that language, the court relied on the construction principle that language should be read in the context of the entire document: "A contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract." *Id.*; *see also* Restatement (Second) of Contracts § 212 cmts. d & e (1981); *Rushing v. Lovelace Bataan Health Program*, 598 P.2d 211 (N.M. 1979) (New Mexico courts have consistently construed contracts as whole and considered an unambiguous contractual provision as conclusive).

Foreseeability and allocation of risk

"The force majeure clauses of the pertinent contracts before us may not be sanctioned when used to force a producer into submitting to a seller's scheme and compel him to do business only on the seller's terms, as was the case here." *Hartman v. El Paso Nat. Gas Co.*, 763 P.2d 1144, 1151 (N.M. Ct. App. 1988). The New Mexico Supreme Court held that striking buyer's affirmative defenses alleging applicability of the contract's force majeure clauses was not erroneous where clauses were used to force the producer into submitting to the buyer's scheme to manipulate Oil Conservation Division's mandate to producer as to how much gas it could produce and to compel the producer to do business only on the buyer's terms. *Id.*

The *Hartman* court found the Seventh Circuit's reasoning on a similar issue persuasive:

> Since impossibility and related doctrines are devices for shifting risk in accordance with the parties' presumed intentions, which are to minimize the costs of contract performance, one of which is the disutility created by risk, they have no place when the contract explicitly assigns a particular risk to one party or the other.

Hartman, 763 P.2d at 1151 (citing *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986)).

Common Law Defenses and UCC

Impracticability and frustration of purpose

Impracticability and impossibility

When examining, construing, and interpreting contract language, including the force majeure provision, the Tenth Circuit looked to "the common law doctrine of impossibility/impracticability, codified at Section 2-615 of New Mexico's Uniform Commercial Code (N.M.Stat.Ann § 55-2-615 (1978)." *Int'l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 885 (10th Cir. 1985) (applying New Mexico law). The force majeure provision provided that "either party is excused from performance if failure or delay in performance is "'occasioned' by such events as fire, flood, act of God, interference of civil and/or military

authorities, etc. The party seeking to be excused from performance must provide the other party with immediate notice of all pertinent facts and take all reasonable steps to prevent the occurrence." *Id.* ("[a]dequate notice was required to trigger the protections of the [force majeure] provision" and although notice was provided here, it was "inadequate in that no reasons were given as to why gas consumption would be decreased").

In *International Minerals*, the Tenth Circuit also concluded "[i]t is settled law that when a promisor can perform a contract in either of two alternative ways, the impracticability of one alternative does not excuse the promisor if performance by means of the other alternative is still practicable." *Id.* at 885.

"Performance will also be excused when made impracticable by having to comply with a supervening governmental regulation." *Int'l Minerals*, at 886; N.M. Stat. Ann § 55-2-615 (1978); Restatement (Second) of Contracts § 264 (1981). Moreover, the government policy or regulation "need not be explicitly mandatory to cause impracticability." *Int'l Minerals*, 770 F.2d at 887. "The important question is whether an unanticipated circumstance has made the performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." *Wood v. Bartolino*, 146 P.2d 883, 886, (N.M. 1944).

Frustration of purpose

"The parties clearly contemplated the likelihood of changing economic conditions, including alterations in fuel price levels and such fluctuation was not the kind of completely unforeseeable event required to invoke the doctrine of frustration of purpose. . . This court will not hold a contract to be frustrated merely because of an increase in cost to one of the parties. . . Similar considerations govern the claim based upon impossibility and commercial impracticability." *Hartman*, 763 P.2d at 1151.

This doctrine is inapplicable to leases for real property (commercial or residential). *Wood*, 146 P.2d at 886 ("It is not disputed that the doctrine of frustration has no application to an ordinary lease . . . nor has it any application to a furnished lease. . . A contract may be frustrated, but a demise is more than a contract; it is a conveyance of an estate in land or a chattel real. It transfers proprietary as well as personal rights.").

UCC Doctrine of commercial impracticability

New Mexico has adopted the UCC doctrine of commercial impracticability. Its statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) delay in delivery or nondelivery in whole or in part by a seller who complies with Paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid;

(b) where the causes mentioned in Paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable;

(c) the seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under Paragraph (b), of the estimated quota thus made available for the buyer.

N.M. Stat. Ann. § 55-2-615.

New York

Force Majeure Clauses

Force majeure clauses are narrowly construed

Although the facts of the cases may be distinguishable based on contractual language, there are multiple New York cases stating that performance is excused only if the force majeure clause specifically includes the event that caused the party's nonperformance. *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dep't 2009); *Kel Kim Corp. v. Central Mkts.*, 519 N.E.2d 295 (N.Y. 1987). New York law provides that ordinarily, a force majeure clause must include the specific event claimed to have prevented performance. *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) (applying New York law). Generally, New York courts expect the contours defined by the parties' agreement to dictate the application, effect, and scope of the force majeure clause. *Belgium v. Mateo Prods., Inc.*, 29 N.Y.S.3d 312, 315 (1st Dep't 2016); *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436, 438 (3d Dep't 2011).

Even where a "catchall" phrase is included in the force majeure provision, it may be insufficient to excuse performance because New York courts do not give general words expansive meaning. *Kel Kim*, 519 N.E.2d at 297 ("the principle of interpretation applicable to [clauses excusing nonperformance] is that the general words are not to be given expansive meaning; they are confined to the things of the same kind or nature as the particular matters mentioned."). "Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused." *United Equities Co. v. First Natl. City Bank*, 52 A.D.2d 154, (1st Dep't 1976); *see also Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (3d Dep't. 2007) (applying *ejusdem generis* as a construction guide for interpreting catch-all language in a force majeure clause).

Where the event preventing performance is not specifically listed in the force majeure clause, but the contract includes a catchall phrase, the court may determine if the triggering event is similar or dissimilar to the matters listed. *See generally Kel Kim*, 519 N.E.2d at 297 (concluding that a commercial tenant's inability to procure and maintain insurance on the property was foreseeable and "materially different" in kind and nature from the events specifically listed in the parties' force majeure clause");[1] *see also Wuhan Airlines v. Air Alaska, Inc.*, 1998 WL 689957, at *3 (S.D.N.Y. Oct. 2, 1998) (refusing to find a breakdown of negotiations as a force majeure event where the clause only listed catastrophes such as bomb, sabotage, and flood or other loss resulting in the aircraft being destroyed or totaled). Nonetheless, courts

[1] The clause reads: "If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay." *Kel Kim*, 519 N.E.2d at 297.

interpreting New York law have sometimes been willing to take an expansive view of the force majeure clause. *British W. Indies Produce Inc. v. S/S Atl. Clipper*, 353 F. Supp. 548, 553 (S.D.N.Y. 1973) (applying New York law) (list that included "Acts of God", sufficient to insulate a party from liability if there is no contributing human negligence").

Duty to mitigate

The party invoking the force majeure clause and thus, seeking non-performance, bears the burden of proof to demonstrate the event in question qualifies as a force majeure contemplated by the contracting parties. Additionally, "the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure." *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985) (applying New York law) ("Even if the detention of the ship by the Coast Guard constituted force majeure, and we are inclined to agree with Judge Carter that it did not, that detention [of the subject vessel] did not frustrate the purpose of the contract or prevent [the buyer] from carrying out its obligation under the terms of the parties' contract to make payment. Indeed to hold that the force majeure clause may be interpreted to excuse the buyer from that obligation . . . would be to wholly overturn the allocation of duties provided for in" the parties' maritime contract"). The *Phillips* court concluded that the parties' agreement was a shipment contract, and not a destination contract, which meant that the buyer's obligation of payment was due to the seller at the time the cargo was shipped, rather than upon receipt. It held that the buyer bore the burden of proof to demonstrate its efforts to issue payment despite the occurrence of the event that it claims constituted force majeure[2] but adduced no evidence to this end. Mere impracticality or unanticipated difficulty is not enough to excuse performance under the force majeure provision. *Phillips P.R. Core, Inc.*, 782 F.2d at 319.

Foreseeability and allocation of risk

Foreseeability is not, as a matter of law, an "essential element" of a force majeure analysis (i.e. determining whether a claimed event constitutes a force majeure, effectively justifying the claiming party's nonperformance). New York law is unsettled on whether the triggering event has to be unforeseeable in order to excuse performance. *See Phibro Energy, Inc.*, 720 F. Supp. at 318 (*quoting United States v. Brooks–Callaway Co.*, 318 U.S. 120, 122–23 (1943)) ("[T]he Supreme Court has held that the event must not only be one included in the *force majeure* clause, but must be unforeseeable as well."); *but see E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir.1976) (applying New York law) (unlike *Phibro* and *Brooks-Calloway*, the court in *Eastern Air Lines* noted that there was no

[2] The subject vessel was detained in transit by the Coast Guard and retained for an indefinite period of time due to apparent latent defects the Coast Guard identified. The seller provided notice to the buyer of this occurrence in a reasonable and timely manner. The buyer telexed the seller stating it was "declar[ing] force majeure" and refused to make any payments under the contract until the force majeure event abated, reserving the right to cancel the contract if delivery did not occur within a 30 days. *See id.* at 317.

indication from the contract's wording regarding qualifying events that defenses to performance were to be limited to breaches caused by unforeseeable events).

Specific force majeure exclusions under New York law

New York cases generally do not excuse performance based on financial difficulty or economic hardship. *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 891 N.Y.S.2d 63, 64 (1st Dep't 2009) (parties' force majeure clause in a lease agreement contemplated either party's inability to perform its obligations under the lease due to "any cause whatsoever" beyond the party's control other than financial hardship and thus, established a conclusive defense to plaintiff's claim that it was excused from performing under the lease on the basis of the effect the economic downturn had on it). The court in *Urban* also held that plaintiff could not avail itself of the doctrine of impossibility "since impossibility occasioned by financial hardship does not excuse performance of a contract." *Id.* at 63–64.

One case held that environmental factors or an Act of God or unforeseen event that gives rise to the financial difficulty or make it impossible to transmit payment would not excuse performance. *Macalloy Corp. v. Metallurg, Inc.*, 728 N.Y.S.2d 14, 14–15 (1st Dep't 2001) (plaintiff was not relieved of its obligations to perform under contract based on the "plant shutdown" language contained in force majeure provision of contract; plaintiff shut down its plant voluntarily due to financial considerations brought about by environmental regulations, which were not circumstances constituting a force majeure event, as plaintiff was well aware of the environmental regulations, and Environmental Protection Agency's (EPA) intention to enforce them fully, prior to entering into contract).

Several cases have weighed in on the issue of economic hardship. "Economic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable; indeed, "financial hardship is not grounds for avoiding performance under a contract." *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436 (3d Dep't 2011) (interpreting a PA law and quoting *Rohm & Haas Co. v. Crompton Corp.*, 2002 WL 1023435, at *2 (Pa. Com. Pl. 2002)). In *Route 6*, the court held, as a matter of law, that economic factors cannot excuse nonperformance. In that case, the parties specifically defined the contours of the force majeure in their agreement by identifying particular events, included a *similar/dissimilar* phrase, and limited the contemplated force majeure events to those beyond the control of the nonperforming party.[3] At issue was whether the financial downturn caused by the 2008 global economic crisis was in fact beyond the nonperforming party's control. The court determined that, although the defendant had no control over the world economy, the way it chose to cope with the economic implications of the global crisis were in its control—"Defendant

[3] The parties' force majeure clause stated: "Except for any payments due [plaintiff] in accordance with this [l]ease, [plaintiff] and/or [defendant] shall be excused for the period of any delay and shall not be deemed in default with respect to the performance of any of the terms, covenants, and conditions of this [l]ease when prevented from so doing by cause or causes beyond the [plaintiff's] and/or [defendant's] control, which shall include, without limitation, all labor disputes, governmental regulations or controls, fire or other casualty, inability to obtain any material, services, acts of God, or any other cause, whether similar or dissimilar to the foregoing, not within the control of the [plaintiff] and/or [defendant]" (emphasis added)."

made a calculated choice to allocate funds to the payment of its debts rather than to perform under the subject lease." *Id.* at 438.

Under New York law, a force majeure clause did not prevent a utility company from recovering on a breach of contract claim against a steel supplier. *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508, at *9–10 (W.D.N.Y. Feb. 13, 2009).

The force majeure clause did not specifically mention that an increase in price for the steel used to build eight transformers would discharge the steel supplier from liability in the event of a breach. The mere fact that the steel supplier secured the steel at a higher price than originally anticipated did not relieve it of its obligations under the contract.

Common Law Defenses and UCC

Common law defenses

Where the force majeure provision specifically identifies the triggering event, or it is otherwise clear that the event at issue constitutes a force majeure but the contract is silent as to what defenses are available to the party seeking non-performance upon the event's occurrence,—New York courts may turn to applicable common law concepts such as impracticability, impossibility, and frustration of purpose.

A court applies frustration or purpose or impossibility depending on the impact the force majeure event has on the parties. For example, did the event render the duties set out in the contract impossible/impracticable to perform or merely frustrate the purpose for entering the contract?

Impracticability & Impossibility

The defense of "impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *Kel Kim*, 70 N.Y.S.2d 900 at 902. Moreover, the impossibility "must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Id. See also Ahlstrom Mach. Inc. v. Associated Airfreight Inc.*, 251 A.D.2d. 852, 854 (3d Dep't. 1998) (although unanticipated, the court ruled that a January storm that struck the northeast was not an unforeseeable event since the contract scheduled shipment in the middle of winter and thus, impossibility defense rejected); *Comprehensive Bldg. Contractors Inc. v. Pollard Excavating Inc.*, 674 N.Y.S.2d 869 (3d Dep't. 1998) (rejecting impossibility defense where record revealed that problems were foreseeable at the time the contract was negotiated).

Frustration of Purpose

Under New York law, frustration of purpose requires the contract be rendered valueless to a party. The basic test for assessing whether an event constitutes application of this doctrine under New York law "is whether the parties contracted on a basic assumption that a particular contingency would not occur." *Profile Publ. and Mgmt. Corp. APS v. Musicmaker.com., Inc.*, 242 F. Supp. 2d 363, 365 (S.D.N.Y. 2003) (applying New York law). The doctrine is not applicable when a force majeure event occurs, and merely

renders the contract less profitable or even when actual performance is still possible, but would cause one party to sustain a loss. *See e.g.*, *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (applying New York law); *see also* Restatement of Contracts (Second) § 265 (1981) (setting forth three criteria that must be met before courts will find frustration of purpose).

UCC Doctrine of commercial impracticability

New York has adopted the UCC doctrine of commercial impracticability. N.Y. U.C.C. Law § 2-615. The statute provides in relevant part:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable *by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made*
>
> . . . .
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. *He may so allocate in any manner which is fair and reasonable*.
>
> (c) The seller must notify the buyer *seasonably* that there will be delay or non-delivery *and*, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

In *Cliffstar Corp. v. Riverbend Products, Inc.*, the court held that successful assertion of commercial impracticability as an affirmative defense requires the party show that the unforeseen event upon which excuse is predicated was the result of factors outside that party's control. 750 F. Supp. 81 (W.D.N.Y. 1990) (applying New York law).

North Carolina

Force Majeure Clauses

No recent cases provide guidance as to whether North Carolina would interpret force majeure clauses broadly or narrowly. One dated decision, *Brevard Tannin Co. v. J.F. Mosser Co.*, 288 F. 725, 727 (4th Cir. 1923) (applying North Carolina law), held that the party seeking to excuse its performance cannot rely on the clause for known conditions existing at the time the contract was made if it failed to include conditions in the contract. *Id.* The force majeure clause between the parties (although not part of the contract sued on) provided: "[d]elivery subject to fires, strikes, car shortages, embargoes, floods, or other causes beyond the control of seller." *Id.* The Fourth Circuit upheld the lower court's decision to preclude the defendant from asserting defenses that his "performance had become impossible because of a government embargo and war conditions." *Id.* Because the contract was made during war (and incidentally, was in part, for the delivery of tanks) and did not include any exceptions for performance because of war conditions, the Court prevented these defenses while concluding that because the contract was made during the war and defendant's promise did not include any exception language concerning war language, the defendant could not prevail. *Id.* (holding that impossibility to perform was no defense in breach of contract case for the failure to deliver due to government embargo and war conditions under a contract made during wartime that made no exceptions for conditions as to performance because of war conditions, which provided: "[d]elivery subject to fires, strikes, car shortages, embargoes, floods, or other causes beyond the control of seller").

In *Crabtree Ave. Inv. Grp, LLC v. Steak and Ale of N.C., Inc.*, the court found that tenant's internal company policy of requiring a Form W-9 was not an event beyond the tenant's control for failing to pay rent on time and force majeure did not excuse performance. 611 S.E. 2d 442, 444–445 (N.C. Ct. App. 2005).

In *S. Coll. St., LLC. Charlotte Sch. of Law, LLC*, the trial court refused to find the parties' force majeure clause applicable because the parties expressly excluded the tenant's rent payment obligation from force majeure protection. 2018 WL 3830008, at *5 (N.C. Super. Aug. 10, 2018).

A party asserting a defense pursuant to a force majeure clause must provide specific details regarding the event that has prevent performance. *In re McAlpine Grp., LLC*, 2012 WL 6138195, at *7–8 (Bankr. W.D. N.C. Dec. 11, 2012) (applying North Carolina law) (finding the debtor failed to meet its burden of proof to prevail on force majeure defense in summary judgment due to conclusory, non-specific factual nature of evidence presented).

No cases address whether a party is obligated to allocate when raising a force majeure defense.

Common Law Defenses and UCC

While case law is scarce, North Carolina would likely entertain alternative defenses such as the doctrines of impossibility and frustration of purpose when asserting defenses based on express contract language.

However, if the parties contracted for the risk allocation regarding the condition, the frustration of purpose doctrine cannot be used to escape a party's obligations because that risk would have been foreseeable. *Brenner v. Little Red Sch. House, Ltd.*, 274 S.E.2d 206, 209 (N.C. 1981) (rejecting defense of frustration of purpose by parent who paid for private school but other parent refused to let child attend because the probability of filling the student's position after the school year decreased substantially and that the parties' allocated the risk to plaintiff in the contract, which expressly provided for this possibility, stating: "tuition is payable in advance of the first day of school, no portion refundable").

In *WRI/Raleigh, L.P. v. Shaikh*, the court held that the common law doctrine of impossibility was inapplicable to restaurant tenant's breach of lease based on alleged inability to install a grease trap because current tenants were running a restaurant and had installed functioning grease trap. 644 S.E.2d 245, 253–58 (N.C. Ct. App. 2007). The court also held that the frustration of purpose defense was inapplicable because the event (needing a grease trap) was reasonably foreseeable.

In *Faulconer v. Wysong & Miles Co.*, the court affirmed the motion to strike affirmative defense of frustration of purpose because it was reasonably foreseeable that business might suffer decline. 574 S.E.2d 688, 691–92 (N.C. Ct. App. 2002).

UCC Doctrine of commercial impracticability

North Carolina has adopted the UCC doctrine of commercial impracticability. N.C. Gen. Stat. § 25-2-615. The statute states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

North Dakota

Force Majeure Clauses

North Dakota courts have recognized that weather events may be construed as "Acts of God" that excuse performance. *Red River Commodities, Inc. v. Eidsness*, 459 N.W.2d 805, 808–09 (N.D. 1990) (remanding for new trial because legal principles of agency and notice were applied incorrectly where farmer's contract with grain dealer excused performance for acts of God or other causes beyond control of parties). In *Red River*, a drought was found to excuse performance even though not directly identified in the parties' contract that provided for: "Fire, strikes, accidents, acts of God and public enemy, or other causes beyond the control of the parties hereto, shall excuse them from the performance of this contract." *Id.* Notwithstanding, the North Dakota cases that examine the concept of force majeure consist largely of weather-related events, which are usually construed as 'acts of God,' and beyond a party's control. *City of Moorhead v. Bridge Co.*, 867 N.W.2d 339 (affirming decision that applied force majeure provision governing "Acts of God" to flooding in order to extend the term another 249 days).

North Dakota courts overlay a duty to act diligently and in good faith when relying on a force majeure contractual defense. "An express *force majeure* clause in a contract must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive." *Entzel v. Moritz Sport and Marine*, 841 N.W.2d 774 (N.D. 2014) (quoting Williston on Contracts § 77.31 at 366 (4th ed. 2004)) (noting that nonperformance due to the flood was not due to Moritz's fault or negligence, and therefore Mortiz was excused from performance under force majeure clause); *see also Pennington v. Cont'l Res., Inc.*, 932 N.W.2d 897, 903 (N.D. 2019) (affirming trial court's finding that delay in obtaining drilling permit was subject to force majeure clause because the lower court failed to address whether Continental acted diligently and in good faith). The force majeure clause in *Pennington* provided:

> "Lessee's obligations under this lease, [] shall be subject to all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction, including restrictions on the drilling []. When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits [] or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot [] this lease shall not terminate because of such prevention or delay, and, at Lessee's option, the period of such prevention or delay shall be added to the term hereof. Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production, or other operations are so prevented or delayed."

932 N.W.2d at 901. The lower court concluded that Continental was delayed from drilling because the lands included portions that were inhabited by a species threatened under the Endangered Species Act and thus, required approval from federal regulatory agencies. *Id.* at 899–900. The Supreme Court opined

that Pennington's arguments related to whether Continental used good faith in diligence in obtaining the drilling permits and ordered those to be addressed on remand. *Id.* at 903.

The plain language of the parties' force majeure clause relieved the landlord of performance for the flood but did not relieve the tenant of liability. *Entzel*, 841 at 779–80 (holding that the marina owner was completely excused from providing a boat slip for the tenant under the parties' force majeure clause ("delays [] occasioned by inclement weather") when the city required that boats be removed from the marina due to the impending flood). That is, the tenant was required to pay for renting the boat slip even during the period when she was unable to use it because of the flood. *Id.* (affirming excuse of performance based on force majeure while reversing award of refund to the tenant).

North Dakota has not addressed the use or impact of arguing force majeure in the alternative to other defenses.

Common Law Defenses and UCC

At least for contracts concerning the sale of goods, North Dakota does not require a party's strict compliance with the parties' notice requirements. In *Red River*, the North Dakota Supreme Court ordered a new trial because the lower court did not consider evidence of actual notice even though the parties' contract required 10-day certified mail notice and conditioned the "[e]xcuse from performance [] upon delivery of this notice." 459 N.W.2d at 809. The Court analyzed UCC Notice requirements and ascertained that if the buyer had actual notice, any breach based on failing to provide contractual notice would be insubstantial and not material breach of the contract. *Id.* at 808–09. The *Red River* Court by dicta also "doubted" that the defendant "was harmed or prejudiced by the lack of a particular form of notice." *Id.* at 809. The Court, however, did not address or factor harm or prejudice in its ruling.

No reported cases address notice for a contract not concerning the sale of goods.

Frustration of purpose and impossibility

North Dakota recognizes the doctrine of frustration of purpose. In *Godon v. Kindred Public School Dist.*, the court held that the doctrine of frustration of purpose was inapplicable because the School District did not breach the contract in that it had no obligation to compensate Godon for the days she was not available to teach even though school was later cancelled due to a flood. 798 N.W.2d 664, 668 (N.D. 2011). The frustration of purpose doctrine was unavailable to purchaser WFND because it failed to plead the defense and because it did not seek to rescind the contract. *WFND, LLC v. Fargo Marc, LLC*, 730 N.W.2d 841, 851 (N.D. 2007). The court also found the doctrine would be inapplicable because WFND was partially at fault and because the obligation was negotiated before the parties entered the agreement, and thus, was not an event that occurred after the contract was made. *Id.*

In *Red River Wings, Inc. v. Hoot, Inc.*, the court denied the majority limited partners (third parties to the contract) the defenses of frustration and impossibility in an action for intentional interference with a contract because the lower court found they caused the dissolution. 751 N.W.2d 206, 226–227 (N.D. 2008).

UCC Doctrine of commercial impracticability

North Dakota adopted the UCC doctrine of commercial impracticability. N.D. Cent. Code § 41-02-78. The statute provides:

> Except so far as a seller may have assumed a greater obligation and subject on substituted performance:
>
> 1. Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections 2 and 3 is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> 2. If the causes mentioned in subsection 1 affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among the seller's customers but may at the seller's option include regular customers not then under contract as well as the seller's own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.
>
> 3. The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection 2, of the estimated quota thus made available for the buyer.

Ohio

Force Majeure Clauses

Ohio law in interpreting force majeure clauses is limited

Ohio courts have not interpreted many force majeure clauses. However, at least one Ohio court summed up the state of the law as follows: "[a] force majeure clause in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party." *Stand Energy Corp. v. Cinergy Srvcs., Inc.*, 760 N.E.2d 453, 457 (Ohio Ct. App. 2001) (holding that where the parties allocated the risk of price increases, the inability to purchase at an advantageous price was not a contingency beyond a party's control and did not constitute a force majeure under the parties' contract for delivery of power). That case did not consider poor economic conditions as an excuse for nonperformance. *Id.* The decisions below give some guidance as to how Ohio will likely to interpret some clauses.

In *United Arab Shipping Co. v. PB Express, Inc.*, the Ohio Court of Appeals found that that a company's inability to transport shipping containers because its independent truck drivers' refusal to work was beyond the company's control and work stoppage was similar to a 'strike,' which was an enumerated event in the parties' force majeure clause, which included "as a result of [] strikes [] or any like causes beyond [PB's] control." No. 961612, 2011 WL 3860639, at *3 (Ohio Ct. App. Sept. 1, 2011).

Additionally, in *Dunaj v. Glassmeyer*, the parties' agreement excused performance when "prevented by any force majeure cause beyond the reasonable control of such party (except financial inability of such party) such as strike, lockout, breakdown, accident, compliance with an order or regulation of any governmental authority, failure of supply or inability, by the exercise of reasonable diligence, to obtain supplies parts or employees necessary to perform such obligation, or war or other emergency." 580 N.E.2d 98, 100 (Ohio Com. Pl. 1990). The Court interpreted the clause to mean that "dramatic unforeseen events could cause the hotel to be partially or completely shut down and actually prevent performance." *Dunaj*, 580 N.E.2d at 101. In denying force majeure relief, the Court found that "no such catastrophic events occurred here." The plaintiff simply failed to meet the income requirements of the management agreement. *Id.*

In *Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, the court found force majeure when property surface owners were denied access to land by lessee under oil and gas contract based on the force majeure clause ("[w]hen drilling, reworking, production or other operations are prevented or delayed by [] inability to obtain necessary [] access or easements, [] or by any other cause not reasonably within Lessee's control."). 67 N.E.3d 845, 850 (Ohio Ct. App. 2016).

Notice requirements

There are no Ohio cases addressing the effect of force majeure Notice requirements.

Duty to mitigate

Courts have not squarely addressed this issue whether there is a duty to mitigate where a force majeure provision applies. One court, however, in *dicta* indicated that if performance is excused, no duty to mitigate exists. *Bailey and Shearer Bros., Inc., v. Reash Bros., Inc.*, No. 82-c-38, 1983 WL 6712, at *4 (Ohio Ct. App. Sept. 16 1983) (concluding that because the trial court found performance excused there was no reason to consider the argument that plaintiff failed to use reasonable efforts to minimize and mitigate alleged losses).

The duty to mitigate will be required if written into the parties' contract. In *American Coal Sales Co. v. Nova Scotia Power Inc.*, the plaintiff's duty to use all reasonable efforts to rectify the condition and to minimize damage caused by the condition was incorporated into the parties' force majeure clause and thus, the duty was required in order to prevail. No. 2:06-cv-94, 2009 WL 467576, at *34–35 (S.D. Ohio Feb. 23, 2009). In *American Coal,* the seller (American Coal) contracted with buyer, Nova, for coal shipments. *Id.* at *4. Their contract incorporated "Load Port Terms," which also included a force majeure provision. *American Coal*, 2009 WL 467576, at *29. The entity transporting the coal refused to honor American Coal's permit requests because it was experiencing delays in unloading coal trains due to freezing temperatures and an embargo was issued on permits. *Id.* at *5–6. Nova disputed American Coal's force majeure declaration and withheld payment from American Coal for the amount it paid for replacement coal during the force majeure period. *Id.* at *9–10. American Coal sought to recover the amount Nova withheld. *Id.* at *12. The court found that American Coal's force majeure declaration fit the purpose and language of the parties' clause but denied summary judgment because whether American Coal's efforts to rectify the force majeure condition and the reasonableness of those efforts were fact questions.

Allocation under force majeure

No cases specifically address whether a party is obligated to allocate when raising a force majeure defense.

Common Law Defenses and UCC

Impossibility and frustration of purpose

Defenses under the common law and the Uniform Commercial Code ("UCC") are available to excuse performance in Ohio. In *America's Floor Source, LLC. v. Joshua Homes*, the court recognized the frustration of purpose doctrine, noting that it occurs when "one of the two parties to a contract creates a situation where the basis of the parties' contract essentially becomes moot" and describing it as a form of breach of contract. 946 N.E.2d 799, 808 (Ohio Ct. App. 2010). The court held that the defendant's principal, in deciding that he would not pay certain bills and exhibiting lack of candor in dealings, frustrated the *purpose* of the contract with the plaintiff supplier. *Id.*

In *Leon v. State Farm and Casualty Co.*, the court found impossibility doctrine inapplicable where the appellant motorcyclist contended that he could not identify the driver who caused his accident because the plain language of the policy required suit to be filed against his insurance company directly within

three years and the motorcyclist could have filed against the uninsured motorist by simply listing the driver as "name unknown." 98 N.E.3d 1284, 1289 (Ohio Ct. App. 2017).

UCC

In *Athens Bone & Joint Surgery, Inc. v. Management Consulting Group, Inc.*, the court held that seller's performance under a contract to sell an x-ray machine to buyer was not rendered impracticable under Article 2 of the UCC § 1302.73 (A) (Ohio Rev. Code Ann. § 1302.73(a)). No. 02-ca-24, 2003 WL 21152871, at *6–7 (Ohio Ct. App. March 25, 2003). While seller contended its nonperformance was impracticable and excused due to its good faith compliance with governmental regulation. Yet, it cited no government regulation, its compliance with governmental regulations was not a term or condition of the contract, and another commercial supplier sold an x-ray machine without requiring buyer to provide safety specifications for the room in which machine was to be installed. Thus the Court found seller's nonperformance was due to refurbisher's failure to deliver x-ray machine to seller, and not a "truly supervening" government regulation. *Id.*

While no cases expressly address a party's ability to rely UCC impracticability doctrine in addition to a force majeure contractual provision, one Ohio decision implies this is permissible. *See Bailey and Shearer Bros., Inc.*, 1983 WL 6712 at *3 (entertaining and denying buyer's allocation arguments under the UCC even though the parties' contract contained a force majeure clause that was silent as to allocation).

Oklahoma

Force Majeure Clauses

Force majeure clauses are narrowly interpreted

Force majeure clauses are generally construed narrowly to enforce the terms of the contract as evidenced by the mutual intent of the parties. *See Grindstaff v. Oaks Owners' Assn., Inc.*, 386 P.3d 1035, 1045 (Okla. Civ. App. 2016) ("A force majeure clause must be construed, like any other contractual provision, in light of 'the contractual terms, the surrounding circumstances, and the purpose of the contract'"). For example, in *Golsen v. ONG Western, Inc.*, where the parties to a take-or-pay natural gas contract included "failure of gas supply or markets" as a force majeure event, the court held that an oil producer's inability to sell gas at a price equal or greater to that specified in the contract was not a "failure of market" because to interpret the contract otherwise would eliminate the requirement in the contract to pay for gas not taken when there was even a partial failure of demand. 756 P.2d 1209, 1221 (Okla. 1988).

A contract's general intent controls

Further, the general intent of a contract is more controlling than a specific provision in isolation. *Id.* In *Grindstaff*, the Court held that because the homeowners' association ("HOA") bylaws exempted the HOA from responsibility for losses due to "acts of God or other force majeure" a homeowner was responsible to fix land erosion on the impacted property due to rain and flooding. 386 P.3d at 1048 (Okla. Civ. App. 2016). Also, in *Sabine Corp. v. ONG Western, Inc.*, a lessee argued government regulation decreased the amount of gas sold and consequently the gas price was much lower than the take-or-pay contract price. The contact language provided that a force majeure event must make a party "unable" to perform. 725 F. Supp. 1157, 1166 (D. Okla. 1989). The court held the term "unable" was "plain and unambiguous." *Id.* Further, government regulation and market price reductions were "foreseeable" and nothing in the contract defined force majeure to include foreseeable events. *Sabine Corp.*, 725 F. Supp. at 1170. Accordingly, the court held that there was no force majeure within the plain meaning of the agreement.

Notice requirements

"The failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice." *Id.* at 1168.

Common Law Defenses and UCC

Impracticability or frustration of purpose

Oklahoma recognizes frustration of purpose as a common law defense to breach. *Id.* at 1178–79 (holding that nonperformance was not excused under either force majeure, impracticability/frustration of purpose, or UCC § 2-615); *see also Tulsa Opera House Co. v. Mitchell*, 24 P.2d 997 (Okla. 1933) (holding that the seller of an opera house, which burned down before the sale was complete, could cancel its performance

under the sales contract as the destruction of the property frustrated purpose of the contract). However, because the frustration of purpose doctrine requires the occurrence of an event to be unforeseeable at the time of contract, its use as an economic excuse for nonperformance is limited. *Sabine Corp.*, 725 F. Supp. at 1178–79.

UCC

The Oklahoma statute adopting the impracticability doctrine in the Uniform Commercial Code ("UCC") is Oklahoma Statutes Annotated, title 12A, section 2-615—"Excuse by Failure of Presupposed Conditions."[1] The statutory language provides that performance can be excused if "impractical." Oklahoma applies this statutory definition in interpreting clauses in take-or-pay natural gas contracts and recognizes a three-part test to determine impracticality under the statute.

> [A] party asserting the defense of commercial impracticability [must] establish that:
>
> 1) it did not, by the terms of its contract, assume a greater obligation than is ordinary; and
>
> 2) its performance was made impracticable by the occurrence of a contingency or condition, the nonoccurrence of which was a basic assumption of the contract.

The third element, a requirement imposed by the courts, is that the event must have been unforeseeable. *Sabine Corp.*, 725 F. Supp. at 1174 (citing *Golsen*, 756 P.2d at 1221).

Courts generally interpret "impractical" as "impossible" or "unable." For example, increased cost of performance is not an excuse. *Sabine Corp.*, 725 F. Supp. at 1224. Any increased cost must be "sufficiently extreme and unreasonable to support finding of impracticability." *Id.* Furthermore, if the event was "foreseeable," commercial impracticability does not apply. *Golsen*, 756 P.2d at 1221. For example, in *Brewer v. J-Six Farms, LP*, a farmer entered into contract to purchase piglets from a "grower." 350 P.3d 420, 426 (Okla. Civ. App. 2015). The contract pegged the contract price to the Chicago mercantile price, but also set both a floor and a ceiling price. *Id.* at 422. The farmer argued a market price collapse was a force majeure event. *Id.* The court held by setting a floor price, parties contemplated the market price

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[1] Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

would fall below the floor and moreover, the farmer presented no evidence he was "unable" to pay the floor price. *Id.* at 426. Therefore, the market hog prices below the floor price was not an unforeseen event for which § 2–615 might excuse performance.

The Oklahoma Supreme Court recognized impossibility may be present "where the general financial health of the purchaser is threatened." *Id.* However, the above test is not easy to meet. The effect of requiring performance must result in a "grave injustice." *Sabine Corp.*, 725 F. Supp. at 1177–78.

The comments to the statute cite *Morrison v. W.L. Green Com'n Co.*, 161 P. 218 (Okla. 1916) which analyzed a wheat sale and delivery contract containing no force majeure clause. In *Morrison*, the Oklahoma Supreme Court held that common law impossibility was to be strictly enforced such that performance cannot be excused unless "the thing to be done cannot by any means be accomplished." *Id.* at 220. Accordingly, even the outbreak of World War I and subsequent embargo of wheat shipments by rail between defendant and plaintiff located in New Orleans did not excuse performance unless defendant proved he could not procure and deliver wheat from any market located anywhere to plaintiff. *Id.* Thus, increased difficulty and cost did not excuse performance. *Id.*

Moreover, the statute requires a nonperformer to "allocate production and delivery between customers" in a "fair and reasonable" manner if partial performance is achievable. *See* Okla. Stat. Ann. tit. 12A, § 2-615(b). Although no court has interpreted this language, the comments to the statute state that leeway is given to the partial non-performer, but decisions should be made in "good faith" and with "real care". *Id.*, cmt. 11. A party has a duty to mitigate the damages it incurs by nonperformance. *Sabine Corp.*, 725 F. Supp. at 1186. The burden of proof to decrease damages based upon a failure to mitigate, however, rests with the nonperforming party. *Id.*

Finally, the statute requires that the party asserting force majeure "must notify the buyer seasonably that there will be delay or nondelivery." *See* Okla. Stat. Ann. tit. 12A, § 2-615(c).

Oregon

Force Majeure Clauses

Force majeure clauses are read to support general intent of contract

Force majeure clauses are generally read to enforce the terms of the contract. When a contract allows a party to terminate "for cause," economic difficulty supports non-performance. *See Rose City Transit Co. v. City of Portland*, 525 P.2d 1325, 1333 (Or. Ct. App. 1974). The City of Portland terminated its public transit contract due to decreased ridership and increased cost. *Id.* at 1334. The transit company argued "cause" meant the City could not terminate unless the transit company breached the agreement. *Id.* at 1333. The court disagreed, ruling that although "cause" meant something more than "at will," financial considerations could be considered and the only requirement is that the decision to terminate must be done in "good faith" and based upon "reasonable grounds." *Id.* at 1334–35.

Duty to mitigate

No Oregon force majeure case has analyzed the duty to mitigate. However, as a fundamental common law duty, a plaintiff will undoubtedly be required to take reasonable steps to mitigate damages. *See, e.g.*, Restatement (Second) of Contracts § 350, "Avoidability as a Limitation on Damages."

Common Law Defenses and UCC

Oregon recognizes frustration of purpose as a common law defense to breach for lack of performance. *Eggen v. Wetterborg*, 237 P.2d 970, 976 (Or. 1951). In *Eggen*, two parties entered into a lease agreement for a gas station. *Id.* at 972. During the lease term, the building caught fire and burned to the ground. *Id.* at 973. The lessee went onto the land to clear and rebuild. *Id.* The lessor argued the destruction of the gas station extinguished the lease, and the land therefore returned to his control. *Id.* The court agreed with lessor, holding the purpose behind entering into the lease was running a gas station and this purpose was frustrated by the building's demise. *Eggen*, 237 P.2d at 976. When a contract contains no force majeure clause, whether an incident rises to warrant rescission under the common law is a question of foreseeability. *Nw. Mut. Ins. Co. v. Peterson*, 572 P.2d 1023, 1026 (Or. 1977).

However, generally when a contract places the risk of a foreseeable event on one party, its occurrence will not lead to frustration of purpose. *Smith Tug & Barge Co. v. Columbia-Pac. Towing Corp.*, 443 P.2d 205, 219–20 (Or. 1968). In *Smith*, a river transporting company leased land on an island on the Oregon side of the Columbia River. *Id.* at 207. A dispute arose when another transport company argued that the lease did not extend to state lands below the waterline of the river. *Id.* The lessee transporting company argued that if it did not have access to the area below the waterline, it would have never entered into the lease because this is where it wanted to erect pilings necessary to store logs while awaiting shipment. *Id.* at 220. The court held there was no frustration of purpose because the lessee should have anticipated when entering into the lease that it might not receive permission to erect pilings below the waterline. *Id.*

It is possible, however, for parties to anticipate an event, such as market volatility and allocate risk of normal fluctuations among themselves, yet if variations occur that are so extreme they extend beyond that contemplated by the parties, rescission may be warranted under frustration of purpose. *Chang v. Pacificorp*, 157 P.3d 243, 257 (Or. Ct. App. 2007). In *Chang*, a metal and chemical manufacturer became concerned with rising electrical costs. *Id.* at 245–46. Unable to obtain a favorable rate with the city utility, it entered into a specific contract with the electrical supplier. *Id.* at 246. The parties understood that electrical rates were changing, so they agreed on a three-year fixed rate followed by a two-year variable rate pegged to the Dow Jones California Oregon Border Energy Index. *Id.* For the first three years, the manufacturer paid less than the rate previously paid with the city utility, but after switching over to the variable rate, the cost escalated. *Chang*, 157 P.3d at 247. The utility argued there was no frustration of purpose of the contract because the risk of increased cost was specifically allocated among the parties. *Id.* at 248. The court, however, found that the manipulation of the energy price by some companies might have resulted in unanticipated costs and intentional price manipulation might be an unreasonable and unforeseeable risk. *Id.* at 257.

Under Oregon common law, for lack of performance to be excused, it must be "impossible." In *Savage v. Peter Kiewit Sons' Co.*, when a contractor bid on a highway contract to sandblast steel used for a bridge, the bidding process allowed bidders to base their bids on what it would cost to blast the steel used for the bridge at its business and then giving it to the highway commission for installation or what it would cost to blast the steel outside once the bridge was in place. 432 P.2d 519, 521 (Or. 1967). The contractor based his bid on outside blasting. *Id.* After he began blasting, sand fell from the bridge into the machinery of a neighboring business, damaging it. *Id.* The third-party business then obtained an injunction to stop the blasting. *Id.* Ultimately, the contractor devised a movable "cocoon" that it placed over the bridge while blasting to keep sand from escaping. *Id.* at 522. However, this increased cost of performance. *Id.* Contractor argued the injunction was an intervening event that made performance impossible. *Id.* The court disagreed, finding that while a general injunction stopping all use could be a superseding event, the one at hand merely increased the cost of performance. *Id.* at 524. The parties clearly contemplated sand might escape into the air when blasting steel outside. *Id.* at 523–24. The contractor could have based his bid on blasting inside his facility, even though this would have raised his bid and thereby lessened his chance to win the work. *Id.* The situation was foreseeable, and therefore did not render the contract impossible. *Id.* at 524.

Oregon also recognizes "act of God" as a defense to breach for lack of performance. In *Peterson*, during the construction of a church, a wind event blew the structure down. *Peterson*, 572 P.2d at 1025. The church's insurance company paid the claim; however, it then sought subrogation from the builder. *Id.* at 1027. The builder argued the wind event was so severe, it was an act of God, and therefore he was not responsible for damages. *Id.* at 1026. The court held whether the wind event was strong enough to be an "unforeseeable occurrence" was a question for the jury. *Id.*

UCC

Nonperformance may also be excused under the UCC

The Oregon statute similar to Uniform Commercial Code section 2-615 is Oregon Revised Statute section 72A.4050—"Excused Performance."[1] The statutory language provides performance be excused if "impractical." No case has cited this statute. However, the language states it applies to both sales of goods and leases.

Allocation of inventory

The statutory language requires a non-performer to "allocate production and deliveries among . . . customers" if partial performance is achievable. *See* Or. Rev. Stat. § 72A.4050(2). No Oregon court has interpreted this language.

Notice requirements

Section 72A.4050(3) requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." However, "seasonable" generally means in accordance with the contract requirements or "reasonable." *See* "seasonable" Merriam-Webster Online Dictionary; https://www.merriam-webster.com (last visited Apr. 6, 2020) ("seasonable" defined as "occurring in good or proper time").

[1] Subject to O.R.S. § 72A.4040 on substituted performance, the following rules apply:

(1) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with subsections (2) and (3) of this section is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(2) If the causes mentioned in subsection (1) of this section affect only part of the lessor's or the supplier's capacity to perform, the lessor or supplier shall allocate production and deliveries among the lessor's or supplier's customers but at the lessor's or supplier's option may include regular customers not then under contract for sale or lease as well as the lessor or supplier's own requirements for further manufacture.

(3) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under subsection (2) of this section, of the estimated quota thus made available for the lessee.

Pennsylvania

Force Majeure Clauses

Pennsylvania courts narrowly construe force majeure provisions

Pennsylvania case law regarding force majeure is extremely scant. *See, e.g.*, *Rohm & Haas Co. v. Crompton Corp.*, No. 020435, 2002 WL 1023435, at *2 (Pa. Ct. Com. Pl. April 29, 2002) ("Pennsylvania state cases addressing force majeure are surprisingly few and far between."). Research disclosed that the Pennsylvania courts who have dealt with force majeure focus on the nature of the events underlying the nonperformance as well as the burden of the party asserting force majeure as a defense.

Pennsylvania courts narrowly construe force majeure provisions. "When the parties themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure." *See e.g.*, *Morgantown Crossing, LP v. Mfrs. & Traders Tr. Co.*, 2004 WL 2579613, at *5 (E.D. Pa. Nov. 10, 2004) (applying Pennsylvania law and holding that force majeure clause covering "strikes, lockouts, inability to obtain labor or materials on the open market, war, riots, unusual weather conditions, acts of God, or other similar causes beyond their control" where delay was attributable to government entity was foreseeable); *see also HIKO Energy, LLC v. Pa. Pub. Util. Comm'n*, 163 A.3d 1079, 1097 (Pa. Commw. Ct. 2017), *aff'd* 209 A.3d 246 (Pa. 2019) (holding that 2014 Polar Vortex storm was not an "act of god" sufficient to excuse a power provider's power interruptions under force majeure provision where force majeure provision included "acts of God, fire, flood, storm, terrorism, war, civil disturbance, acts of any governmental authority, accidents, strikes, labor disputes or problems, required maintenance work, inability to access the local distribution system, non-performance by the EDC").

Pennsylvania courts also focus on the nature of the event underlying nonperformance and the burden on the defendant:

> In order to use a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been *beyond the party's control and not due to any fault or negligence by the non-performing party*. Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse.

Martin v. Pa. Dept. of Envtl. Res., 548 A.2d 675, 678 (Pa. Commw. Ct. 1988) (emphasis added) (refusing to enforce force majeure clause where defendant failed to demonstrate due diligence in performance of his obligations under the contract and failed to demonstrate that nonperformance was beyond his control) (citing *Gulf Oil Corp. v. FERC,* 706 F.2d 444 (3d Cir.1983), *cert. denied,* 464 U.S. 1038 (1984*)* (reversing order excusing nonperformance where defendant failed to demonstrate how it tried to prevent and/or mitigate the event's occurrence and its effects)); *see also Allegheny Energy Supply Co., LLC v. Wolf Run Min. Co.*, 53 A.3d 53, 62 (Pa. Super. Ct. 2012) (rejecting force majeure as a defense because "conditions leading to the breach of the Agreement were not beyond the reasonable control of [defendant]").

Allocation of inventory

Pennsylvania has not addressed whether resources or inventory must be allocated when invoking a force majeure provision. However, as explained below, allocation may be required under the Uniform Commercial Code ("UCC").

Duty to mitigate

No Pennsylvania case has analyzed the duty to mitigate under force majeure.

Common Law Defenses and UCC

Impossibility and frustration of purpose

Pennsylvania recognizes impracticability and frustration of purpose as valid defenses to performance. *See Alvin v. Carraccio*, 162 A.2d 358, 361 (Pa. 1960) (recognizing frustration of purpose as valid defense in Pennsylvania); *see also Step Plan Servs., Inc. v. Koresko*, 12 A.3d 401, 410 (Pa. Super. 2010) (recognizing adoption of Restatement (Second) of Contracts §§ 261, *et. seq*.).

UCC

Nonperformance may also be excused under the UCC

The Pennsylvania statute adopting the UCC for sales of goods is Pennsylvania Consolidated Statutes, title 13, section 2615—Excuse by Failure of Presupposed Conditions.[1] The statutory language provides performance be excused if commercially "impracticable." *See Hancock Paper Co. v. Champion Intern. Corp*., 424 F. Supp. 285, 290 (E.D. Pa. 1976), *aff'd*, 565 F.2d 151 (3d Cir. 1977) (court held a drop in market prices, was not a "commercial impracticability" because the UCC specifically states that a decline in market price is not impracticable; thus, the problem of a depressed market, did not reach level of severity required to excuse performance under this section).

[1] Except so far as a seller may have assumed a greater obligation and subject to section 2614 (relating to substituted performance): (1) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (2) Where the causes mentioned in paragraph (1) affect only a part of the capacity of the seller to perform, he must allocate production and deliveries among his customers, but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. (3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (2), of the estimated quota thus made available for the buyer.

Allocation of Inventory

Section 2615 requires a nonperformer to "allocate production and deliveries among his customers" if partial performance is achievable. *See* 13 Pa. Cons. Stat. § 2615.

Notice requirements

Section 2615 also requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." However, "seasonable" generally means in accordance with the contract requirements or "reasonable." *See* "seasonable" Merriam-Webster Online Dictionary; https://www.merriam-webster.com (last visited Apr. 6, 2020) ("seasonable" defined as "occurring in good or proper time").

Rhode Island

Force Majeure Clauses

Rhode Island will likely apply common law foreseeability concepts when analyzing a specific contractual force majeure clause

As the District Court of Rhode Island explained, Rhode Island case law provides "little guidance" how a state court would analyze a force majeure contract clause. *URI Cogeneration Partners LP v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1286 (D.R.I. 1996). However, it is likely that Rhode Island courts would apply the common law concept of foreseeability in analyzing contractual force majeure clauses. *See id.* In *URI*, the force majeure clause was so extensive,[1] the court framed it as a "parade of horribles." *Id.* at 1287. Nevertheless, the court found because failure to obtain zoning approval was not specifically listed as a force majeure event, whether it was covered by the catchall phrase "not limited to" was determined by the common law requirement that a force majeure event be unforeseeable. *Id.* at 1287. Because obtaining approval was a concern long before the contract was negotiated, and therefore, foreseeable, this event did not excuse performance. *Id.*

Allocation of inventory

Rhode Island has not addressed whether resources or inventory must be allocated when invoking a force majeure provision. However, as explained below, allocation may be required under the Uniform Commercial Code ("UCC").

Duty to mitigate

No Rhode Island case has analyzed the duty to mitigate in the context force majeure. However, as a fundamental common law duty, a plaintiff will undoubtedly be required to take reasonable steps to mitigate damages. *See, e.g.*, Restatement (Second) of Contracts § 350: Avoidability as a Limitation on Damages.

[1] "Force majeure acts "means causes beyond the reasonable control and without the fault or negligence of the party claiming Force Majeure . . . including, but not limited to an act of God; sabotage; accidents; appropriation or diversion of steam energy, equipment, materials or commodities by rule or order of any governmental or judicial authority having jurisdiction thereof; any changes in applicable laws or regulations affecting performance; war; blockage; insurrection; riot; labor dispute; labor or material shortage; fuel storage; fire; explosion; flood; nuclear emergency; epidemic; landslide; lightning; earthquake or similar catastrophic occurrence . . . ." *URI Cogeneration Partners LP*, 915 F. Supp. at 1276.

Common Law Defenses and UCC

Impossibility and frustration of purpose

The common law doctrines of impossibility and frustration of purpose are available in Rhode Island to excuse nonperformance. Rhode Island courts cases appear to apply impossibility of performance broadly. For example, the Rhode Island Supreme Court found a governmental regulation prohibiting performance of an executory contract made it impossible to perform and thereby excused performance. *Cinquegrano v. T. A. Clarke*, 30 A.2d 859, 862 (R.I. 1943). In *Cinquegrano*, a man purchased a truck in November of 1941. *Id.* at 860. Although the truck was ready for delivery before the New Year, the buyer elected not to pick it up until January. *Id.* During the intervening time, as part of the governmental response to the attack on Pearl Harbor, the federal government issued a rule forbidding the transfer of new trucks beginning in January 1942. *Id.* at 861. The buyer asked for the return of his money, but the dealer kept $300 in interest money stating that because the truck was ready for pickup prior to January 1, the fault was the buyer's for picking it up earlier. *Id.* The court held the government intervention made performance impossible and rescinded the contract. *Id.* at 862. It rejected the dealership's argument that the order would eventually be lifted; stating a long delay would affect the value of the truck, so delay was not a purely temporary condition. *Id.*

In *City of Warwick v. Boeng Corp.*, the Court found the purpose of an entire contract not frustrated when a new state law eliminated the need for only one of the reasons for entering into the contract, holding "[i]n order to excuse a party's duty to perform under a contract, the purpose underlying the contract must be *totally and unforeseeably destroyed*." 472 A.2d 1214, 1219 (R.I. 1984) (emphasis added). In *City of Warwick*, the state entered into negotiations with a private owner to purchase the building it leased as the county courthouse. *Id.* at 1216–17. The city objected, stating that once the building passed from private to state ownership, it would lose the property taxes the private owner paid to the city. *Id.* at 1217. To alleviate this concern, the owner agreed to place two years' worth of property taxes into an escrow account that the city could access when taxes were due. *Id.* The city approved the sale only one month after repeal of a state law requiring cities to preapprove transfers of state courthouses within their boundaries. *Id.* The private owner argued that the purpose of the escrow account was frustrated when the city lost its ability to reject the sale, and refused to place this money into the escrow account. *Id.* The court rejected that position, finding the purpose of the contract survived because the private owner still sold the building to the state and the city obtained property tax money to help replace tax funds lost by the sale. *Id.* at 1219.

Finally, when intervening events take place, a Rhode Island court should not excuse performance unless the "changes in circumstances were so unforeseeable that the risk of increased difficulty or expense should not be properly borne by" the party seeking excuse. *Grady v. Grady*, 504 A.2d 444, 447 (R.I. 1986). In *Grady*, the father of two children abandoned his home in Rhode Island and moved to Nevada where he obtained an *ex parte* divorce. *Id.* at 445. He ultimately returned to Rhode Island and entered into an agreement to provide for his ex-wife and children. *Id.* After he remarried and fathered other children, he attempted to renegotiate the terms of the agreement, arguing that a change in circumstances led to his inability to support both families. *Id.* at 447. The court held the father could not renegotiate the

agreement as he should have foreseen he would eventually remarry and father other children. *Grady*, 504 A.2d at 447.

UCC

Nonperformance may also be excused under the UCC

The Rhode Island statute adopting the UCC for sales of goods is Rhode Island General Laws SECTION 6A-2-615—"Excuse by Failure of Presupposed Conditions."[2] The statutory language provides performance be excused if "impractical." Rhode Island recognizes a three-part test to determine impracticality under section 2-615:

> (1) the contract is partially executory; (2) a supervening event occurred after the contract was made; (3) the nonoccurrence of the event was a basic assumption on which the contract was made; (4) the occurrence frustrated the parties' principal purpose for the contract; and (5) the frustration was substantial.

Iannuccillo v. Material Sand & Stone Corp., 713 A.2d 1234, 1238 (R.I. 1998). This test allows parties to show impracticality based on a substantial increase in cost, even in situations where a hazard might be foreseeable. *Id.* at 1239. In *Iannuccillo*, a property owner hired a contractor to level and grade a sloped property to make it suitable for development. *Id.* at 1235. Part of the compensation for the contractor included taking rock from the extracted portion and selling it as gravel. *Id.* at 1236. When the contractor began blasting the soil and rock, he discovered a ledge that would require much greater work and expense to remove. *Id.* When the contractor sought more money to remove the ledge, the owner refused. *Iannuccillo*, 713 A.2d at 1236. The town issued an order stopping work until engineering plans were approved to remove the ledge as its removal might affect neighboring homes. The owner hired an engineering firm to submit plans and remove the ledge. *Id.* He then sought repayment from the contractor for his alleged breach by not completing the work. *Id.* at 1239. The court began its analysis by referring to statutory impracticality and common law impossibility as "companion doctrines," *id.* at 1237, but noted

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[2] Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with subdivisions (b) and (c) is not a breach of his or her duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in subdivision (a) affect only a part of the seller's capacity to perform, he or she must allocate production and deliveries among his or her customers but may at his or her option include regular customers not then under contract as well as his or her own requirements for further manufacture. He or she may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subdivision (b), of the estimated quota thus made available for the buyer.

that common law impossibility is analyzed separately and differently from statutory impracticality. *Id.* The court held the city's stop work order did not make the contract impossible for the contractor to perform in that it was only temporary until plans were submitted to remove the ledge. *Id.* at 1238. However, it also ruled that the removal of the ledge was beyond the agreement between the two parties, finding the contract specified the contractor would be paid "for removal of existing rock now exposed." *Id.* at 1239. Because the ledge was unknown at the time of contract formation, the contractor was not responsible for the increased costs associated with its removal. *Id. Iannuccillo* provides good evidence of how a Rhode Island court will analyze statutory nonperformance cases.

Allocation of inventory

Section 6A-2-615 requires a nonperformer to "allocate production and deliveries among . . . customers" if partial performance is achievable. *See* R.I. Gen. Laws § 6A-2-615(b). However, no Rhode Island court has interpreted this language.

Notice

Section 6A-2-615 requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery."

South Carolina

Force Majeure Clauses

Force majeure clauses will be interpreted based on the parties' intent

While South Carolina has limited decisions interpreting force majeure clauses, the existing decisions show that the clauses will be interpreted based on the parties' intent.

In *Coker Intern., Inc. v. Burlington Indus., Inc.*, 747 F. Supp. 1168, 1170 (D. S.D. 1990) ("*Coker I*"), the Court found the parties' force majeure clause inapplicable to excuse the buyer's non-performance resulting from its intended resale of equipment to a customer in Peru, because of alleged actions taken by the Peru government, specifically, the cancellation on all import licenses. *Id.*[1] The force majeure clause provided: "[d]eliveries may be suspended by either party in case of act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the Goods or of a material upon which the manufacturer of the Goods." *Id.* at 1170.[2] The Court held that the force majeure clause was not triggered because it was intended to apply "to objective events which directly affect the parties' ability to perform the contract in question" that did not exist, and not simply the ability to make a profit on resale of the goods." *Id.*

On appeal, the Fourth Circuit affirmed, holding that that because the clause allows deliveries to be suspended for certain enumerated causes that prevent "the manufacture, shipment, acceptance, or consumption of the goods," the clause would not apply because nothing about the buyer's excuse (his inability to resell the looms) impacted his ability to accept shipment. *Coker Intern., Inc. v Burlington Indus., Inc.*, No. 90-2494, 1991 WL 97487, at *2–5 (4th Cir. June 11, 1991) ("*Coker II*"). Even assuming that the force majeure clause did apply, the court explained, it would only suspend deliveries, not rescind the contract nor provide for the return of the non-refundable down payment. *Id.* at *4.

Duty to mitigate

No South Carolina cases address force majeure Notice requirements or an affirmative duty to mitigate.

Allocation under force majeure

No cases address whether a party is obligated to allocate when raising a force majeure defense.

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[1] While *Coker I* contained an abbreviated version of the government's action, *Coker II* provided a more robust explanation, which is noted here for thoroughness. *Coker II* at * 3.

[2] *Coker I* contained only the relevant portion of the clause. *Coker II* quoted the complete clause, which is provided in *Coker I*'s analysis for completeness and ease of understanding. *Coker II* at * 1.

Common Law Defenses and UCC

South Carolina has not expressly considered whether a party may raise common law defenses to excuse performance in addition to, or in the alternative to, invoking a force majeure provision. But, in both *Coker I and II*, the respective courts analyzed arguments in addition to those based on the parties' force majeure clause.

Impossibility/frustration of purpose

In *Coker*, the Fourth Circuit (as well as the U.S. District of South Carolina in the underlying decision) entertained arguments regarding allocation of risk based on the parties' force majeure clause, frustration of purpose citing Restatement (Second) Contracts, and unconscionability under the UCC, when upholding the U.S. District of South Carolina's decision, implying that alternative common law defenses would be permitted. *See, e.g.*, *Coker II*, 1991 WL 97487, at *2–5 (analyzing buyer's force majeure clause, frustration of purpose, and unconscionability in contract rescission case).

However, the Court found Coker's frustration of purpose arguments "unpersuasive" in that the contract language made clear Coker assumed the risk of resale and noted that sales to developing countries are risky. It found that economic certainty was not a basic assumption upon which the contract was based, that Coker's principal purpose (to resell the looms) had not been substantially frustrated as he could resell them to other buyers, and that even if the doctrine applied it would only discharge the remaining obligations, not require the return of Coker's down payment. *Coker II*, 1991 WL 97487, at *3–4. Similarly, the Court found Coker's unconscionability argument to be meritless because both parties, as corporations, knew what a non-refundable deposit meant and that the risk was bargained-for in exchange for a non-refundable deposit and that Burlington agreed to remove the looms from the market for over six months foregoing other opportunities. *Id.* at 4.

In *Moon v. Jordan*, the court found the impossibility defense inapplicable because a contracting party must perform contractual obligations unless "rendered impossible by act of God, the law, or other party" and thus, a purchaser's financial condition was a subjective possibility, which would not excuse nonperformance absent a contractual provision stating so). 390 S.E.2d 488 (S.C. Ct. App. 1990).

Additionally, in *MPI South Carolina-1, LLC v. Levy Ctr., LLC*, the court held that the impossibility defense was inapplicable because zoning changes did not make performing the contract impossible because the contract was not conditioned on successful development or zoning. The court further held that the frustration of purpose defense was inapplicable to excuse performance based on the change in property regulations because the property could still be developed albeit for less profit and the contract's terms were evidence that the parties did not share the same contractual purpose). 2011 WL 11733080, at *2–5 (S.C. Ct. App. Feb. 16, 2011).

Finally, in *V.E. Amick & Assoc., LLC v. Palmetto Envtl. Grp., Inc.*, 716 S.E.2d 295, 299–300 (S.C. Ct. App. 2011), the court held the impossibility defense inapplicable because performance by a subcontractor to a remediation contract remained possible even though the contractor's engineer certified by Department of Health and Environmental Control (DHEC) had retired, causing the contractor's failure to comply with

DHEC regulations. The DHEC had not rejected any reports and DHEC had the responsibility to decertify or suspend contractor's certification or make an exception, and thus performance by the contractor remained possible.

South Carolina recognizes the UCC Doctrine of commercial impracticability

Nonperformance may also be excused under the UCC

The doctrine, titled "Excuse by failure of presupposed conditions," is codified at South Carolina Statute section 36-2-615. This statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section (§ 36-2-614) on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Id. Only one South Carolina case mentions section 36-2-615, and even that case does so in *dicta*. In *Morin v. Innegrity, LLC*, the South Carolina Court of Appeals, when analyzing an impossibility defense in a breach of contract and violation of the Wage Payment Act dispute, noted that South Carolina's impracticability defense is limited to contracts concerning the sales of goods, and thus, inapplicable. 819 S.E.2d 131, 137 (S.C. Ct. App. 2018).

Allocation of inventory

Section 36-2-615 requires a nonperformer to "allocate production and deliveries among his customers" if partial performance is achievable.

Notice requirements

Section 36-2-615 also requires that the seller "must notify the buyer seasonably that there will be delay or non-delivery." *Id.*

South Dakota

Force Majeure Clauses

There are no South Dakota cases construing force majeure clauses in commercial contracts. However, South Dakota beer industry's regulations address force majeure in regard to suppliers and wholesalers. South Dakota's statute regulating beer industry business relationships states, in pertinent part:

> Upon providing the wholesaler notice by certified mail, a supplier may immediately terminate an agreement, cancel an agreement, fail to renew an agreement upon expiration of its term, or refuse to continue under an agreement if any of the following has occurred: The wholesaler ceases to carry on business with respect to the brewer's products unless the failure to carry on business is due to force majeure and the wholesaler has not taken reasonable steps to overcome those events that constitute the force majeure or has been unable to carry on business for a period of more than five days.

S.D. Codified Laws § 35-8A-6 (8).

Common Law Defenses and UCC

Commercial impracticability and commercial frustration

"South Dakota recognizes the doctrine of commercial impracticability found in the [Restatement (Second) of Contracts] § 261 as an excuse from performance due to extreme and unreasonable difficulty, expense, injury or loss involved." *Miller v. Mills Const., Inc.*, 352 F.3d 1166, 1172 (8th Cir. 2003) (applying South Dakota law and holding it was impracticable for subcontractor to complete its contractual obligations due to contractor's failure to provide the correct materials for construction and collapse of the structure because of high wind speeds). Commercial impracticability under South Dakota law requires that the difficulty excusing performance be unanticipated and inconsistent with the facts the parties assumed would continue to exist. *Id.* at 1173. "The most important question is whether an unanticipated circumstance has made performance of the promise vitally different from what the parties contemplated when they entered the contract." *Groseth Intern., Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 167 (S.D. 1987) (citing *Williston* § 1931 and reversing lower court's summary judgment ruling in favor of franchisor and remanding for a jury trial on the issue of impracticability where franchisor was no longer financially able to sustain franchise contracts, but rather than providing "fair share" of asset sale to franchisee, franchisor instead elected to terminate franchise agreement.)

South Dakota also recognizes the defense of commercial frustration. Commercial frustration is applicable only where there is "frustration of [a party's] principal purpose in entering the contract; however, the defense will not relieve the promisor from its duty to perform, "if the frustrating event is within the promisor's control or due to the promisor's fault." *Groseth Intern., Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 167 (S.D. 1987) (defense of commercial frustration was not applicable to promisor who sold all assets and

withdrew from market due to market downturn, thus precluding its ability to perform contractual obligations.)

UCC

Nonperformance may also be excused under the UCC

The South Dakota statute adopting the UCC for sales of goods is codified at South Dakota Codified Laws section 57A-2-615—Excuse by Failure of Presupposed Conditions. The statute provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Allocation of inventory

Section 57A-2-615 requires a nonperformer to "allocate production and deliveries among his customers" if partial performance is achievable. *Id.*

Notice requirements

Section 57A-2-615 also requires that the seller "must notify the buyer seasonably that there will be delay or non-delivery." *Id.*

Tennessee

Force Majeure Clauses

Force majeure clauses are interpreted narrowly

In Tennessee, a force majeure provision in a contract "defines the scope of unforeseeable events that might excuse nonperformance by a party." *Bayader Fooder Trading, LLC v. Wright*, No. 13–2856, 2014 WL 5369420, at *3–5 (W.D. Tenn. Oct. 21, 2014) (interpreting Tennessee law and holding that excessive rainfall could constitute an unforeseeable event when there was sufficient expert testimony). Tennessee courts have articulated three elements to determine whether to excuse performance based on a force majeure event: (1) performance must have been impossible; (2) the force majeure event must have been unforeseeable; and (3) the party seeking to enforce the force majeure clause could not mitigate against the effects of the force majeure event. *Id.* (relying on *Bryan v. Spurgin,* 37 Tenn. 681, 685 (1958) (holding that a delivery of flour was excused when river conditions made travelling unsafe)).

Notice requirements are strictly enforced

No Tennessee courts have analyzed notice requirements within force majeure provisions. However, Tennessee courts have required strict enforcement with Notice requirements in other contexts. *See, e.g.*, *Am.'s Collectibles Network, Inc. v. MIG Broad. Grp., Inc.*, 330 F. App'x 81, 88 (6th Cir. 2009) (interpreting Tennessee law and holding that termination of the contract was not effective since the party did not comply with the Notice requirements).

Tennessee courts require a duty to mitigate

Tennessee courts impose a duty to mitigate damages in connection with a force majeure event. In fact, performance of a contract will not be excused unless it is shown that a party exhausted mitigation options. *Bayader Fooder Trading, LLC*, 2014 WL 5369420, at *3–5 (holding that a force majeure provision stating that sellers "shall not be responsible for delay in shipment of the goods or any part thereof occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, dire, or unforeseeable and unavoidable impediment to navigation, or any cause comprehended in the term 'force majeure'" did not excuse performance from a farmer to produce alfalfa due to droughts and floods because the farmer could have hired additional help). Likewise, the defense of impossibility is also unavailable if there has been a failure to mitigate. *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181, 182 (W.D. Tenn. 1974) (holding, under Tennessee law, that a defense of impossibility did not apply when a farmer failed to sell the requisite amount of crops due to flooding on his land but could have sold crops grown on a different property).

Allocation of inventory

No cases in Tennessee address whether resources or inventory must be allocated when invoking a force majeure provision.

Common Law Defenses and UCC

Impossibility and frustration of purpose

Tennessee courts have not analyzed whether common law defenses can be asserted in addition to a defense based on a contractual force majeure provision. With that said, Tennessee recognizes two common law defenses that excuse performance. One of the defenses is the doctrine of impossibility as a defense. The doctrine of impossibility of performance is not applicable where performance becomes impossible due to factors which should have been foreseen. *Gardner v. Gilreath*, CA No. 174, 1990 WL 130894, at *6 (Tenn. Ct. App. Sept.13, 1990). Further, a party is not relieved of liability based upon the defense of impossibility of performance when the triggering event is caused by the party's own conduct or developments that the party could have "prevented or avoided or remedied by appropriate corrective measures." *United Brake Sys., Inc. v. Am. Envtl. Prot., Inc.*, 963 S.W.2d 749, 756–57 (Tenn. Ct. App. 1997).

Tennessee courts may also excuse performance of contractual obligations through the doctrine of frustration of purpose. *N. Am. Capital Corp. v. McCants*, 510 S.W.2d 901, 902–05 (Tenn. 1974) (holding that a party was not excused from performance under a lease due to the failure of federal officials to approve a site for use as a bank because it was a foreseeable event). The doctrine of frustration of commercial purpose applies only if (1) the happening of an event was not foreseen by the parties to the contract, (2) neither party caused the event or had control over the event, and (3) the event destroys or nearly destroys either the value of performance or the object or purpose of the contract. *Haun v. King*, 690 S.W.2d 869, 871–73 (Tenn. Ct. App. 1984) (doctrine of frustration of commercial purpose did not apply when a party declared bankruptcy and could not make lease payments).

UCC

Nonperformance may also be excused under the UCC

The Tennessee statute adopting the UCC for sales of goods is Tennessee Code Annotated section 47-2-615—"Excuse by Failure of Presupposed Conditions."[1] The statutory language provides performance be

[1] Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with subdivisions (b) and (c) is not a breach of his or her duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in subdivision (a) affect only a part of the seller's capacity to perform, he or she must allocate production and deliveries among his or her customers but may at his or her option include regular customers not then under contract as well as his or her own requirements for further manufacture. He or she may so allocate in any manner which is fair and reasonable.

excused if "impractical." In *Bunge Corp. v. Miller*, a seller of soybeans alleged that his performance under a sales contract was impossible because his land was under water due to flooding and that the primary road between seller's farm and buyer's terminal was flooded and that one alternate route was across a levee which might not support weight of loaded truck. 381 F. Supp. 176, 180 (W.D. Tenn. 1974). However, the Western District of Tennessee held that where there was no evidence the buyer had any knowledge of seller's operations and where beans delivered by seller had come from land owned by him, land owned by another, and land owned both by seller and his brother, the doctrine of impossibility did not excuse the seller from untimely delivery under the contract.

Allocation of inventory

Section 47-2-615 requires a nonperformer to "allocate production and deliveries among . . . customers" if partial performance is achievable. *See* Tenn. Code. Ann. § 47-2-615(b). In *Cecil Corley Motor Co., Inc. v. Gen. Motors Corp.*, the court held that either under Michigan or Tennessee law, the automobile manufacturer had a duty, during periods of short supply, to allocate available production among its customers (here, its dealers) on a fair and reasonable basis. 380 F. Supp. 819, 840 (M.D. Tenn. 1974). The court also held that Pontiac complied with that duty, in fact, providing the plaintiff dealer with more cars than most of the other dealers. *Id.*

Notice requirements

Section 47-2-615 requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." However, "seasonable" generally means in accordance with the contract requirements or "reasonable." *See* "seasonable" Merriam-Webster Online Dictionary; https://www.merriam-webster.com (last visited Apr. 6, 2020) ("seasonable" defined as "occurring in good or proper time"). In *Bunge Corp.*, the court held that even if the seller had met all of the other prerequisites for impossibility, he could not rely on it because he failed to give notice until after he had already failed to deliver the contracted-for number of soybean bushels. 81 F. Supp. at 180.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subdivision (b), of the estimated quota thus made available for the buyer.

Texas

Force Majeure Clauses

Force majeure clauses are interpreted narrowly

Texas construes force majeure clauses narrowly. The scope of a force majeure clause depends on the specific contract language. *Allegiance Hillview, LP v. Range Tex. Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.) ("[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure," and reviewing courts "are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended."); *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) (". . . its [a force majeure clause] scope and application are 'utterly dependent upon the terms of the contract in which it appears.'" "In other words, when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure).

Common law rules are used to fill in any gaps when interpreting force majeure clauses. *TEC Olmos and Terrace Energy Corp. v. ConocoPhillips Co.*, 555 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (stating that a court may consider common law rules to 'fill in gaps' when interpreting force majeure clauses").

Whether an event not enumerated in a force majeure clause can support a force majeure claim depends on the construction or the "character "of the clause itself. *See Sec. Banking & Inv. Co. v. Flanagan*, 241 S.W. 702, 706 (Tex. Civ. App.—Texarkana 1922) (". . . it does no violence to the evident intention of the parties to say that the last phrase, containing the enumerated conditions, should be considered as explanatory and a guide in determining the character and kind of conditions which should be regarded as exempting the appellants from doing the things essential to the prosecution of the work in which both parties were interested. In that way only can effect be given to all the language they used.").

Typically, if not accounted for in the clause itself, the event must be similar to those enumerated in the force majeure clause. In *R & B Falcon Drilling Co. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 974 (S.D. Tex. 2000), the Southern District of Texas rejected a party's attempt to invoke a force majeure clause, under Texas law, because the alleged force majeure event was not of the same general character as those specifically listed in clause. The force majeure clause listed "riots, strikes, wars[], insurrection, rebellions, terrorist acts, civil disturbances, dispositions or order of governmental authority . . . inability to obtain equipment, supplies or fuel" as other items reasonably beyond the control of the parties. The court explained "[t]o get a sense of what types of events excuse performance, the Court will look to the events enumerated in the clause." *Id.* at 975. The court noted that "these events are essentially governmental instability and supply-chain-related events external to actual performance of the contract." *Id.* Therefore, a seabed anomaly or a mechanical problem of unknown origin, which was the alleged force majeure event was "of a distinctly different character than these listed events in that it is something that relates to the

set-up and operation of the rig, it is contemplated by other sections of the contract, and it is something that Plaintiff could have detected." *Id.*; *see also Matador Drilling Co. v. Post*, 662 F.2d 1190, 1198 (5th Cir. 1981) (applying Texas law, holding, in part, that a force majeure condition did not exist because the appellee did not show that its cessation of operations was "of the same general character as the 'strikes, actions of the elements, water conditions, inability to obtain fuel or other critical materials" listed in the force majeure clause and was "manifestly not the kind of calamitous and unanticipated event that the force majeure clause contemplates.").

However, a "catch-all" provision may permit any event, even if not of the type enumerated in the force majeure clause, to be deemed a force majeure event depending upon the wording of the catch-all provision. But, generally, the event must be unforeseeable and not within the party's reasonable control. In *TEC Olmos and Terrace Energy Corp. v. ConocoPhillips Co.,* for example, the Houston 1st Court of Appeals ruled that not only must the event be beyond the reasonable control of the party, but it must have been unforeseeable. 555 S.W.3d at 182–184. The defendant pointed to the force majeure clause's catch-all phrase ("any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected") to assert that although "economic downturn" was not an event listed in the force majeure clause, it should be considered a force majeure event. The court disagreed, noting that not only does an event have to be beyond the reasonable control of the party whose performance is affected, it must be unforeseeable and economic downturns are not unforeseeable. *Id.*

Additionally, in *Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc.*, the force majeure clause enumerated several events and included a catch all phrase to include events occurring ". . . otherwise by operation of force majeure (which term includes any other similar or dissimilar cause, occurrence or circumstance not within the reasonable control of lessee). . . ." 861 S.W.2d 427, 435–37 (Tex.App.—Amarillo 1993, no writ). The court held the force majeure clause to be inapplicable because the alleged force majeure event – the Texas Railroad Commission shut-in order preventing defendant from performing under oil and gas lease – was found to be "within the reasonable control" of defendant because it was caused by defendant's failure to comply with prior Texas Railroad Commission orders. *Id.*

Courts enforce notice requirements in accordance with the contract terms

Texas courts will generally enforce Notice requirements as they are stated in the contract. In *Rowan Cos., Inc. v. Transco Expl. Co., Inc.*, the appellant argued that the appellee could not recover under the force majeure clause, in part, because the appellant failed to give written notice that a force majeure event – a fire – had occurred. 679 S.W.2d 660, 666 (Tex. App.—Houston [1st Dist.] 1984), *writ ref'd n.r.e.* (Jan. 16, 1985). The force majeure clause stated in part:

> "In case either party hereto shall be unable, wholly or in part, because of such cause of force majeure, to carry out its obligations under this agreement, it shall promptly give written notice to that effect to the other party, stating the particulars of such force majeure, and such party shall also give written notice to the other party of the termination of such conditions."

Id. On appeal, the appellee did not deny that it was promptly notified of the fire. The court held that the appellant could recover under the force majeure clause's rate for the following reasons: (1) the language requiring written notice did not indicate that it was required for relief under the force majeure clause; (2) the clause did not impose any penalty for failure to give written notice; and (3) there was no harm to the appellee from the lack of written notice as the daily rate for repairs and the force majeure rate were the same. *Id.*

Other cases interpreting notice clauses include: *Allegiance Hillview, L.P. v. Range Tex. Prod., LLC*, 347 S.W.3d 855, 865-66 (Tex.App.—Fort Worth 2011, no pet.) (holding that the appellee gave timely and sufficient notice according to the force majeure clause, finding that appellant's argument that notice was invalid because appellee's notice only spoke to a separate or unrelated force majeure event was in error because the event in the notice was in fact the correct event) and *Matador Drilling Co. v. Post*, 662 F.2d 1190, 1197-1198 (5th Cir. 1981) (applying Texas law, holding that a force majeure clause was unavailable, in part, because appellee failed to provide notice as required to suspend its obligations under the force majeure clause).

There is no duty to exercise reasonable diligence

Texas courts have held that there is no duty to exercise reasonable diligence to overcome disruption caused by a force majeure event, absent language in the force majeure clause to the contrary. *See Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 281–283 (Tex. App.—Amarillo 1998, pet. denied) (the court, noting that "we are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended," held that defendant well operators had no duty to special duty exercise reasonable diligence to overcome the effects of force majeure); *see also Moore v. Jet Stream Inv., Ltd.*, 261 S.W.3d 412, 422 (Tex.App.—Texarkana 2008, pet. denied) (the court noted ". . . due diligence is not an issue when deciding whether a force-majeure clause applies" and "Texas law is well established that due diligence is not required under force-majeure clauses").

Allocation of inventory

Texas has not addressed whether allocation of inventory is required under a force majeure provision. However, if the contract in question has no force majeure clause and it deals with the sale of goods, Texas' version of Article 2 of the Uniform Commercial Code ("UCC"), codified in Chapter 2 of the Texas Business and Commerce Code, requires a seller to allocate its available products among its customers in a fair and reasonable manner. Tex. Bus. & Com. Code § 2.615(2).

Common Law Defenses and UCC

Under certain circumstances, defenses found in the common law and Uniform Commercial Code may be available to excuse a party's inability to perform.

Impracticability, impossibility and frustration of purpose

If a contract does not include a force majeure clause, a party that has failed to perform may able to argue its non-performance is excused under the doctrine of impossibility of performance. Impossibility is based on Section 261 of the Restatement (Second) of Contracts and generally applies in three instances: (1) the death or incapacity of a person necessary for performance; (2) the destruction or deterioration of a thing necessary for performance; and (3) prevention by governmental regulation. *Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60, 65 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) For sellers, the UCC has a similar provision: "Delay in delivery or non-delivery in whole or part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . ." TEX. BUS. & COM. CODE §2.615(1).

In Texas, "impossibility of performance" has also been described as "commercial impracticability" or "frustration of purpose." *Tractebel*, 118 S.W.3d at 64 n.6 (holding seller was not excused from breaching contract for sale of emission reduction credits on the basis of commercial impracticability where seller failed to use reasonable efforts to appeal state's cancellation of its emission reduction credits, and seller's performance was not impossible).

Two types of impossibility

There are two types of impossibility: (1) objective and (2) subjective. *See Janak v. FDIC*, 586 S.W.2d 902, 906–07 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *see also* Restatement (First) of Contracts § 455 (1932) ("Impossibility may be due to the nature of the thing to be done or to the capacity of the person who has promised to do it. It is the difference between "the thing cannot be done" and "I cannot do it." The first is objective; the second subjective"). Objective impossibility relates solely to the nature of the promise while subjective impossibility due to the inability of the individual to perform. *Id.* Only objective impossibility can serve as a defense for failure to perform. *Janak*, 586 S.W.2d at 906–907 (holding that original objective impossibility of performance existed where an agreement to enter a judgment in settlement of a lawsuit was rendered impossible where the lawsuit had been dismissed for want of prosecution prior to the agreement).

A party must make reasonable efforts

In order to assert that its performance was impossible or impractical, a party must show that it made reasonable efforts to overcome the obstacle to performance. *Tractebel*, 118 S.W.3d at 68; Restatement (Second) of Contracts, §§ 261, 264 (1981) ("[A] party is expected to use reasonable efforts to surmount obstacles to performance . . . , and a performance is impracticable only if it is so in spite of such efforts."). Even governmental action or regulation will not excuse performance unless a party has exhausted all reasonable efforts to overcome the action. *Tractebel*, 118 S.W.3d at 68–70; *see also* Restatement (Second) of Contracts § 261 (1981) illus. 11 ("A contract to construct and lease to B a gasoline service station. A valid zoning ordinance is subsequently enacted forbidding the construction of such a station but permitting variances in appropriate cases. [A] . . . makes no effort to obtain a variance, although variances have been

granted in similar cases, and fails to construct the station. A's performance has not been made impracticable").

When common law and/or UCC rights are available

Texas law likely does not permit the assertion of common law rights or rights under the Uniform Commercial Code if there is a force majeure clause in a contract. In most cases, it is the force majeure provision that controls. *See PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 18–19 (5th Cir. 1990) (interpreting Texas law) (the court rejected appellant's argument that Section 2.615 imposes a requirement that all force majeure events be beyond the parties' reasonable control by holding that the parties' written force majeure provision overrode any requirements imposed by the statute).

Also, the inverse is likely true. That is, if a contract does not include a force majeure provision, or if no written form of the provision exists) then a party cannot assert a force majeure defense. *See R.R. Comm'n of Tex. v. Coppock*, 215 S.W.3d 559, 566–67 (Tex.App.—Austin 2007, pet. denied) (landowners appealing the Railroad Commission's decision to extend coal mining company's surface coal mining permit not permitted to assert force majeure principles in a case where there were no force majeure provisions present for the Court to interpret).

UCC

Nonperformance may be excused under the UCC

If the contract in question deals with the sale of goods, another alternative to excuse nonperformance can be found in Article 2 of the Uniform Commercial Code, codified in Texas under Chapter 2 of the Texas Business and Commerce Code under Section 2.615. A party can argue that any alleged failure to perform is excused by Section 2.615, which notes that delay in delivery or non-delivery by a seller is not a breach of the contract if performance "has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made." Tex. Bus. & Com. Code § 2.615(1).

Allocation of inventory

In addition, in the event the seller has the capacity to partially deliver some of the goods promised under the contract, and has contractual obligations to deliver the product to other parties, the excuse of non-performance under Section 2.615 is permitted only if the available products are allocated among the sellers' customers in a manner which is fair and reasonable. Tex. Bus. & Com. Code § 2.615(2).

Notice requirements

Section 2.615 requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." Tex. Bus. & Com. Code § 2.615(3).

Utah

Force Majeure Clauses

An event cannot be considered an event of force majeure if the failure to perform was a result of a party's "own miscalculations, decisions, and actions." Force majeure delays must be beyond the party's reasonable control or unpreventable. *Desert Power, LP v. Pub. Serv. Comm'n*, 173 P.3d 218, 222 (Utah Ct. App. 2007) (A force majeure clause in a power contract between a power company and a corporation did not excuse the power company from performance under the contract where the corporation's decision to redesign the interconnection and resulting delays did not fall within the terms of the force majeure clause).

Notice requirements

At least one court applying Utah law has strictly construed a force majeure notice provision. *Aquila, Inc. v. C. W. Mining*, No. 2:05-cv-00555, 2007 WL 9643101, at *5 (D. Utah Oct. 30, 2007) ("Because the parties expressly agreed that written notice of a force majeure event must be given in order to excuse [defendant's] performance, and no written notice was given, [defendant's] failure to perform is not excused."). *See Int'l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 885 (10th Cir. 1985) (applying New Mexico law but holding generally that failure to comply with the notice requirements is fatal to a force majeure claim).

Force Majeure clause supersedes common law defenses

Parties cannot rely on common law defenses and the Uniform Commercial Code ("UCC") to circumvent the terms and limitations of a negotiated force majeure provision. *See* A*quila, Inc. v. C. W. Mining*, No. 2:05-cv-00555, 2007 WL 9643101, at *5 (D. Utah Oct. 30, 2007), *aff'd*, 545 F.3d 1258 (10th Cir. 2008). In *Aquila*, a coal producer argued that failure to deliver the quantity and quality of coal required by the contract was legally excused under force majeure clause on account of labor problems and geological problems. The court held that producer failed to prove that its performance was excused as a force majeure. The producer did not provided the requisite notice of the alleged geological problems and, "[a]lthough the labor problems had some impact on CWM's coal production, how much impact [was] not clear." *Id.*

Common Law Defenses and UCC

Impossibility and frustration of purpose

"The defenses of force majeure, impossibility of performance, frustration of purpose, and U.C.C. § 2–615(a) are closely related, if not identical." *Aquila*, 2007 WL 9643101, at *5; *see also Skolnick v. Exodus Healthcare Network, PLLC*, 437 P.3d 584 (Utah Ct. App. 2018) ("Frustration of purpose differs from the

defense of impossibility only in that performance of the promise, rather than being impossible or impracticable, is instead pointless").

Early Utah decisions strictly applied the impossibility defense, excusing performance only by "the act of God or the public enemy, or the interdiction of the law as a direct and sole cause of the failure." *McKay v. Barnett*, 60 P. 1100 (Utah 1900). The contemporary and more liberal formulation of the doctrine excuses performance due to impracticability, rather than only impossibility:

> Under the contractual defense of "impossibility," an obligation is deemed discharged if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable.

Tech Ctr. 2000, LLC v. Zrii, LLC, 363 P.3d 566 (Utah Ct. App. 2015).

The impossibility defense is unavailable when "the party has assumed the risk of the event." *Kilgore Pavement Maint., LLC v. W. Jordan City*, 257 P.3d 460, 462 (Utah Ct. App. 2011) (Rejecting request by paving company for an equitable adjustment increasing price of paving contract when cost of liquid asphalt oil rose from $350 per ton to $1005 per ton. The contractor assumed the risk of impracticality in forming fixed price contract with city). The party seeking to excuse himself from performance has the burden to "prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promissor, or if counterperformance remains valuable." *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 69 (Utah 1982). In *Bitzes*, a developer reconfigured lots and attempted to cancel a previously entered option contract on a certain original plat after a city required a drainage easement across a portion of the developer's lots. The court denied the developer's impossibility of performance defense because the "delays caused by neighborhood opposition and alterations mandated by city were contingencies which an experienced developer could have foreseen and which did not substantially frustrate its purpose of selling lots in the subdivision, even if such things reduced his profits. *Id. See also W. Prop. v. So. Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989) (discharging defendant's obligation to construct building where performance was impossible due to the city's failure to approve construction of building because, in part, the parties assumed that the city would cooperate in the development of the land.).

UCC

Nonperformance may also be excused under the UCC

The Utah statute adopting the UCC for sales of goods is Utah Code Annotated section 70A-2-615—"Excuse by Failure of Presupposed Conditions." The statutory language provides performance be excused if "impractical."[1] *See Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., Inc.*, 646 F.2d 434 (10th Cir.

[1] Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (1) Delay in delivery or nondelivery in whole or in part by a seller who complies with Subsections (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by

1981), *opinion clarified*, 689 F.2d 903 (10th Cir. 1981) (holding that contract between importer of sewing machines and distributor was not rendered impracticable when return on employer's capital investment had been reduced considerably because of devaluation of American dollar, because letter importer sent to distributor three weeks prior to contract execution showing the possibility of currency fluctuation was foreseeable).

Allocation of inventory

Section 70A-2-615 requires a nonperformer to "allocate production and deliveries among . . . customers" if partial performance is achievable. See Utah Code Ann. § 70A-2-615.

Notice requirements

Section 70A-2-615 requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." However, "seasonable" generally means in accordance with the contract requirements or "reasonable." *See* "seasonable" Merriam-Webster Online Dictionary; https://www.merriam-webster.com (last visited Apr. 6, 2020) ("seasonable" defined as "occurring in good or proper time").

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the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (2) Where the causes mentioned in Subsection (1) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. (3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under Subsection (2), of the estimated quota thus made available for the buyer.

Vermont

Force Majeure Clauses

There no Vermont state courts or federal courts interpreting force majeure clauses under Vermont state law. However, at least one federal court in Vermont has suggested that cases involving potential force majeure events will be decided employing general force majeure principles, such as the need to be diligent in attempting to avoid or prevent the force majeure event. *In re Bushnell*, 273 B.R. 359, 364 (Bankr. D. Vt. 2001) (holding that where there was no contract containing a force majeure clause, but the claimant was attempting to invoke force majeure principles, the claimant did not show that its failure to timely file its motion to extend time to appeal the bankruptcy court's decision "could not have been avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ").

Common Law Defenses and UCC

There are several cases in which defenses found in the common law and Uniform Commercial Code ("UCC") were available to excuse a party's inability to perform. However, it is unclear if these defenses would be available if there was a contract containing a force majeure clause as Vermont courts have not expressly addressed this issue.

Impracticability and impossibility

A party that has failed to perform may able to excuse its non-performance under the doctrine of impossibility of performance. In Vermont, impossibility of performance is applied narrowly. *Agway, Inc. v. Marotti*, 540 A.2d 1044, 1046 (Vt. 1988) (internal citations omitted) (holding that appellant did not show that compliance with agreement to pay for construction materials was not impossible where facts showed compliance was likely only inconvenient). In reaching this holding the court explained that "[p]erformance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved, but that cases in Vermont "have recognized only a narrow application of this principle." The court further explained that the impossibility "must consist in the nature of the thing to be done and not in the inability of the party to do it.... [I]f what is agreed to be done is in nature possible and lawful, it must be done; ... the promissor takes the risk within the limits of his undertaking of being able to perform." *Agway, Inc.*, 540 A.2d at 1046.

Vermont courts have equated "impossibility" with "impracticability." *See also id*. (explaining that impossibility includes impracticability, the Vermont Supreme Court noted "[i]t is a defense to a contract action that a party's performance under the contract is "impracticable" because of a fact of which he has no reason to know and the nonexistence of which is a basic assumption on which the contract was made. Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. Our cases have recognized only a narrow application of this principle.")

Finally, impossibility is limited to the performance actually promised in the contract. *Town of Lyndon v. Burnett's Contracting Co., Inc.*, 413 A.2d 1204, 1207 (Vt. 1980) (holding defendant's performance was not made impossible by plaintiff's failure to obtain all necessary easements to build a sewer line because defendant's promise was not to build a sewer line, but instead was a promise to keep its bid open and sign a contract to build a sewer line).

UCC

For sellers, the UCC has a provision that can also be used to excuse performance: "Delay in delivery or non-delivery in whole or part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . ." Vt. Stat. Ann. tit. 9A, § 2-615.

The burden of proving each of the elements required for relief under section 2-615 is upon the party claiming excuse. *In re Adelphia Cable Commc'ns.*, No. 6778, 2003 WL 1903928, at *11 (Vt.P.S.B. Apr. 11, 2003). A simple increase in cost, even to the point of making the contract unprofitable, is not enough to show commercial impracticability. *Id.* (Vermont Public Service Board order explaining that a cable service provider did not show that compliance with requirements in the Certificate of Public Good, which authorizes a company to own or operate a telecommunications business in Vermont, was not commercially impossible because the evidence showed that the provider's value would not be destroyed, only that it would only be less profitable than it had been.).

Virginia

Force Majeure Clauses

Force majeure clauses are narrowly interpreted

Force majeure clauses are narrowly interpreted, and will excuse a party's nonperformance if the event causing the party's nonperformance is enumerated in the clause. *Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co.*, No. 7:16-cv-00489, 2018 WL 4008993, at *10 (W.D. Va. Aug. 22, 2018) (applying Virginia law and holding that a coal purchaser improperly invoked a force majeure clause when the intervening event, a third party's failure to expand a shipping terminal, was not explicitly listed in the force majeure clause). Courts rely on this principle to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Id.* (internal citations omitted); *see Gordonsville Energy, LP v. Va. Elec. & Power Co.*, 257 Va. 344, 354 (1999) (interpreting the force majeure clause narrowly in its definition of a "forced outage day" in an electricity sale and purchase agreement); *see also Middle E. Broad. Networks, Inc. v. MBI Glob., LLC*, No. 1:14-cv-01207, 2015 WL 4571178, at *1 (E.D. Va. July 28, 2015) (finding the force majeure provision did not apply because the party seeking to invoke the clause, which included ". . . matters outside the control of either party, such as war, weather, and acts of God" because it was the party's failure to pay a subcontractor, and not the ongoing war with ISIS, that caused the party's non-performance).

The terms of the clause are paramount. Although interpreting federal law in construing a force majeure clause in consent decree, a Virginia federal district court's ruling may shed some light in the interpretation of Virginia force majeure clauses. In *U.S. v. Hampton Roads Sanitation Dep't*, the Eastern District of Virginia indicated that an act of God could be covered as a force majeure event even if could be foreseen so long as the force majeure clause did not specifically require the lack of foreseeability as one of its terms to apply. No. 2:09-cv-481, 2012 WL 1109030, *7 (E.D. Va. 2012) (allowing a local governmental agency waste water sanitation agency to invoke the force majeure clause after several heavy rainfalls overwhelmed its system causing discharge outside the levels of its agreement with the EPA).

However, Virginia will only recognize a force majeure clause where the act of God, and not a human act, was the sole proximate cause of the injury. *Cooper v. Horn*, 448 S.E.2d 403, 425 (Va. 1994) (finding that the force majeure defense was inapplicable because human negligence of allowing trees to grow next to a dam, alongside heavy rains, contributed to the dam's collapse).

Notice requirements may be strictly construed

Virginia courts have held that failing to adhere to Notice requirements can be found to be a breach of contract. *Drummond Coal*, 2018 WL 4008993, at *9.

Virginia courts have enforced contractual duties to mitigate when invoking force majeure

Parties attempting to invoke the force majeure clause may have a duty to mitigate – in particular if the language of the agreement so states. *See Hampton Roads* at *8 (concluding that the defendant had a duty before and after the weather event to use its "best efforts," as required by the parties' agreement, to mitigate the wastewater discharge).

Thus, if theoretically a party could have but failed to take steps to mitigate nonperformance due to the pandemic, a court might find that the defaulting party helped cause or further the injury and thereby deny enforcement of the force majeure clause. For example, to ensure that a force majeure clause will be upheld where a party cancels a conference, the party probably should offer to mitigate its nonperformance by possibly offering to reschedule the conference to a future date.

Allocation of inventory

Virginia has not addressed whether resources or inventory must be allocated when invoking a force majeure provision

Common Law Defenses and UCC

Frustration of purpose and impossibility

Even where there is no force majeure clause or where the clause does not contain specific or catch-all language applicable to COVID-19, the doctrines of (i) frustration of purpose and (ii) impossibility of performance, may still apply to void a contract and their elements are "essentially the same." *Drummond Coal*, 2018 WL 4008993, at *9 (rejecting the defense of frustration of purpose and impossibility, holding governmental regulation of coal standards, though create tougher market conditions, do not frustrate the purpose of contract entirely nor make it impossible for the defendant to pay an agreed-upon non-performance fee). A party must prove three elements to invoke these alternative defenses: 1) the unexpected occurrence of an intervening act; 2) that such occurrence was of a character that its non-occurrence was a basic assumption of the agreement of the parties; and 3) that occurrence made performance impracticable. *Id.* at *13.

UCC

Nonperformance may be excused under the UCC

The Virginia statute adopting the Uniform Commercial Code ("UCC") for sales of goods is VA Code Ann. section 8.2-615—"Excuse by Failure of Presupposed Conditions."[1] The statutory language provides performance be excused if "impracticable."

[1] Except so far as a seller may have assumed a greater obligation and subject to the preceding section [§ 8.2-614] on substituted performance: (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made

Allocation of inventory

Section 8.2-615 requires a nonperformer to "allocate production and deliveries among . . . customers" if partial performance is achievable. *See id.*

Notice requirements

Section 8.2-615 also requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." *Id.*

impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer. Va. Code Ann. § 8.2-615.

Washington D.C.

Force Majeure Clauses

Washington, D.C. courts look to the language the parties bargained for in the contract

When interpreting force majeure provisions, D.C. courts "look to the language that the parties specifically bargained for in the contract to determine the parties' intent concerning whether the event complained of excuses performance." *Nat'l Ass'n of Postmasters of U.S. v. Hyatt Regency Wash.*, 894 A.2d 471, 475 (D.C. App. 2006) (citing *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 n. 5 (5th Cir.1990)). The clause at issue in *Hyatt Regency* stated:

> The parties' performance under this Contract is subject to acts of God, war, government regulation, terrorism, disaster, strikes, civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal or which materially affects a party's ability to perform its obligations under this Contract. Either party may terminate this Contract for any one or more of such reasons upon written notice to the other party within three (3) days of such occurrence or receipt of notice of any of the above occurrences.

Id. At issue in this case was whether "unexpected scheduling conflicts," fell into the residual clause of the force majeure provision. *Id.*

The *Hyatt Regency* Court interpreted the "any other emergency" language narrowly, refusing to hold that the rescheduling constituted an excuse for nonperformance. *Id.* at 476. Specifically, the court followed *ejusdem generis* principles, concluding that a scheduling emergency failed to quality as an excuse for nonperformance. *Id.* at 476.

D.C. courts also focus on whether or not the triggering event was beyond the reasonable control of the defendant. *See Whole Foods Mkt. Grp., Inc. v. Wical Ltd. P'ship,* 2019 WL 5395739, at *5 (D.D.C. Oct. 22, 2019) (holding that an infestation could not constitute excuse for performance because defendant could have prevented it).

Allocation of inventory

D.C. courts have not addressed allocation in the context of force majeure provisions.

Common Law Defenses and UCC

D.C. courts have not explicitly addressed whether litigants can assert force majeure and impracticability defenses at the same time. However, courts have considered such parallel arguments when made. *See Hyatt Regency Wash.*, 894 A.2d at 474 (permitting defendant to assert defenses based on force majeure and impracticability).

Impracticability and frustration of purpose

In D.C., frustration of purpose and impracticability are available as defenses. "Under the frustration defense, the promisor's performance is excused because changed conditions have rendered the performance bargained from the promisee worthless, not because the promissor's performance has become different or impracticable." *Island Dev. Corp. v. D.C.*, 933 A.2d 340, 349 (D.C. App. 2007) (holding that defendant's obligations under lease agreement were neither impracticable nor frustrated by the introduction of new legislation).

Under a frustration analysis, the court is concerned with the impact of the event upon the failure of consideration, while under impracticability, the concern is more with the nature of the event and its effect upon performance." *Id.* at 349. These doctrines will "relieve a party of his obligations under a contract only in extreme circumstances." *Id.* at 350.

UCC

Nonperformance may also be excused under the UCC

The Washington D.C. statute adopting the UCC for sales of goods is D.C. Code Annotated section 28:2-615—Excuse by Failure of Presupposed Conditions.[1] The statutory language provides performance be excused if commercially "impracticable" but impracticability does not mean impossibility. *See Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 312, 316 (D.C. Cir. 1966) (noting that the concept of impracticability assumes that performance was physically possible and thus, there is nothing necessarily inconsistent in claiming commercial impracticability for method of performance actually adopted).

Allocation of inventory

Section 28:2-615 requires a nonperformer to "allocate production and deliveries among his customers" if partial performance is achievable. D.C. Code Ann. § 28:2-615.

Notice requirements

Section 28:2-615 also requires that the seller "must notify the buyer seasonably that there will be delay or non-delivery." D.C. Code Ann. § 28:2-615.

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[1] Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (b) where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable (c) the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Washington

Force Majeure Clauses

Force majeure clauses are interpreted under the "context rule" of claim construction

There are numerous Washington decisions interpreting and applying specific force majeure provisions in commercial contracts. However, the state has not developed any overarching rules governing the construction of these provisions. As a general matter, Washington courts follow the "context rule" of contract interpretation, which "permit[s] a court to look to extrinsic evidence to discern the meaning or intent of words or terms used by contracting parties, even when the parties' words appear to the court to be clear and unambiguous. *Hollis v. Garwall, Inc.*, 137 Wash. 2d 683, 693 (1999). This rule has special importance when interpreting force majeure provisions, as Washington courts have significant leeway to review the parties' interactions when deducing their meaning.

In *Puget Soundkeeper Alliance v. Rainier Petroleum Corporation*, an environmental group alleged that an oil company's storm water discharges violated the Clean Water Act. No. C14-0829, 2017 WL 6515970, at *2 (W.D. Wash. Dec. 19, 2017). The parties eventually settled and entered into a consent decree prohibiting certain discharges from a pier Rainer rented from Exxon. The consent decree contained a force majeure provision, stating that "[a] force majeure event is any event outside the reasonable control of Rainier Petroleum that causes a delay in performing tasks required by this decree that cannot be cured by due diligence" and giving examples of events, including "[a]ctions or inactions of third parties over which [Rainier] has no control." *Id.* at *2. Delays caused by a force majeure event were not violations of the decree if Rainer notified Soundkeeper in writing within 15-days and outlined the steps it would take to mitigate any harm. *Id.* After entry of the order, Rainer encountered numerous problems implementing the required changes, including a lack of consent to physical modifications from landlord Exxon, co-tenant Shell, and local environmental authorities. Rainer met and conferred with Soundkeeper but the negotiations broke down and Soundkeeper moved for a contempt order. Rainer admitted its noncompliance but stated that force majeure events, particularly Exxon's refusal to agree with modifications, excused its performance as "actions or inactions of third parties" over which it had no control. The court disagreed, and found that: 1) Rainer knew two months before entry of the consent decree that Exxon may not approve any changes, but waited 10 months to address the issue; and 2) even if it qualified as a force majeure event, Rainer had failed to comply with the notice requirement of the force majeure provision. *Puget Soundkeeper All.*, 2017 WL 6515970 at *10.

In *Inn at Center, LLC v. City of Seattle*, a developer failed to make a required lease payment to the City of Seattle and sought shelter in the lease's force majeure provision. 2004 WL 418021, 120 Wash. App. 1039 (2004) (unpublished). The parties had signed a long-term lease in late 1999 that required construction of a hotel to begin 60 days after all permits were obtained, but no later than December 31, 2000. If construction had not begun at that time, the lease would automatically terminate. The parties

subsequently agreed to several extensions, provided that the developer would pay the City $15,000 monthly until construction began. The lease contained a force majeure provision, providing that a force majeure event was "any circumstance or act beyond the control of a party, that such party could not have reasonably anticipated or prevented and that has, or may reasonably be expected to have, a material adverse effect on the rights or obligations of such party under this Ground Lease." *Id.* at *5. The provision excuses most performance but expressly excluded "any monetary obligations" from force majeure protections. The developer did not always pay on time, but the parties were able to resolve issues informally. But construction had still not begun when the September 11th, 2001 attacks occurred. The developer stopped making its monthly payments and informed the City that 9/11 and its effect on the hospitality industry constituted a force majeure event, excusing the developer of any performance under the lease. The court disagreed, holding that "the $15,000 per month option payment was a monetary obligation and expressly outside the scope of the force majeure clause." *Inn at Ctr.*, 2004 WL 418021, at *6.

Allocation of inventory

Washington courts have not expressed any general duty to allocate when a force majeure event occurs.

Common Law Defenses and UCC

Like many states, Washington has long recognized a common law excuse for performance due to "acts of God." *See, e.g.*, *Donald B. Murphy Contractors, Inc. v. State*, 40 Wash. App. 98, 105 (1985) ("Neither party to a construction contract is liable to the other for acts of God, unless liability is expressly assumed"). Unfortunately, what qualifies as an act of God is not clear under Washington law. *See generally* § 12:6.Acts of God, 33 Wash. Prac., Wash. Const. Law Manual § 12:6 (2019-2020 ed.) ("Little Washington case law exists on this subject"). No case could be found discussing whether common law and UCC excuses for performance are valid defenses when a contract contains a force majeure clause.

Impracticability/frustration of purpose

In Washington, the doctrine of impossibility covers both "strict impossibility and impracticability due to extreme and unreasonable difficulty, expense, injury or loss" but, the "mere fact that a contract's performance becomes more difficult or expensive than originally anticipated, does not justify setting it aside." *Thornton v. Interstate Sec. Co.*, 35 Wash. App. 19, 29 (Div. 3 1983) (rejecting looser California standard for impossibility and holding that impossibility defense was unavailable to employer in employee's breach of contract case, where performance by corporation was not rendered impossible by "an unexpected, yet foreseeable event," but by decision of corporation to sell its in-state assets and require employees to move). Washington also requires that the event causing impracticability or impossibility must have been unforeseeable and outside the invoking party's control. *See Metro. Park Dist. of Tacoma v. Griffith*, 106 Wash. 2d 425, 439 (1986) (holding that destruction of park boathouse was fortuitous and unavoidable, but did not render park's performance under contract with concessionaire impractical or impossible because contract only required that park give access and allow concessions in any existing facilities, not specifically the boathouse).

Washington recognizes a related excuse for frustration of purpose. This doctrine generally follows the approach of the Restatement (Second). As stated in model jury instructions, "A party's remaining duties of performance under a contract are excused if the party's principal purpose is substantially frustrated, without that party's fault, by the occurrence of an unforeseen event when the non-occurrence of such an event was a basic assumption on which the contract was made." Excuse of Performance—Frustration of Purpose, 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 302.10 (7th ed.).

UCC

Nonperformance may also be excused under the UCC

Washington has codified the UCC doctrine of commercial impracticability. The statute reads as follows:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections (b) and (c) of this section is not a breach of his or her duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in subsection (a) of this section affect only a part of the seller's capacity to perform, he or she must allocate production and deliveries among his or her customers but may at his or her option include regular customers not then under contract as well as his or her own requirements for further manufacture. He or she may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection (b) of this section, of the estimated quota thus made available for the buyer.

Wash. Rev. Code Ann. § 62A.2-615.

Allocation of inventory

As noted above, section 62A.2-615 requires a nonperformer to "allocate production and deliveries among his customers" if partial performance is achievable. *Id.*

Notice requirements

Section 62A.2-615 also requires that the seller "must notify the buyer seasonably that there will be delay or non-delivery." *Id.*

West Virginia

Force Majeure Clauses

Force majeure clauses are narrowly interpreted

In West Virginia, the term "force majeure" means "[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes and wars)," as defined by Black's Law Dictionary. A contractual force majeure clause is defined as a "provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled." Allen, Stephen G., "Force Majeure Under Coal Supply Contracts," 26 ENERGY & MIN. L. INST. CH. 6 (2005). There is a dearth of cases in West Virginia interpreting force majeure clauses.

Notice requirements in force majeure clauses

Contracts generally list specific notice requirements, such as the form in which the notice of termination or postponement should be delivered, and where and how soon the notice should be sent. There are no cases in West Virginia that interpret Notice requirements in force majeure clauses. However, under the Uniform Commercial Code ("UCC"), in instances where it applies, notice is required. *See* W.Va. Code § 46-2-615. For example, Article XI of the Master Coal Purchase and Sale Agreement states that a party alleging an excuse for nonperformance based upon an event of force majeure must "give written notice to the other party and furnish full information as to the cause of its inability to perform and the probable extent thereof within thirty (30) days after such cause occurs."

Common Law Defenses and UCC

Impossibility and impracticability

In excusing a party's nonperformance, West Virginia courts follow a relaxed version of version of impossibility, requiring only "impracticability." *Waddy v. Riggleman*, 606 S.E.2d 222, 229 (W. Va. 2004) (explaining the impracticability factors). As the West Virginia Supreme Court explained: "[t]he modern rule, the rule of impracticability, is identified in the Restatement (Second) of Contracts as "Discharge by Supervening Impracticability," and is described as follows:

> Where, after a contract is made, a party's performance is made impracticable 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 duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

It has been observed that "[m]ost of the more recent cases follow this approach." *Id.* However, the court also noted "[a]lthough the present rule is less strict than its inflexible ancestor, it, nevertheless, remains a

difficult standard to meet . . . . "While impracticability embraces situations short of absolute impossibility, mere increase in difficulty is not enough." *Id.* (internal citations omitted).

In *Waddy*, the plaintiff entered into a contract to purchase land from sellers. The sellers' attorney was unable to secure releases to clear title to the land by the closing date. The plaintiff then brought suit for specific performance for the sale of the land. *Id.* The trial court found for the defendant sellers holding the sale was impossible because there was no clear title to the land by the closing date. However, the West Virginia Supreme Court reversed and remanded because: (1) the sale was not impossible but simply, impracticable and impracticability was not established by the record; (2) the nonoccurrence of not being able to provide clear title was a basic assumption on which the contract was made (i.e. the parties assumed there would be clear title); and (3) the impracticability was defendants' fault as they had contracted to accept the duty of clearing the title. *Waddy*, 606 S.E.2d at 232–233.

UCC

Nonperformance may also be excused under the UCC

If a contract is for the sale of goods, West Virginia statute adopting the Uniform Commercial Code ("UCC") for the sale of goods is West Virginia Code section 46–2–615—"Excuse by Failure of Presupposed Conditions.[1]

Allocation of inventory

Section 46-2-615 requires a nonperformer to "allocate production and deliveries among . . . customers" if partial performance is achievable. *Id*

Notice requirements

Section 46-2-615 requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery." *Id.*

[1] Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impractical by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Wisconsin

Force Majeure Clauses

Wisconsin reads force majeure contracts narrowly

A wholesale grocery and a canning company entered into a contract with a force majeure clause allowing non-performance "if by the destruction of the Cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control." *Newell v. New Holstein Canning Co.*, 97 N.W. 487, 488 (Wis. 1903). The court found that a September frost precluding the cannery from growing enough produce to meet the quantity amounts in the contract did not excuse performance because the cannery had not proven it was impossible to get tomatoes either from "adjoining territor[ies]" or on the open market. *Id.*[1]

In *Hess Bros. v. Great N. Pail Co.*, even the outbreak of World War I and resulting difficulty with obtaining rail transport and rising costs associated with war production did not rise to the level necessary to excuse performance. 185 N.W. 542 (Wis. 1921). When two companies contracted for the delivery and sale of five boxcars of pails, they "expressly agreed that the contract should be subject to certain conditions beyond the control of the parties; among others, car supply and delay in transit." *Id.* at 542. Two boxcars were shipped in 1916, one in January and one in September. *Id.* However, in December 1916 the plaintiff sent a letter asking for delivery of the third car. *Id.* The pail company responded that a rail embargo began in December 1916 for all deliveries out of Chicago and it considered the contract closed. *Id.* Further, other negotiations would have to be conducted if there was interest in continuing shipments in 1917. *Id.*

The buyer responded that it did not consider the contract closed and instructed the pail company to send the next shipment once the embargo lifted. *Id.* at 543. The pail company next suggested sending other smaller pails as a substitute, but the buyer declined. *Hess Bros.*, 185 N.W. at 543. The Court rejected the pail company's argument that the embargo and increased costs due to the war made it impossible to honor the contract terms, finding the clause affected only delay and not performance. *Id.* at 544. The Court specifically addressed the difficulties with performance that many businesses were undergoing due to the war and need for certainty in contracts prevailed, even when the financial considerations were significant. *Id.*

In a case concerning financial considerations arising as a result of World War I, a supplier of pig iron located in Wisconsin contracted to ship its product to a steel foundry in Montreal "subject to strikes, accidents or other causes incident to manufacture or delivery beyond control of seller." *Can. Steel Foundries v. Thomas Furnace Co.*, 203 N.W. 355 (Wis. 1925). The Wisconsin supplier made a total of

[1] The cannery made two inquires to obtain tomatoes from other sources: One eleven miles away from the cannery and one forty-six miles away. The Court deemed these efforts insufficient. *Newell*, 97 N.W. at 488–89,

eight shipments to plaintiff, all without payment. *Id.* In the middle of December, the supplier stated it could not continue shipments due to an embargo of ore shipments to Canada. *Id.* at 356. The supplier made no mention of the lack of payment. *Id.* After the embargo ended, the supplier stated the foundry was in default for non-payment, canceling the remainder of the contract, and seeking payment for the pig iron already shipped. *Id.* The Court found, first, that by the terms of the contract, the "embargo absolutely prevented delivery in the part of the seller. It was a cause over which it had no control and suspended the operation of the contract, or at least excused the default of the defendant during the time it was in existence." *Id.* at 357. Further, although the defendant's "motive" of the may not have been purely to use the payment default as a way to avoid a contract price that due to increases in material costs due to the war was becoming disadvantageous, non-payment for shipped product according to the contract terms warranted rescission. *Can. Steel Foundries,* 203 N.W. at 358.[2]

Notice requirements

Wisconsin courts will enforce Notice requirements as they are stated in the contract. *Hess Bros.*, 185 N.W. 542 at 544.

Allocation of inventory

Wisconsin has not addressed whether resources or inventory must be allocated when invoking a force majeure provision. However, as explained below, allocation may be required under the Uniform Commercial Code ("UCC").

Duty to mitigate

No Wisconsin case has analyzed the duty to mitigate under force majeure. However, as a fundamental common law duty, a plaintiff will undoubtedly be required to take reasonable steps to mitigate damages. *See, e.g.*, Restatement (Second) of Contracts § 350: Avoidability as a Limitation on Damages.

Common Law Defenses and UCC

Impossibility

The common law doctrine of impossibility is available in Wisconsin to excuse nonperformance. For example, in an early case, two parties contracted for delivery of varying qualities of lumber, but with a single price based upon quantity. *McMillan v. Fox*, 62 N.W. 1052 (Wis. 1895). After entering into the contract, a portion of the lumber yard burned that held some of the best quality lumber. *Id.* The court held, without deciding that the fire might have excused performance under an impossibility standard, that plaintiff waived the right to assert impossibility by continuing to pay the contract price for deliveries until

[2] Apparently, there was evidence at trial that the Wisconsin supplier intentionally did not notify the foundry of its non-payment and that the foundry intentionally did not pay because it was unsure the supplier would fully meet the contract. *Canadian Steel Foundries*, 203 N.W. at 358.

the final shipment with full knowledge both of the fire and the quality of the lumber burned. *McMillan*, 62 N.W. at 1053–54.

In *Wunderlich v. Palatine Fire Ins. Co.*, the court held performance was excused when all of contracted lumber was destroyed by fire in a "wholly executory" contract. 80 N.W. 471, 473 (Wis. 1899).

UCC

Nonperformance may also be excused under the UCC

The Wisconsin statute adopting the UCC for sales of goods is Wisconsin Statutes Annotated section 402.615 — "Excuse by Failure of Presupposed Conditions." The statutory language provides performance may be excused if "impractical."

The Seventh Circuit analyzed impracticality under § 402.615 in *Federal Pants, Inc. v. Stocking*, 762 F.2d 561 (7th. Cir. 1985). In *Federal Pants*, a supplier had a contract with a retailer to supply trademarked goods from a major sportswear company. Although the supplier was authorized to sell the sportswear company's products, the retailer was not. When the sportswear company discovered an unauthorized merchant was selling its products, it rescinded its contract with the supplier and the supplier, in turn, ended deliveries to the retailer. When the retailer sued the supplier for damages, the court held the contract impractical to perform and excused performance. *Id.* at 567.

Allocation of inventory

Section 402.615 requires a nonperformer to "allocate production and deliveries among . . . customers" if partial performance is achievable. *See* Wis. Stat. Ann. § 402.615(2). However, no Wisconsin court has interpreted this language.

Notice requirements

Section 402.615 requires that the seller "must notify the buyer seasonably that there will be delay or nondelivery. However, "seasonable" generally means in accordance with the contract requirements or "reasonable." *See* "seasonable" Merriam-Webster Online Dictionary; https://www.merriam-webster.com (last visited Apr. 6, 2020) ("seasonable" defined as "occurring in good or proper time").

The Wisconsin Supreme Court has addressed lack of notice under section 402.615. For example, in *Federal Pants* (discussed *supra*), the Seventh Circuit held that by waiting more than thirty days after receiving notice from the supplier regarding its inability to perform before the retailer complained, the retailer violated the statutory notice provision. *Federal Pants*, 762 F.2d at 567.

Wyoming

Force Majeure Clauses

In 1990, the Fifth Circuit Court of Appeals noted that there was a "dearth" of Wyoming case law addressing force majeure clauses; that has not changed much in the intervening 30 years. *Perlman v. Pioneer P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990) (applying Wyoming law in affirming trial court finding that force majeure did not excuse performance of gas and oil lease because government permits had not been denied and even if they had, plaintiff made no effort to remove the force majeure condition as required by the clause).

Force majeure means an event "caused by a superior force." *Unicover World Trade Corp. v. Tri-State Mint, Inc.*, No. 91-cv-0255, 1994 WL 383244, at *10 (D. Wyo. Feb. 23, 1993), *aff'd*, 24 F.3d 1219 (10th Cir. 1994) (applying Wyoming law and holding the delays in shipping were not beyond the defendant's control and the force majeure clause did not apply).[1] In reaching this holding, the court explained that the force majeure event should be "beyond the control of the party invoking the clause." *Id.* The clause is not "an escape way for those interruptions of production that could be prevented by the exercise of prudence, diligence, care and the use of those appliances that the situation or party renders it reasonable he should employ." *Id.* at *10.

Courts have strictly enforced force majeure clauses

Courts analyzing force majeure clauses should engage in contract interpretation, sticking to the actual terms of clause and not insert any elements of a common law doctrine of force majeure in the analysis. *Perlman*, 918 F.2d at 1248. Perlman had entered an oil and gas lease and a surface lease requiring him to explore, drill, prospect and operation for oil and gas on acreage in Montana and Wyoming. *Perlman*, 918 F.2d at 1248. Following a meeting with Wyoming officials regarding a different Perlman well, Perlman believed that extensive and costly hydrology studies would be required for the well governed by the current lease. *Id.* at 1247. Perlman unilaterally concluded the actions of the Wyoming regulators hindered his performance under the contract and declared it a force majeure event, relying on the provision in the clause regarding "inability to obtain governmental permits or approvals necessary or convenient to Lessor's operations ..." *Id.*

Because the clause was unambiguous and its terms were specifically bargained for by both parties, the court interpreted the terms according to their plain language: "[b]ecause the clause labelled 'force majeure' in the Lease does not mandate that the force majeure event be unforeseeable or beyond the

1 The clause at issue: FORCE MAJEURE Each party agrees to use its best efforts to carry out its part of the Agreement, but in the event of strikes, lockouts, accidents, fire, delays in manufacturing, delays of carriers, acts of God, government actions, state of war, or any other causes beyond its control, neither Party guarantees performance nor shall incur liability to the other due to the resulting inability perform. Unicover World Trade Corp. v. Tri-State Mint, Inc., No. 91-cv-0255, 1994 WL 383244, at *10 (D. Wyo. Feb. 23, 1993).

control of Perlman before performance is excused, the district court erred when it supplied those terms as a rule of law." *Id.*[2]

The appeals court found Perlman's argument failed as the regulators had not refused to commit to permitting a well and there was no firm indication that the required hydrology studies would cause delay beyond the six month term of the lease. *Id.* at 1248. The court found:

> From the evidence it is clear that no actual hindrance resulted from the regulations or the regulators in Wyoming because Perlman made no effort whatsoever to obtain the appropriate permits or to begin drilling the wells. Consequently, Perlman's self-serving conclusion that a force majeure condition existed was at best merely speculation as to what might have happened had he attempted to drill the wells as planned.

Perlman, 918 F.2d at 1249. Additionally, under the terms of the force majeure clause in the contract, Perlman had an obligation to attempt to remove or overcome the purported force majeure event; his failure to even attempt to do so supported the court's rejection of his force majeure argument. *Id.*

Where the force majeure clause expressly excluded events that were financial in nature, a bankruptcy proceeding would not excuse performance as a force majeure event. *Champlin Petroleum Co. v. Mingo Oil Producers*, 628 F. Supp. 557, 560 (D. Wy. 1986) (applying Wyoming law). In *Champlain,* the plaintiff is the owner of the mineral estate and surface rights of approximately 5.7 million acres of land known as Overland Dome Field. *Id.* at 558. Champlain leased the property to Amoco for production of oil, gas or associated hydrocarbons. *Id.* at 559. The interests were ultimately assigned to Mingo Oil Producers. *Id.* Overland Dome entered bankruptcy and the bankruptcy trustee assigned Champlin's interest in the lease to Mingo. *Id.* Champlin brought the action claiming the original lease to Amoco that was assigned to Mingo had terminated and requested injunctive relief preventing Mingo from accessing the Overland Dome property. *Id.* at 560. Mingo claimed the lease had not terminated and in any event its performance would have been excused by the force majeure provision. The clause at issue[3] specifically stated that it covered "other cause[s] beyond the control of Lessee other than financial." *Id.* The court found that

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2 The clause at issue: 14. FORCE MAJEURE . . . This lease shall not be terminated . . . nor Lessee held liable in damages . . . if compliance [with covenants in lease] . . . is prevented or hindered by an act of God, of the public enemy, adverse field, weather or market conditions, labor disputes, inability to obtain materials in the open market or transportation thereof, inability to obtain governmental permits or approvals necessary or convenient to Lessor's operations . . . such circumstances of events being hereafter referred to as "force majeure". . . . Lessee shall notify Lessor in writing . . . within fifteen (15) days of any force majeure which prevents or hinders any compliance, activity or event hereunder. . . . Lessee shall use all reasonable efforts to remove such force majeure . . ." Perlman, 918 F.2d at 1246.

3 The text of the clause is: All express or implied covenants of this lease shall be subject to all Federal and State laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such law, Order, Rule or Regulation, or if prevented by an act of God, of the public enemy, labor disputes, inability to obtain material, failure of transportation, or other cause beyond the control of Lessee other than financial. *Champlin Petroleum Co.*, 628 F. Supp. at 560.

[w]hile the bankruptcy proceedings were clearly outside the control of the lessee or its assigns, the very premise of such proceedings are inherently the result of financial problems." *Id.* at 560–61. The court also noted that the bankruptcy trustee would not get two of the wells into production due to the lack of available funds. *Champlin Petroleum Co.*, 628 F. Supp. at 561. "[T]his Court concludes that the provisions of the force majeure clause are not available to extend the lease under the conditions of the present case." *Id.*

Notice requirements

Wyoming courts have not addressed notice requirements for force majeure.

Allocation of inventory or goods

Wyoming courts have not addressed allocation of goods in force majeure.

Common Law Defenses and UCC

Commercial frustration/commercial impossibility

Wyoming courts have noted that the generally recognized distinction between the two doctrines lies in the inability to literally perform (impossibility) and the impracticability to perform (commercial frustration). *Downing v. Stiles*, 635 P.2d 808, 811 (Wy. 1981) (reversing finding of frustration of purpose where defendant could still perform under the contract even if the financial situation had changed). The doctrine of commercial frustration is close to, but distinct from, the doctrine of impossibility of performance. Both concern the effect of supervening circumstances upon the rights and duties of the parties but in cases of commercial frustration "performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration." *Id.*

Commercial frustration concerns the "effect of supervening circumstances upon which the rights and duties of the parties [where] performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event." *Mantle v. N. Star Energy & Constr. LLC*, 437 P.3d 758, 785 (Wy. 2019) (holding that the contract could still be performed despite the change in financial conditions). The defense is not available if the difficulties that frustrate the purpose of the contract reasonably could have been foreseen by the promisor when the parties entered into the contract. *Mantle*, 437 P.3d at 785. In *Mantle* the plaintiff had breached loan covenants which made the contract less profitable, but nonetheless did not affect the fundamental purpose of the contract which was to transfer oil and gas leases to Mantle. *Id.* In reaching this decision, the court explain that "[t]o apply the doctrine of commercial frustration, there must be a frustrating event not reasonably foreseeable." *Id.*

Wyoming courts will not find commercial frustration where the contracting party can still meet its obligations, but will suffer a financial loss. *Downing*, 635 P.2d at 811. There is a dearth of Wyoming case law interpreting the specific doctrine of impossibility.

UCC

The UCC provisions regarding impracticability and impossibility became part of contracts in Wyoming "as though written into its terms." *Meuse-Rhine-Ijssel Cattle Breeders v. Y-Tex Corp*., 590 P.2d 1306, 1307 (Wy. 1979) (U.C.C. as adopted by Wyoming applied to contract for sale of bovine sperm). The Wyoming statute adopting the UCC for sales of goods is Wyoming Statutes Annotated section 34.1-2-615 — "Excuse by Failure of Presupposed Conditions."[4] There are no reported cases applying these doctrines under Wyoming law.

[4] (a)Except so far as a seller may have assumed a greater obligation and subject to the preceding section [§ 34.1-2-614] on substituted performance:

(i) Delay in delivery or nondelivery in whole or in part by a seller who complies with subdivisions (ii) and (iii) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid; (ii) Where the causes mentioned in subdivision (i) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable; (iii) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subdivision (ii), of the estimated quota thus made available for the buyer.

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